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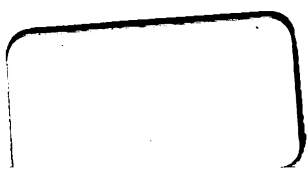
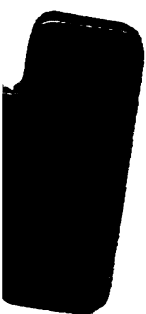






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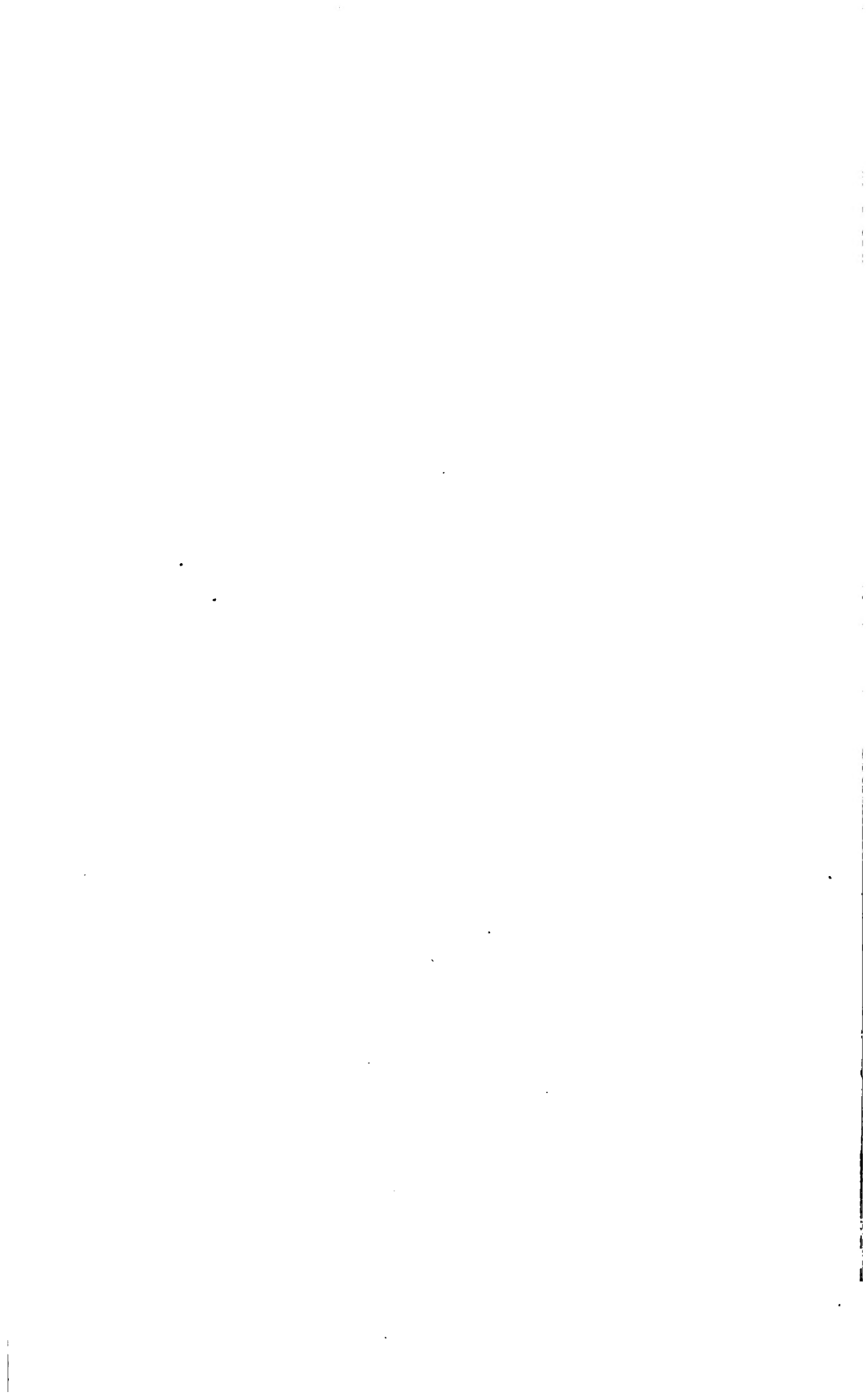


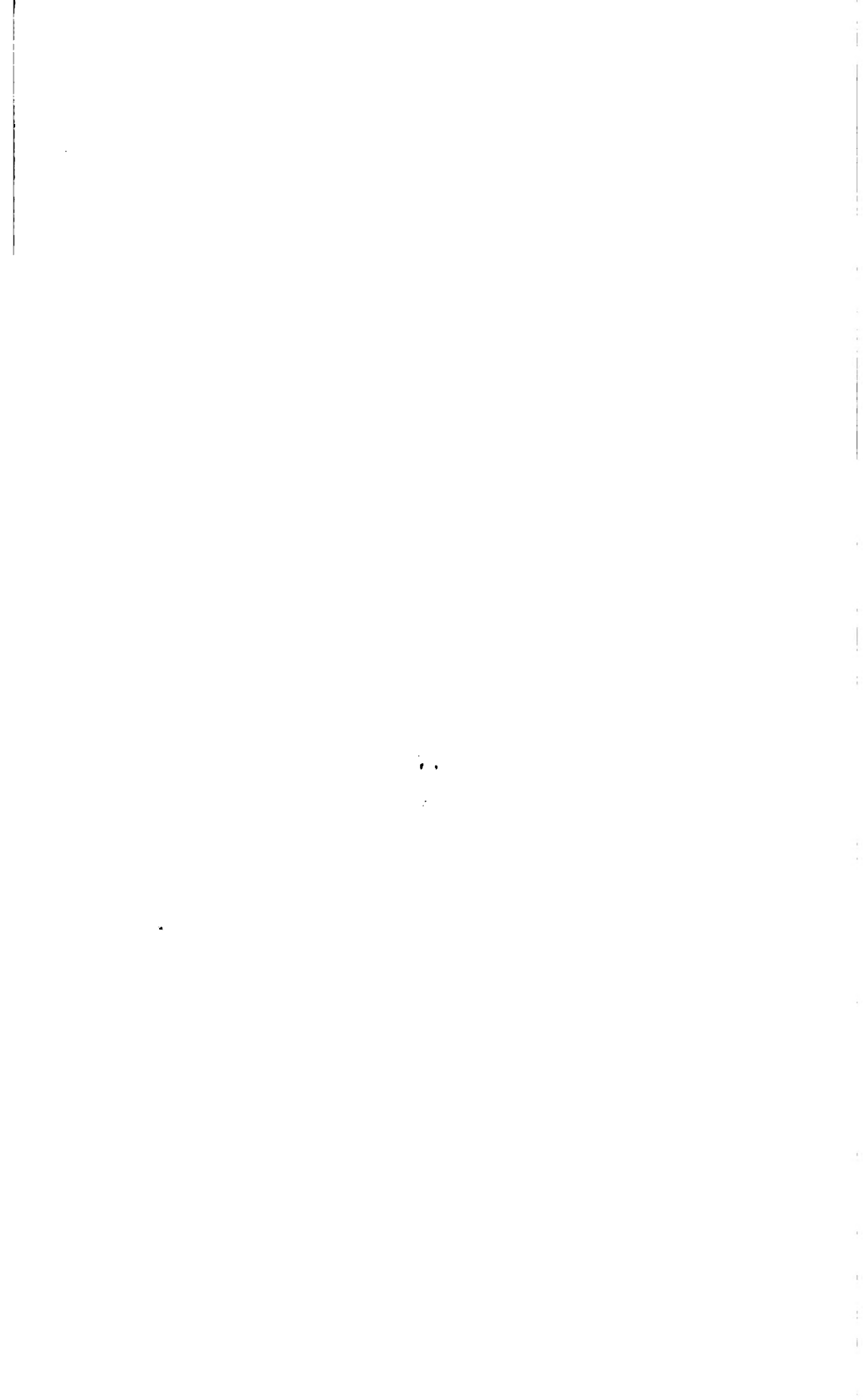
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—“*Quod magis ad nos  
Pertinet, et nescire malum est, agitamus.*”

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# The Legal Observer.

Vol. X.

SATURDAY, MAY 2, 1835.

No. CCLXVII.

— "Quod magis ad nos  
Pertinet, et nescire malum est, agitamus.

HORAT.

## THE NEW CHANCERY ARRANGEMENTS.

THE Master of the Rolls, the Vice Chancellor, and Mr. Justice Bosanquet, have been appointed Lords Commissioners for the custody of the Great Seal. We can only consider this to be a temporary arrangement, as its effect is undoubtedly to impede the business of the Court of Chancery. The plan usually adopted heretofore on putting the great seal in commission has been, to call in the assistance of two at least of the Common Law Judges—thus rather giving greater facilities for the disposal of the Equity business. The present arrangement however, by taking away the Master of the Rolls and the Vice Chancellor from their respective Courts on certain days to attend to the business of the Court of Chancery, has the reverse effect. This is so obvious that it can only be intended to last but for a short time; and we shall therefore, having stated the objection, briefly consider what will probably next be done.

We believe, then, that the report so commonly circulated, respecting the intention of the present government to separate the judicial from the political functions of the Lord Chancellor, is founded on truth, and that the charge of the bill for effecting this object will be given to Lord Brougham. It is certain that this project was at one time a favorite with that noble and learned Lord, although more recently it was abandoned by him. We shall state his various opinions on the matter, as in doing so we may form some notion of the new bill about to be proposed.

At the close of the session in 1832, on the 15th of August, Lord Brougham, then Lord Chancellor, spoke as follows:\*

\* See the speech at length, 5 L. O. 247—252.

"It is my fixed and deliberate opinion, by which I am desirous of being understood to abide firmly, in spite of the objections from quarters which are entitled to great respect,<sup>b</sup> to which I understand that opinion has been exposed,—that a great change indeed is absolutely necessary in the constitution of the high office which I undeservedly have the honor to fill. I think that we cannot much longer remain in this country with that great—I will not say that gross and grievous,—but truly with that great, signal, and striking anomaly, that the highest Judge in civil matters under the Crown is a minister of the Crown, and is removable at the pleasure of the Crown—that to him is intrusted, sitting alone and without control, the disposal of property of an immense amount, and of the rights and interests, still more dear to the parties than any rights of property, however important. The Lord Chancellor is all this while removable at the pleasure of the Crown, and is also, whether he will or not, a political character as well as a judicial one. Why, then, what is to be done with that high office, with that great public functionary? I propose merely to separate one branch of the Lord Chancellor's judicial functions—I mean that branch in which he sits and acts as a Judge alone—from his other functions; from his political functions, and from the functions which he discharges as Speaker of the House, and from his functions as adviser of the Crown; and also from that other function incident to the Speakership of this House,—I mean, the judicial function in that appellate jurisdiction, not exercised by the Lord Chancellor alone, but in conjunction with, and (if need be) under the control and superintendence of, coadjutors of a judicial character. If these functions be no longer united, then, my Lords, the great

<sup>b</sup> It was said at the time, that Lord Grey was opposed to the plan.

anomaly of which I complain will be removed without any increase of patronage, and without a single shilling of additional burthen to the public; and my opinion is that the provision which has been made by Parliament for the sustentation of the office of Keeper of the Great Seal is abundantly sufficient, if well applied, to maintain in due dignity the Lord Chancellor as an officer of state, and as the Chief Judge, irremovable and purely judicial, in the High Court of Chancery."

In July 1833, Lord Brougham again adverted to the subject, and proposed that a Chief Judge in Equity should be appointed, reserving to the Lord Chancellor his political functions, his ministerial functions, his functions in the House of Lords in cases of appeal to them, his functions in the privy council, and his judicial functions in the Court of Chancery to be exercised whenever necessary, and also his jurisdiction in lunacy. The Chief Judge in Equity to be paid by taking 2000*l.* from the Master of the Rolls on the death or resignation of Sir John Leach, making the salary 5000*l.*, and 6000*l.* from the Lord Chancellor, leaving him 8000*l.*, and thus giving to the Chief Judge in Equity 8000*l.* The Chief Judge to have jurisdiction in all matters depending in the Court of Chancery, and nearly the same powers as the Lord Chancellor.

No further step however was taken in the matter, and at the close of the session in 1834, Lord Brougham seemed inclined to abandon the project altogether, for we find him thus adverting to it:<sup>c</sup>

"I only wish to add one word to explain my reasons for not bringing in the Bill introduced to your lordships' notice last session, for regulating the Court of Chancery, which would in part have provided a substitute for this Court, and which proposed to sever the judicial from the political and parliamentary duties of the Lord Chancellor. This was a proposition much objected to in the profession, when it was feared that the place of Lord Chancellor might under the Bill be filled up by persons not being lawyers. There is however another reason for not persisting in that plan, and it is this—that about Easter last, when I came to look into the state of arrears in the Court of Chancery, I thought it likely that in a few weeks there would be none at all, and that expectation has been completely realized. I could not think, therefore, that I had any ground for making a new Judge, when it

was evident that the Chancellor might, if he chose to bestir himself, get rid of the arrears of the Court of Chancery as well as those of the House of Lords. As it would be preposterous to create a new Judge who should have nothing to do, I dropped the idea I formerly entertained."

In the letter also of the noble Lord, dated from Paris, in November<sup>d</sup> last, after his retirement from office, in adverting to his desire of completing the reform of the Court of Chancery, he mentions his wish to have abolished the office of Vice Chancellor, but does not allude to the separation of the duties of the great seal. However, we have good reason for thinking that Lord Brougham has returned to his original opinions on the subject, and will introduce a Bill for that purpose after the meeting of Parliament. We have already given our opinion<sup>e</sup> with respect to the general merits of the plan: we cannot say anything further until we see the Bill for effecting it. We are decidedly in favor of the appointment of a permanent Chief Judge in Equity, if this can be done without turning the Lord Chancellorship into a mere political office, capable of being filled by any politician of the day, whatever may be his legal acquirements. We have now given our readers the best idea of the new scheme in our power, and we shall return to the subject when the Bill is brought in.

## THE PROPERTY LAWYER. No. XLIII.

### REVERSIONARY INTEREST.

We beg to refer our readers to our seventh volume, pp. 211,—215, where we endeavoured to state the principal rules with respect to the sale of reversionary interests, and to mention the latest cases on the subject, which is of much practical importance. We now add to them a decision of the present Vice Chancellor, whose judgment we shall thus abbreviate. The rule laid down in it as to costs is important.

The plaintiff attained the age of twenty-one in Jan. 1823, and was entitled to one tenth of a sum of 23,333*l.* 6*s.* 8*d.* consols, divisible on the death of a lady aged 55, after deducting the sum of 4000*l.* sterling; and he was also entitled, after the death of a gentleman aged 54, to one tenth of a sum of 16,666*l.* 13*s.* 4*d.* consols. Both sums stood in the name of the Accountant General of this Court. In Nov. 1826, he went to some billiard rooms in Cork Street, which were then kept by Charles Hunt, son

<sup>c</sup> See the speech fully given, 8 L. O. 500—502.

<sup>d</sup> See 9 L. O. 115.

<sup>e</sup> See 5 L. O. 229.

of the defendant Samuel William Hunt, and had theretofore been kept by the defendant himself. And the plaintiff, in playing at billiards with Charles Hunt, lost to him the sum of 532*l.* of which the plaintiff paid 32*l.* in cash, and gave his promissory note for 500*l.* payable at three months date. It is proved that in 1827, the plaintiff was in great distress, and arrested for debt. In August 1827, the plaintiff caused his two reversionary interests above mentioned to be put up for sale by auction by Mr. Robins, in two lots. The interest in the 23,333*l.* 6*s.* 8*d.* consols, formed lot 1; the other interest, lot 2. The defendant attended the sale, and was introduced at the sale to the plaintiff by Charles Hunt. The defendant became the purchaser of lot 1, at the price of 700*l.*, and paid a deposit of 140*l.* Lot 2 was bought in at the sum of 640*l.* There were several biddings for it, though it does not appear what they were; and instructions had been given not to let it go for less than 650*l.* After the auction some treaty took place between the plaintiff and defendant, as to lot 2, which ended in an agreement to sell lot 2 to the defendant, for 500*l.* An assignment by one deed of both lots was prepared, and approved of by the defendant's solicitor, which the plaintiff executed, and on the 9th of Oct. 1827, tendered to the defendant, who refused to pay his purchase money, and insisted that he was the holder of the promissory note for 500*l.*, and had a right to set off the amount of it against the purchase money. The plaintiff thereupon filed a bill against the defendant for a specific performance of the agreements; and the result was, that on the 27th Dec. 1827, the defendant performed them, by paying 1067*l.*, (that is) 560*l.*, the residue of the purchase money of lot 1, with 7*l.* for interest upon it, and 500*l.* the purchase money of lot 2, without interest. Shortly afterwards, the *cestui que vie* of lot 2 died, and the plaintiff tendered to the defendant his 500*l.* with interest and costs, and requested to have the transaction as to lot 2 rescinded, which the defendant refused, and the plaintiff then filed his bill to set aside the sale of lot 2, on payment of the 500*l.* with interest.

It was insisted that the doctrine laid down in *Gowland v. De Faria*, 17 Ves. 20 (stated 7 L. O. 213), was overruled by the decision in *Heuden v. Rosher*, Maclel. & Y. 89. The only evidence given by the plaintiff, was the opinion of Mr. Morgan, that the value of the reversionary interest in the 1000*l.* and the 915*l.* reduced annuities, was 928*l.* 8*s.*, and evidence that the bidding of 910*l.* at the auction was *bond fide*. That bidding, however, was not only for the 1000*l.* and the 915*l.* reduced annuities, but also for the moiety in reversion of 800*l.*, funded in court. Therefore the bidding itself, being less than Morgan's valuation, though for more property than he valued, shewed that little reliance could be placed upon his opinion as evidence of value; whereas the defendant's evidence went directly to prove that the price given by him was a fair price. And there was nothing in the case of *Heuden v. Rosher*, from which it could be inferred

that any advantage had been unduly taken of the plaintiff by the defendant. That case was decided in 1825. In 1827 the case of *Hinchman v. Smith*, 3 Russ. 433 (stated 7 L. O. 213), occurred, and Sir John Leach, Master of the Rolls, then said:—"In *Gowland v. De Faria*, Sir William Grant did not consider himself as laying down a new rule, but as following the current of authority; and since that case, the rule has been so far regarded as the settled law of the Court, that although I have, upon more than one occasion, judicially questioned both the principle and policy of the rule, yet it would not become this Court to make a precedent in direct opposition to it." I cannot therefore consider the judgment of the Chief Baron in *Heuden v. Rosher*, as having set aside the authority of *Gowland v. De Faria*, even with respect to inadequacy of price alone. Sir William Grant, however, had before him a case in which the defendant did take advantage of the plaintiff's difficulties; and, if similar circumstances exist in the case before me, I must hold the plaintiff entitled to relief. The direct evidence as to the value is not very satisfactory. Mr. Robins, one of the defendant's witnesses, states, as I understand him, that the value of lot 2 was 600*l.* But the circumstances of this case shew that unfair advantage was taken by the defendant of the plaintiff's situation. The bill and answer both state that the agreement to purchase lot 2, was founded on a note sent by the defendant to the plaintiff, on or about the 12th Sept. 1827. It is manifest that, when the plaintiff concluded the bargain in the terms of the note, he was urged by the importunity of distress to overlook a most important circumstance, namely, that what he was selling was not the reversion of 1333*l.* consols, but of 1666*l.* 13*s.* 4*d.*; that is, 1333*l.* consols and one-fourth more. All this, however, was overlooked by the plaintiff. He was anxious only for a sum in hand. But when he tendered the conveyance the defendant delayed the completion, on a pretext that he had a right to set off the note for 500*l.* Upon the stat. of 16 Car. 2, c. 7, it was held that a note for money lost at play, was good in the hands of a *bond fide* holder. But the stat. of 9 Ann. c. 14, makes such a note absolutely void; and though the defendant in his answer, and his son, as his witness, swear that they did not know under what circumstances the note was given, it is impossible to refer the understanding stated in the answer to have existed as to the note between the father and the son, to any thing but the original nature of the note. Upon this unjust pretext, however, the plaintiff was kept out of his money for several weeks, was obliged to file a bill, and ultimately received only the 500*l.* without interest. The conduct of the defendant was therefore oppressive and unjust; and, as he refused to rescind the transaction, when application was made to him before the filing of the present bill, the decree must declare the plaintiff to be entitled to lot 2, upon the payment, to the defendant, of 500*l.* and interest, without costs. In the cases of *Gowland v. De Faria*, 17 Ves. 25, and

*Peacock v. Evans*, 16 Vds. 512, costs were given to the defendant. But though relief is given upon the principle of a mortgage, the defendant's conduct has been so bad, that I must deprive him of his costs. — *Newton v. Hunt*, 5 Sim. 511.

## REVIEW.

*The Practice of the Law in all its Departments; with a view of Rights, Injuries, and Remedies, as ameliorated by recent Statutes, Rules, and Decisions; shewing the best Modes of creating, perfecting, securing, and transferring Rights; and the best Remedies for every Injury, as well by acts of parties themselves, as by legal proceedings; and either to prevent or remove Injuries; or to enforce specific relief, performance, or compensation: and the Practice in Arbitrations; before Justices; in Courts of Common Law; Equity; Ecclesiastical and Spiritual; Admiralty; Prize; Court of Bankruptcy; and Courts of Error and Appeal. With new Practical Forms. Intended as a Court and Circuit Companion. In Three Volumes. Vol. III.—Part I. By J. Chitty, Esq., Barrister, of the Middle Temple. London: S. Sweet.*

THE fifth part of Mr. Chitty's General Practice, just published, we understand, will, with the next part, conclude the work. Mr. Chitty's object has been to take a different view of the subject from previous authors on the practice of the Common Law Courts, by examining the principles on which the rules are founded, and thereby impressing the memory more deeply with their nature and effect.

"We all confess (he says), but few adequately perceive, why it is so difficult to recollect a dry rule of practice, and we incorrectly impute to a defect of memory what in reality is attributable to our never having adequately known the subject; the simple truth is, that reason or principle is the appropriate food of the mind, and it follows that no position is received with adequate appetite, unless it be associated with the reason upon which it is founded. The attention is not sufficiently excited, and consequently the perception of the rule is imperfect, and the image is so indistinctly and faintly impressed on the memory that it is soon forgotten; but when the mind is gratified by perceiving the reason of a rule, it is never forgotten, because all the powers of the mind are then duly and constantly exercised in perpetuating the full knowledge and recollection of the rule."

Mr. Chitty has not confined his attention to the mere statement of the several modes of proceeding, but has pointed out which are preferable, and stated the reasons. As an instance of his method, Mr. Chitty refers to the *Instructions* which he has suggested

(pp. 117—124) to sue or defend, from which the following is extracted.

"With respect to *Instructions to sue*, much more attention and care to obtain full and accurate information, not only regarding the right and the probable defence, as the evidence, should be observed in the first instance than is usual, especially when the cause of action or defence has arisen at a distance in the country, when it might occasion prejudicial delay at a subsequent stage to have to wait for information that should have been communicated before the commencement of proceedings, and not unfrequently to begin *de novo*; for it will be found that if the principal attorney in the country and his agent in London be very fully informed at the earliest stage of all the facts applicable to the case, whether of the intended plaintiff or defendant, much subsequent trouble and many errors will be avoided, and much time saved, which is frequently lost by the necessity for the London agent writing to the country attorney for further information at each successive stage, all which might with very little trouble at the first interview with the client, and certainly no increase of expense, have been obtained and forwarded in the first instance. Nor is this a mere theoretical suggestion of convenience, for it has been recently decided by very high authority, that it is the professional duty of an attorney to adopt this line of conduct, and it is moreover his duty to ascertain that the evidence will support the plaintiff's case before he commences an action; and where an attorney commenced an action in the name of an executor without having first ascertained the evidence even to prove the defendant's handwriting to a promissory note, the Court made the plaintiff pay the costs as in case of a nonsuit, although in general an executor, when plaintiff, is not to be subjected to costs. It will moreover frequently occur, that if a minute inquiry into the facts and evidence be made in the first instance, before the defendant has even heard of any intended litigation, the truth will be better elicited than if the investigation were delayed until after the defendant had cautioned neighbours and witnesses from making any communications that might be adverse to his interests. And in a recent case, where an attorney brought on to trial an action for verbal slander, without first ascertaining from the witnesses the exact slanderous words as uttered, and was obliged, on account of a variance in those words, to withdraw the record, it was considered that such negligence precluded him from suing for his professional charges.

"As certain rules of Court and the statute for uniformity of process, 2 W. 4, c. 39, sometimes require the addition of residence and degree or occupation of the plaintiff and defendant as well as the intended form of action to be inserted or indorsed even in serviceable process, or in an affidavit of debt, or in an affidavit subsequently to be made in the cause, and also when process is issued for a debt, that the amount of the debt be indorsed thereon; it is always advisable for an attorney, in the first instance, immediately upon being retained, to



obtain very full instructions to sue, and for which a fee of 6s. 8d. (or 3s. 4d. when the debt does not exceed 20*l.*) is allowed on taxing costs, and which charge usually constitutes one of the earliest items in a bill of costs; but that fee is frequently very inadequate, and should be at least tripled, if the full instructions be obtained as presently suggested. To avoid loss of time that might be occasioned in afterwards making enquiry into facts, it is advisable in the first interview with the client to make very full inquiries into all circumstances connected with the case, and to require such client to answer the same, and to take a minute of the result. The subscribed form may assist as an outline of the proper inquiries, and it may be expedient in the first instance to transmit a copy of the questions and answers, with the directions to issue a writ, to the London agent, because such agent, from time to time referring to them, will be enabled immediately to decide upon the form of action to be stated in the writ, as well as the amount of the debt to be indorsed, when at present, for want of such instructions, it frequently happens that he is obliged to write back into the country for fuller instructions, or to avoid delay, is compelled to guess the form of action to be inserted in the writ, and afterwards, when the full instructions for declaration arrive, it very frequently becomes necessary to abandon such process and incur the expense and delay of a fresh writ.

"All such preliminary inquiries and answers are calculated to anticipate and avoid the frequent errors and even nonsuits that arise from the want of earlier examination into the circumstances of each case. These instructions being the basis of the action, require much more care than is usually evinced in obtaining them. It is even further recommended that in general, and especially if the client be not a man of business or of known accuracy, one or more of the principal witnesses, who will afterwards prove the case on the trial, be examined by an experienced attorney, and not merely by an inexperienced clerk; for it frequently occurs that very small circumstances vary the form of action, and that a mere cursory inquiry would mislead. Thus suppose a client should inform an attorney that a neighbour has broken his fence, filled up his ditch, and traversed his field with waggons; if the client were himself in possession, then the form of the writ and subsequent declaration should be "in an action of trespass;" but if on further inquiry it should appear that the close at the time of the injury was in possession of the client's tenant under a lease or from year to year, then the form should be, "in an action on the case," viz., for the injury to the client's reversionary interest, by destroying the hedge and ditch, and not a trespass or direct and immediate injury to his own possession. The instructions should also be so full as at all events to enable the agent in town to fill up in the writ the names, additions and residences of the plaintiff and defendant, and all other requisites, and also serve as instructions for the declaration, replication, &c. "Accuracy in the preliminary instructions is so important, that it may be expedient, as a

general rule, in all cases to state in print or writing all the general questions that usually arise, and to introduce in writing all other particular questions that may be applicable to each case. The questions should be stated in one column, and the client should then be required to write his answers to each in another opposite column; or if too voluminous to be conveniently there introduced, then on a different paper, but in the same order as the questions; and afterwards the principal attorney himself, or a very experienced and intelligent clerk, should go over the whole and examine the client, and even the principal witnesses, upon each answer, so as to secure accuracy; and the form might be to the subscribed effect."

"The defendant's attorney should in like manner, at the earliest interview with his client, and even before the commencement of an action, make all possible inquiries that may assist either in settling or staying the action at the least expense, or in defending it with success, ascertaining as well all the facts as the evidence in proof of them, and how each particular witness can be relied upon. In cases, when proper, he should suggest when and how a judicious apology, or a tender, or request, may be made, or state to the defendant his right not to be taken to prison until twenty-four hours after arrest; and within what time after having been served with a writ, or arrested, the defendant may pay the debt and costs indorsed, so as to avoid further expense, or may deposit the sum for which he may be arrested, with 10*l.* to the sheriff in lieu of giving a bailbond, or may be ready with two persons who have sufficient property within the county to become bail; or at least persons of such known property as probably not to be objected to by any officer. These and numerous other questions, calculated to elicit necessary or useful information essential for the due conduct of any defence, may be stated in writing in the same form as instructions to sue, and to the effect suggested in the subscribed form."

We are unable at present to lay before the practitioner these valuable "Instructions," but have no hesitation in earnestly recommending them as highly useful and important, and by following which, we doubt not that, as Mr. Chitty anticipates, many disastrous nonsuits and insufficient defences will be prevented. The solicitors in the country will avoid future inconvenience to themselves and their agents in London, by obtaining and transmitting full information in the commencement of an action, and save both parties much unprofitable correspondence, as well as serious delay.

The following is a summary of the contents of the present part:

"In the four earliest Chapters, subjects of general importance are first considered; as—First, The six several branch jurisdictions of each Court, and which should be resorted to, as either the Court in Banc, in which usually

four judges preside; the *Practice Court*; the jurisdiction and practice before a *single Judge at Chambers*; the jurisdiction and practice before the *Master and Prothonotary*; the jurisdiction and practice before a *Judge at Nisi Prius*; and the new jurisdiction and practice before the *Sheriff* of each county. *Secondly*, Is fully considered the several authorities on or by which the practice of the Courts stands or is regulated, as *Statutes, Rules, Usages and Decisions*, with a comparative view of the different effect of each. *Thirdly*, The present altered law relating to the *Terms and Vacations*, and all regulations respecting time. *Fourthly*, Are stated all the advisable *preliminary steps* antecedent to the actual commencement of an action or defence.

"The *fifth* Chapter states all the *Parts and Requisites of Process in general*, as founded on the Uniformity of Process Act, 2 W. 4, c. 39, and this on a plan entirely new, and which it is hoped will meet with approbation.

"In the next Chapters successively each description of process, with its *peculiar requisites* and incidents, are *separately* examined, viz. *Writs of Summons, Distringas, Capias, Detainer, Summons* against a *Member of Parliament* when a trader, and all the incident proceedings relating to each, until appearance or bail above; and, lastly, are considered Proceedings to *Outlawry* and to prevent the operation of a statute of *Limitations*."

The Part now before us closes with the subject of Process. The author expects that he shall be able to commence the next Part with the new Law qualifying the right of Arrest. We question whether Mr. Chitty will be troubled to state any such alteration: and for the sake of the suitors (though not for the profession) we hope it may not take place.

Be this as it may, our brethren will doubtless be benefited by the conclusion of the work, and especially by the communication of that vast fund of practical experience which the author has accumulated on the promised topics of Briefs, Affidavits, conducting Trials, and other matters.

Mr. Chitty, throughout the volume, has decried the injurious practice adopted by some practitioners, of taking advantage of trifling irregularities and unworthy objections; and on this, as on all occasions, he has strongly advocated that course of liberal conduct which (as he observes) should ever be pursued by the members of an highly honourable and justly influential profession. In noticing the inconveniences which have resulted from the exceedingly strict rules laid down by the Courts under the new enactments as to Process, Mr. Chitty says,

"It is true that each requisite might with great care be strictly and accurately observed without the exercise of any extraordinary in-

telligence on the part of the legal practitioner; but experience has evinced that it is frequently otherwise, and as the delay and expense occasioned by these really unimportant irregularities principally injures the *client*, who is not to blame, he and the public will naturally complain that effect should be allowed to such *trifling objections*, delaying, if not actually defeating, the remedy; and it must be painful to counsel to be compelled, by what is considered professional duty, to obey his disgraceful instruction to move to set aside process for just debt, merely because in the copy of process a single letter has been omitted, as in *Middlesex*, in the name of the county, to the sheriff of which the writ itself was directed, although not in a part of the writ which affects to offer any information to the defendant; or merely because the form of action has been described "action on the case upon promises," instead of "action on promises," especially as a defendant, immediately he has been served with any process not stating any form of action, may immediately and before his appearance, obtain explicit particulars of the plaintiff's demand by summons and order of a judge. It is submitted that there is an imperative call for legislative amelioration of the newly invented practice, which, by the uniformity of process act, has subjected the administration of justice to many objections. If the object of the legislature really was by every writ with its memoranda, warnings, and indorsements, to give to every defendant such explicit information of the cause of action as a bill in Chancery, setting forth the detail of the complaint, and such practical directions *what* he has to perform and *how*, that he might himself take all requisite measures without consulting an attorney, then the enactments, even with the rules thereon, fall very short of affording all such requisite information. Thus there is no intimation to the defendant by a bailable capias of his right to insist on being taken for the first twenty-four hours after his arrest to a third person's house in the county, and within three miles, not being a gaol or lock-up house, and that the officer refusing forfeits 50l.; nor is there any direction on serviceable process at what particular office of the proper Court, or how the defendant shall enter his appearance; and when a defendant appears in person there is no requisition that the appearance shall state his residence, or where the plaintiff may serve him with a declaration or other proceeding, and in many other respects full information, essential to enable a defendant to act for himself, is *withheld*, or at least not afforded by the 2 W. 4, c. 39, or the rules thereon; nor is there in a writ of summons any notification to the defendant that if he should avoid the process and not appear, a *distringas* will issue against his goods.

"If on the other hand it is to be supposed that the defendant, when served or arrested, will consult an attorney what he is to do, or rather employ him to transact all measures for him as is the constant practice, then there is no occasion for such great particularity in the writ and indorsements, because that attorney must

or ought to be able readily to afford all requisite information upon the most cursory examination of the most general writ, merely requiring the defendant to enter his appearance, or put in bail in the proper Court; at least there seems to be no necessity for visiting a plaintiff with so many serious consequences for his attorney's deviating from the prescribed forms, and unless a party, in support of his application to set aside the proceeding on account of a deviation from a prescribed form, will swear and satisfy the Court that he has *really been misled* and prejudiced, there is no reason why the proceeding should be set aside; and if it be essential for the sake of uniformity that the prescribed form should be *strictly* observed, that object might be attained by empowering the Court or a judge to subject the practitioner to some discretionary pecuniary penalty, and in case of repetition he might be suspended either temporarily or absolutely from assuming to practise, and it seems a harsh rule that a *switor* shall have his proceedings set aside, and not even permitted to amend on payment of costs."

On this subject we may add the following reference to the advice and exhortation of Mr. Tidd, the venerable preceptor of our author.

"One of our most talented lawyers, the amiable and excellent instructor of more than half the bar, at the same time that he invariably inculcated the necessity for acuteness, astuteness, and full knowledge as well of technical rules as of scientific principles, as essential for the protection of the client's interest, and as weapons of defence against the technical objections of an opponent, even more impressively advised the *waiving of all petty objections*, and when time was required by a defendant, then in the choice of two evils, he recommended the adoption of a tolerated dilatory plea, to a demurrer however well founded, because the latter would create an unconquerable hostility on the part of the opponent, inclining him in his turn to take a technical objection whereby the time of trial was delayed by petty contests upon collateral points wholly immaterial to the merits. He truly suggested that the client on each side suffers as much or more from the *sharpness* of his own attorney as from that of the opponent, in consequence of such petty exhibitions of *acuteness* in trifles rather than in extended or scientific knowledge, and thus parties, who might have been reconciled, become determined enemies. It frequently occurs that a practitioner, though sharp in his practice, is prone himself to blunder, and when he has obtained a rule for setting aside his opponent's proceeding for irregularity, his own rule is discharged with costs, on account of some defect in his own affidavit or in the terms of his own rule; See an instance *Smith v. Crump*, 1 Dowl. Pr. 519; and *Macher v. Billing*, 4 Tyr. 812. Lord Coke observes *qui hæret in litera hæret in cortice*; and the late Lord Chief Justice Ellenborough observed to a counsel, who ap-

peared too much attached to small objections, 'Sir, if you cannot elevate your mind above such trumpety objections, you will never rise in your profession.' It will be found of the utmost importance to a young barrister, especially if he has previously practised as a *plender*, to avoid in Court the least appearance of pleasure when moving to set aside proceedings for irregularities, or any exultation on account of his success on such points, and as the Court very reluctantly give effect to such motions, it is particularly important, when compelled to move by professional duty, to be fortified by the strongest decisions exactly in point, and by affidavits themselves free from objections. The late Ch. J. Ellenborough, though himself eminently qualified as a special pleader, thus expressed to a barrister on the home circuit his dislike to technical objections: 'I confess I always entertain strong prejudice against a special pleader called to the bar after long practice under it, because their habits appear to attach them too much to technicalities. I am happy as regards yourself that you have so soon removed that prejudice.'"

We had hoped, indeed, that the age of "Sharp Practice" had gone by, and that both branches of the Profession must have been convinced that they but prepared the ingredients of the "poisoned chalice for their own lips" who diffused a spirit of personal hostility into every legal proceeding; and that as they degraded the administration of justice by petty objections, and inflicted needless expense on the suitors or their professional opponents, it could not fail to happen that their mean triumphs would soon be visited by as mean a revenge, and that by bringing the profession into disrepute, they not only rendered the public disinclined to seek those remedies which often proved worse than the disease, but tended to throw impediments in the way of obtaining redress for the most grievous injuries. Thus, instead of directing their energies to the principles of the Law, and the honourable discharge of their important duties, their time was largely occupied in hunting for petty defects, and taking advantage of trifling omissions. We fear there was some foundation for the opinion that the Judges lent too ready an ear to these technical objections, and that the practice which might be excusable at the Old Bailey, was carried into the superior Courts of Westminster. Let us hope, with Mr. Chitty, that all branches of the profession will agree to discountenance this unworthy course of proceeding.

There are many other parts of the publication which we had marked either for extract or observation;—such as the respective parts of the various writs, accompanied

by a table, presenting a clear and concise analysis of every step; so that the practitioner may instantly see whether a supposed defect exists in any particular case, and its consequences, (p. 163)—the allowance of the costs of an application before action (pp. 136, 7)—retaining counsel (pp. 132, 4)—taking the opinion of counsel (p. 132), and various other subjects.

The notes also abound with valuable and interesting matter, particularly at pp. 7, 10, 12, 26, 206, 253, 262, 270; and we hope at an early period to enrich our pages with some further extracts.

## PROFESSIONAL GRIEVANCES.

### HOLIDAYS AT THE CHANCERY OFFICES.

Mr. Editor,

YOUR excellent publication being the only law work to which solicitors can resort, to make known their complaints as to the conduct of public officers, with a view to their redress, I would beg to draw your attention to the circumstance, that the Chancery Offices were sometime since closed for nearly a fortnight, to the great hindrance of public business, and in pursuance of a regulation made on an implied understanding that they would be open in Easter, should it fall in term-time; notwithstanding which, and in breach of such condition, they have been closed for a week this Easter. This is really too bad.

Of the practice of the Common Law Offices, in adding *Saturday* as well as Good Friday to Easter Monday and Tuesday, (the only two days allowed by the act,) as holidays, it is impossible to speak in measured terms. The reluctance of the Courts to entertain applications against their officers for neglecting their duties, naturally prevents such applications.

AN ATTORNEY.

[We have heard that a memorial has been presented to the Judges, by the Incorporated Law Society, in order to correct the evil complained of; but we are not aware of the result. We think our correspondent can scarcely be warranted in saying that the Courts discountenance applications against their officers; for we believe no motion on the grievance in question has yet been made to any of the Courts. ED.]

## SELECTIONS FROM CORRESPONDENCE.

No. XCVIII.

### CAUTION.—CLAIM OF RENT.

Mr. Editor,

WHILE attempts like the following are practised by a certain class of the profession, solicitors

should be very careful that, under the guise of an embargo upon their professional courtesy, their credulity is not too far practised upon; and that they be not made the dupes of artful and designing practitioners, and perhaps utterly ruined in the opinion of their clients.

Sometime since a client of mine took a house of a mortgagee, and having paid him rent for a few quarters, was at last told that he had assigned his interest to another party. Several claimants then appeared, troubling him with notices not to pay rent to *A.*, and not to pay rent to *B.*; and at last, a certain solicitor came forward, and demanded the rent for his client, "the purchaser of the property." On behalf of my client, I requested an inspection of the title. This I was refused, on alleged prudential motives; but an abstract was sent to me, shewing a regular purchase deed to the last claimant, which, I was assured, was legally completed. An appointment to settle was pressed for. Not feeling satisfied, however, with this abstract, I pursued my enquiries in other quarters, and found that the purchase-money had never been paid, and the purchase never completed, although the solicitor assured me both had been done, and even threatened my client with a distress for rent.

May I avail myself of your columns,—valuable as they are to my branch of the profession—to warn my younger brethren especially against attempts of this kind?

A SUBSCRIBER.

## NEW BILLS IN PARLIAMENT.

### REGISTRATION OF VOTERS.

THIS is intitled a "Bill for the more effectual registration of persons entitled to vote in the Election of Members to serve in Parliament in England and Wales."

The following is the substance of the proposed enactments:

1. Recited enactments repealed.
2. Clerk of the Peace to have warrants, &c. printed. Clerk of the peace to issue his warrant to high constable. Clerk of the peace to send precepts, &c. to high constables. Clerk of the peace to send copies of part of the register for the current year.
3. High constables to issue precept to overseers, and to deliver forms.
4. Overseers to give notice, requiring country voters to send in their claims. Notice to be affixed on churches and chapels.
5. Overseers to prepare lists of country voters and publish them. Lists to be made in proper columns of forms. Overseers to have power of objecting. Overseers to keep copies of lists for inspection. Lists to be sent to high constable, and original notices of claim and objections, and the part of register for the current year.

6. Notice of objections by third parties to persons not entitled to be retained in the county lists. Such objection to be on the register or claimant; and by overseers and third parties to party objected to; and must be given before 25th of August to overseers. Where party objected to non-resident, notice may be sent by post.

7. On 29th August overseers to transmit lists to high constables, and the original notice of claims and objection. Persons on the register not required to make any subsequent claim. Proviso as to places having no overseers.

8. Revising barrister to notify his appointment to the clerk of the peace; and clerk of the peace to high constable, who is to make out an abstract of persons objected to, and transmit same to clerk of the peace, and he to revising barrister.

9. Revising barrister to give notice to clerk of the peace, of the times and places for holding courts. Clerk of the peace to give notice to high constables.

10. High constables to attend courts for the revision of voters. High constables to receive lists. Where several high constables, each responsible throughout the whole hundred.

11. Overseers to attend courts.

12. Ground of objection to be stated in notice; and no other ground of objection to be inquired into.

13. Where person objected to appears, service of notice of objection not to be required.

14. Qualification not to be questioned, when before objected to, and objection disallowed.

15. Objector to prove first a *prima facie* case in support of objection. Where objection does not appear, the party objected to not to be called upon to prove his qualification; nor where *prima facie* case not proved. Where qualification before objected to, and objection allowed, the party objected to first to prove his qualification.

16. Names to be retained when no objection; or when the objection does not appear. Unless objector prove *prima facie* case of objection, name to be retained; and when party objected to proves that qualification was before objected to, and objection disallowed. Where objector has proved *prima facie* case in support of objection, then person objected to to prove his qualification. If qualification not then proved, or if incapacitation proved, same to be expunged. Names of persons dead to be expunged. Power to rectify mistakes, and supply omissions in lists. Barristers to have power to insert in the county lists the names of claimants omitted by the overseers in proof of qualification. Claim to be in respect of lands and tenements within the parish.

17. Where objection does not appear, or where objection made without probable cause, costs to be allowed. Where claim made without probable cause, costs to be allowed to the party objecting. Mode of recovering costs. Power of distress.

18. Form of certificate, when objection made without probable cause. Form of certificate,

when claim made without probable cause. Form of warrant. No certiorari allowed.

19. Clerk of the peace to issue his warrant to returning officers of boroughs; and also to town clerks. Clerk of the peace to send copies of parts of the register relating to the several parishes to returning officers in boroughs.

20. Returning officers to have precepts, &c. printed. Forms to be delivered with precepts.

21. Returning officer to issue precepts to overseers, and printed forms.

22. Overseers to cause list to be fixed on church-doors or other places.

23. Overseers in boroughs to make out lists. Lists to be fixed up. On 29th August, overseers to transmit lists and notices to returning officer.

24. Returning officer to issue precept to town-clerks.

25. Freemen to send in notices of claim. Town-clerk to make out list of freemen, and to fix the same up, and keep for perusal; and on the 29th August transmit them to returning officer. Proviso where no town-clerk.

26. Revising barristers in boroughs to notify appointment to clerk of the peace, and the clerk of the peace to the returning officer, who is to make out an abstract of persons objected to, and transmit the same to the clerk of the peace, and he to the revising barrister.

27. Returning officer to produce lists and notices.

28. Overseers to cause copies of lists to be written or printed. Clerks of the peace to cause registers to be written or printed. Returning officers in boroughs to cause registers to be written or printed. Application of monies arising from sale.

29. Expenses incurred by overseers and returning officers in cities and boroughs to be paid out of the poor rate. Expenses incurred by clerk of the peace and high constables, to be paid by county treasurer. Account of clerk of the peace to be allowed at first sessions. Account of overseers' expenses to be laid before the barristers.

30. 2 W. 4, c. 45, s. 27. Meaning of the words "or other building."

31. To entitle a person to be registered, poor rates and assessed taxes to be paid for twelve months previous to the 6th of April.

32. Mode of computing distances. Voter must occupy or be possessed of the same premises for which he was registered.

34. Freeholders in New Shoreham, Cricklade, Aylesbury, and East Retford, not to be assessed to the land tax.

35. Oaths of Allegiance, Supremacy, and Abjuration, to be dispensed with at elections.

36. Committees of the House of Commons to examine into voters, whether objected to before barristers or not.

37. Power to pay expenses incurred by barrister.



## ON LOCAL COURTS.

MUCH as has been, and continues to be said, about the abuses in, and non-effectual administration of the Law; I think it will nevertheless appear to the sound thinking practitioner, that the law, as it is at present, approaches nearer to perfection than it ever has done at any former period.

Among other questions which have been mooted at the present day, none appears more important, or deserving more careful consideration, than the subject of Local Courts; and the attention of the profession generally will be more strongly drawn in consequence of the accredited rumour of its being in contemplation to introduce a measure into parliament for the accomplishment of that object.

It is difficult to conceive the necessity for a measure of this kind, when, after looking at the present state of the law, it must be obvious that justice is administered with all possible dispatch.

The object the promoters of this measure had in view appears to be, to dispense with the necessity of country practitioners having their proceedings partially conducted through the medium of an agent, and the establishment of Courts within their own district, and therein to determine questions which may arise within their locality; thus according to their view obtaining more speedy justice, and at less expense.

First, we will look at the *time proposed to be saved*. As the law at present stands, after the writ has been obtained and served, and declaration and issue delivered, any case the amount in dispute of which does not exceed 20*l.* can, by a writ of trial, be carried down for hearing before the sheriff of the county in which the cause of action arose; and let it be recollected, that courts are held by every sheriff six times a year at least. Now it certainly appears that the regular establishment of local courts would not tend more effectually to the administration of the law than the present courts of the respective sheriffs, inasmuch as it would be almost impracticable to dispose of business in a shorter period of time than that just referred to.

With respect to the probable *saving of expense*, it appears equally obvious that the expense of a suit within the jurisdiction of a local court, let it be ever so small, must be as much as the trial of a case before the sheriff.

I am not aware what is contemplated by the promoters of this measure, with respect to the power of the proposed Courts, whether they are to have cognizance of every description of action, and whether to an unlimited or limited amount? If the latter, I think the benefit to be derived therefrom will very little exceed the present system; and if the former, its object will of course dispense with the usual circuits of the Judges; and in that event the Superior Courts will be used solely for the trial of causes in London and Middlesex, and appeals from the inferior courts in the country. And though the profession in town will, by the passing of

the proposed measure, be in some degree deprived of a part of their present emoluments, a greater advantage is likely to accrue from appeals from the judgments in the localities, which it is apprehended will be of frequent occurrence.

The advantages should be borne in mind which a suitor would derive from having his case heard before a Judge of the Superior Courts, and the satisfaction he would feel in knowing that it would be decided by one whose knowledge and sound sense he could confide in; not that I would for a moment attempt to depreciate the learning of any barrister or other gentleman who may be appointed; and now that this advantage can be derived every six months at the assizes, I think the time elapsing is not more than sufficient to frame and compile the suitable evidence necessary for the management of almost every case of importance: therefore, as the present system stands, it appears to me that the Sheriffs' County Courts are held sufficiently often for the speedy administration of justice in inferior cases, where the debt is under 20*l.*; and that with due regard and attention to the interests of the parties concerned, a more summary mode of administering the law would only be attended with dissatisfaction on both sides. And with regard to the assizes being held every six months, it is surely little time enough to prepare an important case for argument.

It is not the practice of the law by respectable men that is complained of, neither is it the length of time that elapses before a case is disposed of; but the main thing which has tended to bring the profession into disrepute, is the number of shabby practitioners with which this metropolis is infested, and which it has been, and will continue to be, the object of respectable men to expose and destroy. Had the law been administered properly by every one to whom it is intrusted, there would have been no cry for Local Courts, no cry for the abolition of the Law of Arrest, which has been only brought on by the mal-practice of those who live by the plunder of others, and whose actions are in the highest degree reprehensible: and were it not for this, the profession of the law would be looked upon universally as an honorable one, and its members treated with that respect, and be considered as holding that station, which they deserve.

In concluding this paper I will only observe, that the main object of the Local Courts will be the administering justice at a cheap rate; and I hope these few remarks may faintly tend to shew, that if the view I have taken of the case be a correct one, this object will not be accomplished, and that in the end the present practice will be found most efficient.

J. W. D.

## SUPERIOR COURTS.

### Lord Chancellor's Court.

#### TITLE.—CONSTRUCTIVE NOTICE.

*A vendor by the contract of sale is held to have undertaken to make a good title to the property he sells, if he does not explain and stipulate for any defect. The purchaser is not bound to inquire beforehand, or to infer any flaw in the title.*

This was a motion to discharge an order of the *Vice Chancellor*, dissolving an injunction which restrained the defendant from proceeding in an action at law. The plaintiff is lessee under the trustees of Lord Cadogan, of a plot of ground in Kensington Crescent, for which he covenanted to pay a rent of 120*l.* a-year. On this ground a person named Wilmot agreed with the plaintiff to erect five houses; but after some time his means failed him, and he transferred his interest in the houses to the plaintiff. The defendant Smith then entered into a contract to purchase the same houses, subject to a ground rent of 15*l.* a year for each house, to be allowed out of the purchase-money for materials and labour employed by him in completing the houses which were then unfinished. The defendant completed his part of the agreement; the plaintiff was unable to grant any underlease of the premises without subjecting each of the five houses to the liability to pay the whole ground rent of 120*l.* to Lord Cadogan. Under these circumstances, the defendant objected to complete the purchase, on the score of defective title. The plaintiff thereupon brought an action for the purchase-money. The matter was referred to a gentleman at the Bar; but before he pronounced his award, Mr. Smith died, and the plaintiff took advantage of the abatement consequent on that event to get rid of the reference. The representative of Smith then brought an action to recover the amount of his bill for work and labour done, as well as for materials supplied in completing the houses. The plaintiff filed his bill in Chancery, and obtained the common injunction; but the *Vice Chancellor* dissolved it, and against that decision the present appeal was brought.

Sir William Horne and Mr. Wakefield argued, in support of the motion, that the doctrine of constructive notice applied to the case, and that the defendant, who took the same title as Wilmot, was bound by the nature of the title, in the same manner as he was. The agreement between him and the plaintiff fully proved that he knew the nature of the latter's title. He must be taken to have known it also from Wilmot, for whom he was the builder and the agent.

Mr. Jacob contended that the defendant was not bound to make any inquiries into the nature of the title which Wilmot took, nor into the nature of the plaintiff's title. All he required was, that the plaintiff should give him a

good title, and having failed in that, he very naturally desired permission to proceed at law for the recovery of his bill. If the plaintiff, in the prosecution of the suit, succeeded in making out his title in the master's office, and in compelling the defendant to fulfil his agreement, then the money which the defendant sought to recover could be deducted from the purchase-money.

The Lord Chancellor never recollected an attempt to stretch the doctrine of constructive notice farther than this. The plaintiff undertook—that is implied in the contract—to give a good title to the property. He had failed to do so, and the defendant could not be expected to wait for his bill until the plaintiff succeeded in inducing the trustees of Lord Cadogan to grant separate leases, in order to secure the defendant's houses from a demand for the whole of the ground rent due on the lot. The defendant was not bound to inquire whether the plaintiff had a good title or not: he was promised a good title; that was enough; and the plaintiff had failed to give one. There had, besides, been a culpable delay on the part of the plaintiff. Two years and more had elapsed from the bringing of the first action until the filing of the bill; and this, if there were no other reason, would go far to form a reason for refusing the present motion, with costs.

*Fielder v. Smith*, at Westminster, January 31, 1835.

### King's Bench Practice Court.

#### PLEADING.—DELIVERY OF PLEADINGS.—IRREGULAR JUDGMENT.—NON DELIVERY OF PLEADINGS.

*If it is the direction of a rule of Court that a particular pleading should be delivered, it should be left with the party to whom it is delivered, and it is not irregular that that party should not re-deliver it; and therefore a judgment signed for such non-re-delivery is irregular.*

This was an application to set aside an interlocutory judgment for irregularity. The ground of signing such judgment was, that after delivering the demurrer-book to the defendant, he did not within four days return it to the plaintiff, but kept it.

A rule nisi having been obtained to set aside this judgment—

Cause was afterwards shewn against it, and it was contended, that the judgment here was regular, as the defendant should have returned the demurrer-book.

In support of the rule, it was submitted, that as the proceedings in the present case were by *scire facias*, they did not come within the practice of pleadings made up by officers of the Court, even before the alterations made by the practice introduced by the new rules. It had always been the course for the attorneys to make them up. The rules of Hilary term, 4 W. 4, had placed all proceedings on the same footing. The proceedings being to be delivered, that must mean that they were to be retained by the person to whom they were deli-

vered. The judgment was therefore irregular, there being no ground for the plaintiff signing it on account of the course pursued by the defendant.

*Patterson, J.*, was of opinion, that the judgment was irregular, and therefore made the rule absolute for setting it aside.

Rule accordingly.—*Baylis v. Hayward*, E. T. 1835. K. B. P. C.

#### INTERPLEADER ACT.—SHERIFF.—INDEMNITY.

##### —RELIEF BY THE COURT.

*Quære, whether the Court can interfere to relieve a sheriff, who makes an application to the Court for relief under the Interpleader Act, unless he has been refused an indemnity by the parties making claim to the property seized by the sheriff.*

In the present case an action had been brought and judgment obtained. On the judgment thus obtained, an execution was issued directed to the sheriff, on which he distrained. While in possession, he received notice of a fiat of bankruptcy. He then applied to the Court of King's Bench to obtain the usual rule under the Interpleader Act, s. 6. The affidavit on which the application was founded, contained no allegation that an application had been made either to the execution creditor, or to the claimant for an indemnity.

*Williams, J.*, doubted whether, unless the affidavit contained such a statement, the Court could think it right to grant the rule for the sheriff's relief. If he had an indemnity, he had no occasion for relief under the Interpleader Act. A writ to shew cause might however be taken.

Rule nisi granted.—*Wills v. Popjoy*, E. T. 1835. K. B. P. C.

#### CONTEMPT.—ATTACHMENT.—MASTER'S ALLOCATUR.—DATE OF AFFIDAVIT.

*A party is guilty of a contempt by not paying a sum of money found due for costs by the Master's allocatur; and therefore an attachment for non-payment may be obtained in the next term, but on an affidavit sworn some time before.*

In this case an application was made for an attachment for non-payment of costs pursuant to the allocatur of the Master. The only difficulty was, that the affidavit of non-payment was sworn two days after the end of Hilary term.

*Williams, J.*, thought that such fact was unimportant.

Rule accordingly.—*Rea v. Rogers*, E. T. 1835. K. B. P. C.

#### JUDGMENT AGAINST THE CASUAL EJECTOR.—SERVICE OF DECLARATION.—EXECUTION.—TENANT IN POSSESSION.

*Service of a declaration in ejectment on the personal representative of the person claim-*

*ing a right to the property in question, may be sufficient.*

This was an application for judgment against the casual ejector. The affidavit of the service of the declaration stated, that service of it had been made on the executor of the person claiming a right to the property.

*Williams, J.*, was of opinion, that the service was sufficient.

Rule granted.—*Doe d. Vizard v. Roe*, E. T. 1835. K. B. P. C.

#### REMOVAL OF JUDGMENT FROM INFERIOR JURISDICTION.—RULE NISI.—RULE ABSOLUTE.

*The judgment of an inferior jurisdiction can be removed for the purpose of issuing execution at once, by application to a superior Court.*

On an application to remove the judgment of an inferior Court, for the purpose of suing out execution on it. The question was, whether the rule for that purpose was absolute, or nisi, in the first instance.

*Williams, J.*, was of opinion, that it was absolute in the first instance.

Rule absolute accordingly.—*Pansy v. Gooday*, E. T. 1835. K. B. P. C.

#### Exchequer of Pleas.

#### FOREIGN WITNESS.—ALLOWANCE OF EXPENSES.—MASTER'S DISCRETION.—REVIEWING TAXATION.

*To what expenses a foreign witness, detained in this country for the purpose of a cause, is entitled on taxation.*

This was an application for a rule to review the Master's taxation, on the ground of his disallowing the wages of a captain of a vessel, who had been detained in this country as a witness in this cause. It was contended, that he was entitled to his wages the same as if he had been sailing. He had lost 7l. by remaining in this country, the Master having refused to allow him anything but his expenses of living and travelling.

The Court was of opinion that the Master was right in his allowances and disallowances, and therefore refused the rule.

Rule refused.—*White v. Brazier*, E. T. 1835. Excheq.

#### INTERPLEADER ACT.—SHERIFF.—ATTACHMENT.—LACHES.—COSTS.

*A sheriff, in order to obtain relief under the Interpleader Act, must come to the Court promptly, on receiving notice of conflicting claims on the goods seized.*

In this case an application had been made, and a rule obtained by the sheriff, under the Interpleader Act. It appeared, however, that previous to this application an attachment had issued against him for not returning the writ,

On shewing cause against the sheriff's rule, it was contended that the application was too late.

The Court was of opinion that the sheriff could only be relieved under the Interpleader Act, by paying the costs of the attachment.

Rule absolute accordingly. — *Alenore v. Adeane*; *Hop v. Sime*, E. T. 1835. Excheq.

ORDER OF REFERENCE. — ARBITRATOR'S POWER. — ENLARGING TIME FOR MAKING AWARD. — WAIVER.

*By the terms of a reference the arbitrator was to make his award on or before the 28th of June, or such further or ulterior day, not exceeding the 28th of July, as he should appoint, and signify in writing under his hand, and as the Court of Exchequer or a Baron thereof might order. The arbitrator enlarged the time, but no order of the Court or of a Baron was obtained: the time was further enlarged by two Baron's orders, which were made by consent: Held, that it was not competent to either party to object to the award, on the ground that the first enlargement of time was made without sufficient authority.*

This was an application for a rule to set aside an award, on the ground of the arbitrator having improperly enlarged the time for making his award. It appeared from the terms of the order of reference that the arbitrator was at liberty to enlarge the time for making his award, but not without the authority of the Court of Exchequer, or one of the Barons of that Court. He, however, did enlarge the time without such authority. He subsequently enlarged the time a second time in pursuance of a rule of the Court, and with consent of the parties, and the award was accordingly made and published. It was contended, that as the first enlargement had been made without the concurrence of either the Court of Exchequer or one of the Barons thereof, it was invalid, and that the award, therefore, ought to be set aside.

The Court was of opinion, that as the parties had consented to the subsequent enlargement, they had waived their right to object to the first irregular enlargement, and therefore refused the rule.

Rule refused. — *Benwell and another v. Hipsman and another*, E. T. 1835. Excheq.

## NOTES OF THE WEEK.

### HOUSE OF LORDS.

#### Bills for second Reading.

Title of the Bill. Proposer.

Residence of Clergy.	Lord Brougham.
Pluralities Prevention.	Lord Brougham.
Ecclesiastical Jurisdiction.	Lord Brougham.
Illegal Securities.	

### HOUSE OF COMMONS.

#### Bills to be brought in.

Law of Tenure.	Attorney General.
Law of Escheat.	Attorney General.
Prisoners' Defence.	Mr. Ewart.
County Coroners.	Mr. Cripps.
Poor Law Amendment.	Mr. Trevor.
Registration of Births, &c.	Mr. Wilks. 19 May.
Tithes Commutation.	Sir R. Peel, Bart.

#### Second Reading.

Law of Libel.	Mr. O'Connell.
Bankruptcy Funds.	Master of the Rolls.
Ecclesiastical Courts.	Sir F. Pollock.
Clergy Discipline.	Sir F. Pollock.
Dissenters' Marriages.	Sir R. Peel, Bart.
Infants' Property (Ireland).	
Contempts in Equity (Ireland).	
Oaths Abolition, 13th May.	

#### In Committee.

Copyholds Enfranchisement.	Attorney General.
Highways.	Mr. Lefevre.
Registration of Voters.	Lord J. Russell.

#### Consideration of Reports.

Execution of Wills.	Attorney General.
	12th May.
Law of Executors, &c.	Attorney General.
	12th May.
Abolishing Imprisonment for Debt, &c.	Attorney General.
	15th May.

Although the preceding list of the several stages of the Law Bills in Parliament does not vary from that of the last week, except in the change of the official titles of several of the proposers of the measures, we repeat it here on the occasion of commencing a new volume.

### NEW DECISION AS TO ATTORNEYS IN THE EXCHEQUER.

Upon bail being called, it was objected by the Filazer that the bail-piece, &c. were irregular, the same having been put in "*Heely, by E. Cole*;" when Mr. Baron Alderson decided that an attorney of the King's Bench or Common Pleas cannot practise in the name of an attorney of this Court; and ordered, that the justification should stand over until Monday, the bail to be put in and notice served in the mean time in the name of an attorney of this Court. — *Chadwick v. Marsden, a prisoner*. 25th April, 1835.

## NEW ORDER IN THE EXCHEQUER OF PLEAS.

### SPECIAL AND COMMON PAPER.

IT IS ORDERED, that in future the party setting down a cause in the *Special Paper*, shall state whether there is to be any argument or not; if not, then it is to be put in a *Common Paper*, and the party entering it

need only deliver two paper books. If the matter is to be argued, it is then to be put into another list, to be entitled "*Special Paper—Cases to be argued:*" four paper books in such cases are then to be delivered in the usual way.

When a cause is entered in the *Common Paper*, notice should be given to the opposite party.

By the Court.

ROSE.

27th April, 1835.

## SOLICITORS TO BE ADMITTED IN CHANCERY.

*The day after Easter Term, 1835.*

### Clerks' Names.

Coote, W. Henry, No. 20, Austin Friars.

Hill, Francis Canning, 10, King's Bench Walk.

Robertson, James, Richmond, Surrey.

Willes, W. Phillips, 10, New Millman Street.

### To whom articulated.

John Eyre Coote, the younger, Austin Friars; assigned to John Eyre Coote, the elder, same place; re-assigned to John Eyre Coote, the younger.

John Pontifex, of St. Andrew's Court, Holborn.

John Henry Bolton, New Square, Lincoln's Inn.

Henry Tuson, Ilchester; assigned to John Galsworthy, 9, Cook's Court, Lincoln's Inn.

## ANSWERS TO QUERIES.

### Law of Property and Conveyancing.

JOINT-TENANCY.—WIFE.—ADMINISTRATION.  
VOL. 9, P. 383.

The marriages did not sever the joint-tenancy. Co. Litt. 185 b.; Bac. Ab. tit. Joint-tenants; *May v. Hook*, 1 B. C. C. 112 n.; *Patriche v. Powlet*, 2 Atkins, 54, and the cases there cited. SPES.

### Common Law.

MINOR.—WIFE'S DEBT. VOL. 9, P. 398.

1. Although Mr. Fonblanque, in the Treatise of Equity, thinks otherwise, yet the better opinion seems to be, that a minor marrying is liable for his wife's debts contracted before marriage while she was of full age. The law which incapacitates a minor from contracting, proceeds on the principle of protecting his weakness; but where the contract is made by a person of full age (as in this case) the principle does not apply. The contract from which the husband's liability arises here, is that of marriage, which the law enables him (with the consent of parents) to make. The

Judges, in deciding a motion in the case of *Paris v. Stroud and us.*, Barnes, 95, expressed an opinion that the husband was clearly liable; and there is reason to believe that this opinion will be acted upon if the case comes before a Court. I think therefore that *H.* will be quite safe in now suing *W.* and wife, without waiting until *W.* arrives at age. G. Br.

2. *W.* being an infant, is not chargeable for the goods supplied to his wife before marriage, even if they were necessities. *Turner v. Trisby*, 1 Strange, 168. LECTOR.

SAVINGS BANK.—LETTERS OF ADMINISTRATION. VOL. 9, P. 416.

*J.* is referred to the 40th sec. of the 9 G. 4, c. 92, which enacts, that "where the principal and interest due to any depositor at his decease exceeds the sum of fifty pounds, the same shall not be paid to any person as representative of such deceased depositor, but upon production of the probate or letters of administration of his or her effects." The case supposed by *J.*, however, under the existing law, cannot take place. Every depositor, prior to the first investment, is required to subscribe a certain declaration; and in case of children unable to sign or comprehend such declara-

tion, a trustee is nominated, who alone is recognised as owner, and to whom, of course, on the infant's death, the amount would be payable. S. C.

**BILL.—GAMING. VOL. 9, P. 464.**

1. *A.* and *B.* (the drawer and acceptor) were not parties to the gaming transaction; and the mere act of *C.*'s indorsement to *D.*, in discharge of a gaming debt, does not bring it within the statute of 9 Anne, c. 14, s. 1, which provides "that any notes, &c. *given*, granted, drawn or entered into, or executed for money &c. won at gaming, shall be utterly void," and cannot be construed to affect this case; for the word "*given*," taken in conjunction with the words which follow, must mean a bill accepted for a gaming debt due from acceptor to drawer; and even in that case, an indorsee for valuable consideration might sue drawer or payee, though the drawer, nor any person deriving title through him, could have sued acceptor. *Edwards v. Dick*, 4 B. & A. 212. On the whole, I see nothing to prevent *E.*'s action against *B.* R. C. S.

2. The only cases I can find which bear upon the point submitted by W. Y. C., are, *Sigeb v. Jebb*, 3 Stark. 1, and *Henderson v. Benson*, 8 Price, 281. 1.—A promissory note, given to secure the payment of money won at any game, whether of skill or chance, is void under the stat. 9 Anne, c. 14. 2.—Where a bill of exchange was accepted in consideration of a gambling debt, it is within the same statute, although the drawer was an entire stranger to the acceptor and the person for whose benefit it was accepted, and although the bill was endorsed and delivered over, before acceptance, to the party who had prevailed on the drawer to draw it. As a general rule, all gaming securities are void by the statute in question; but gaming contracts are not. See *Robinson v. Bland*, 1 W. Bla. 260.

ASPIRO.

**CORPORATION—BILL OF EXCHANGE. VOL. 9, P. 464.**

A corporation, not established for trading purposes, cannot be acceptor of a bill of exchange, payable at a less period than six months from the date thereof, it being within the provisions of the several statutes passed for the protection of the Bank of England (3 & 4 W. 4, c. 98); and it is doubtful whether any, except a trading corporation, can bind themselves as parties to a bill of exchange. *Broughton v. Manchester and Salford Waterworks Proprietors*, 3 B. & A. 1. And see *Murray v. East India Company*, 5 B. & A. 204.

ASPIRO.

**Law of Attorneys.**

**CLERK'S SERVICE WITH COUNSEL. VOL. 9, P. 464.**

I think it is quite clear, on looking to the words of the act 1 & 2 G. 4, c. 48, s. 2, that *A.* may serve any one of the five years of his articleship with a barrister; for the act does not specify any particular year, but enacts that an articulated clerk may serve a part of his time (not exceeding one year) as pupil to a practising barrister or certificated special pleader, such part to be reckoned and allowed him in the five years. But certainly every one must agree with the appropriateness of the editor's remark, in saying the last year is the most beneficial for a young man to enter into a conveyancer's office. W. H. S.

**Law of Landlord and Tenant.**

**DISTRESS.—SUNDAY. VOL. 9, P. 143.**

In my answer to this query, p. 175, I referred to *Drury v. Desfontaine*, 1 Taunt. 131, as deciding that an act done on a Sunday by a person not in the exercise of his ordinary calling, is neither void at common law, nor by the stat. 29 Car. 2, c. 7. *J.* has also answered this query; but does not appear to be aware of the above case, to which his answer is contradictory. GRADUS.

**QUERIES.**

**Common Law.**

**BILL OF SALE OF GOODS.**

Is it necessary that a bill of sale of goods should contain a power of sale, in order to enable a mortgagee to sell? S.

**TURNPIKE TICKET.**

*A.* held a ticket under the trustees of certain turnpike roads, as a security for money advanced by him. *A.* dies, and the party entitled under his will, finding that the original ticket is lost, applies to the trustees for a new security, which they decline giving, or to enter it anew on their books, saying that the production of the original ticket is indispensable—they pay the interest regularly; under such circumstances, what remedy has *A.*'s representative against them? A. B.

**Law of Attorneys.**

**ARTICLED CLERK.—INSTRUCTION.**

Is a clerk, under articles to an attorney, at a premium of four or five hundred guineas, legally bound either to ingross deeds or copy

drafts, &c., or is he bound *occasionally* to do so; or is it *solely* the business of the clerk receiving wages? It may be admitted, that for the first year he cannot better employ himself; but such an admission could not afterwards be allowed. If the clerk should refuse the above "work and labour," and in consequence leave the attorney's office, can he recover a part of the premium, and in what manner should the action be brought? All precedents for articles of clerkship are nearly alike; but it is submitted, that upon a general principle, a clerk, *not* receiving a salary, but paying for his instruction, cannot, either in law or equity, be bound to the work of a paid clerk.

C. S.

### Ratio of Landlord and Tenant.

#### TENDER OF RENT.

In the case of a tender of rent, the landlord refuses to take it, but some time after makes a demand, when the tenant refuses payment: Can the landlord, in an action of debt, recover the rent, *with costs*? S.

### Practice.

#### DECLARATION BY THE BYE.

In Chitty's Archbold's Practice, p. 220, "it is submitted," that the former practice, as to declaring *by the bye*, can no longer prevail, and at all events as regards third persons so declaring. Mr. Chitty's reasons for this impression is, that "the present process being returnable in Vacation as well as in Term," the practice cannot be adopted now, it being necessary *formerly* that the declaration by the bye should be delivered *within* the Term in which the process was returnable. Is there any decision to decide the point? Mr. Chitty cites *Smith v. Muller*, 3 T. R. 627, as to the former practice. S. B. S.

#### MASTER'S ALLOCATUR.

Can any action for taxed costs be brought on the master's allocatur, or must the party to whom such costs are allowed, proceed by demanding the same, making such order a rule of Court, and then by attachment, "or how otherwise?" C. K. N.

### MISCELLANEA.

#### A LAWYER'S WILL.

This is my last will and testament,  
Read it according to my intent.—  
My gracious God to me hath given  
Store of good things that under Heaven  
Are given to those "that love the Lord  
And hear and do his sacred word;"

I therefore give to my dear wife  
"All my estates" to keep for life,  
Real and pers'nal, profits, rents,  
Messuages, lands, and tenements;  
After her death I give the whole  
Unto my children, one and all,  
To take as "tenants in common" do,  
"Not as joint tenants" "*per mie—per tout.*"  
I give "all my trust estates" in fee,  
To Charlotte my wife and devisee,  
To Hold to her, on trusts the same  
As I have held them in my name;  
I give her power to convey the fee  
As fully as though 'twere done by me,  
And here declare that from all charges  
My wife's "receipts are good discharges."—  
May God Almighty bless his "word"  
To all my "presents from the Lord,"  
May He his blessings on them shed,  
When down in sleep they lay their head;  
And now my wife, my hopes I fix  
On thee my sole Executrix,  
My truest, best, and to the end  
My faithful partner, "crown," and friend.—  
In witness whereof I hereunto  
My hand and seal have set,  
In presence of those whose names below  
Subscribe and witness it— J. C. G.

26th Jan. 1835.

This will was published, seal'd and sign'd  
By the testator, in his right mind,  
In presence of us, who at his request,  
Have written our names, these facts to attest. }

J. M.  
D. E. } Solicitors.  
J. G. D. }

### THE EDITOR'S LETTER BOX.

We think that "A Constant Reader" has not stated any additional fact or argument relating to the regulations of the Inns of Court, beyond the contents of his former letter, in which he fully and properly stated the point in question.

We are informed by the attorney in the cause, that the rule against the Sheriff of Northamptonshire, for an alleged overcharge on granting a warrant on a writ of *capias*, was on the 22d April last, made absolute with costs, no cause being shewn against it.

The Queries and Answers of J. T. A.; T. W. D.; "Lector;" "Spes;" Q.; and T. T. T., have been received.

The Query of a Trustee, inserted 7th Feb. last, relative to the payment twice of a receipt stamp, is recalled to the attention of our correspondents.

In answer to "Enquirer," Mr. Starkie was called to the Bar on the 23d May, 1810, and Mr. Alexander on the 11th Feb. 1820. They are both of Lincoln's Inn.—*Vide Legal Almanack.*

The letters of J. R. S. and J. W. D. shall be inserted.

# The Legal Observer.

Vol. X.

SATURDAY, MAY 9, 1835.

No. CCLXVIII.

— "Quod magis ad nos  
Pertinet, et nescire malum est, agitamus.

HORAT.

## OF PAYMENTS BY AND TO BANKRUPTS.

IN the present article we propose to shew what payments *by* a bankrupt, and what payments *to* a bankrupt, are valid, notwithstanding a prior act of bankruptcy. The cases arise upon the construction of the 82d section of the 6 G. 4, c. 16, by which it is enacted "that all payments really and *bond fide* made *by* any bankrupt before the date and issuing of the commission, to any creditor (such payments not being a fraudulent preference) shall be deemed valid, notwithstanding any act of bankruptcy by such bankrupt; and all payments really and *bond fide* made *to* any bankrupt before the date and issuing of the commission shall be deemed valid, notwithstanding any prior act of bankruptcy by such bankrupt; and such creditor shall not be liable to refund the same to the assignees, provided he had not notice at the time of such payment by or to the bankrupt, of any act of bankruptcy." There was a provision in different words, but similar in intention, in the 1 Jac. 1, c. 15, s. 14, respecting payments to a bankrupt, the latest case upon which was held to afford the governing principle, and lead the construction of the corresponding portion of the present enactment. In the case alluded to<sup>a</sup>, Packwood, a dealer in carpets, after an act of bankruptcy, sold some carpets to the defendant's wife, who had no notice of the act of bankruptcy, and paid for them; and in the action brought by his assignees to recover their value—an action sanctioned in some degree by the earlier decisions—the jury, under the direction of Lord Tenterden, found for the defendant, on the ground that the goods were purchased *bond fide* in the ordinary course of trade; and on a motion for a new trial, the Court

thought that, under the circumstances stated, the assignees could not maintain an action.

The first case<sup>b</sup> under the present bankrupt act was somewhat different, inasmuch as the sale was not of goods in which the bankrupt traded: it was a sale of the bankrupt's private library; but the purchase and payment were *bond fide*, and on that ground the Court held that the assignees could not recover. Lord Tenterden said, "The plaintiffs contend, that by the relation to the act of bankruptcy the goods were *their* property, and not the property of the bankrupt; that the sale was void, as being made by one who had no authority to sell; and consequently that they have a right, after demand and refusal, to recover the value of the goods in trover. The defendant relied on the 82d section of the 6 G. 4, c. 16; and on his behalf the case of *Cash v. Young* was quoted. In that case, the goods being such as the bankrupt usually dealt in, were bought at his shop, which continued open, notwithstanding he had committed an act of bankruptcy. In the present case, the goods were indeed bought in the open shop or warehouse of the bankrupt, but were not such as he dealt in, and the plaintiff therefore contended further, that this case was not within the mischief noticed, and intended to be prevented in that decision. We are of opinion, however, that the rule of the law and the construction of the statute ought to be the same. The new statute declares that the payment shall be deemed valid; but if, notwithstanding the payment to the bankrupt, the assignees may recover back the goods without offering to return the money, the payment will not be valid for any beneficial purpose to the party paying: and the only mode therefore in which effect can be given to the words of this section is, to hold that the party paying shall retain the goods, so long at least as he

<sup>a</sup> *Cash v. Young*, 2 B. & C. 413.  
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<sup>b</sup> *Hill v. Farnell*, 9 B. & C. 45.  
B



is kept out of his money. It is not necessary for us to say what would be the effect of an offer on the part of the assignees to return the money,—an event not very likely to happen on a *bond fide* sale.” In a subsequent case,<sup>c</sup> Lord *Tenterden* ruled at  *nisi prius*, that where the prices at which the purchase was made were so low that the jury thought it not a fair transaction, the payment was not protected, and the jury on that ground found a verdict for the assignees and against the purchaser, who was defendant. “The question is, not whether the purchase by the defendants was fraudulent, but whether it was in the ordinary course of trade and dealing. In considering that, you may look at the antecedent transactions between the parties, although they cannot be impeached in the present action; and from them it appears that the defendants have sometimes bought from the bankrupt at very low prices: are you then of opinion that the defendants, men in business, could be so ignorant of the market price of the article in which they dealt, as not to know they were buying it very far below its value? If they knew this, I think the purchase was not a transaction of such a kind as to come within the protection: it was not a fair transaction in the common course of business.” And a sale of this sort may itself constitute an act of bankruptcy; for a sale is a transfer, and it may be a “fraudulent transfer,” within the meaning of the third section, though, from its nature, it is not exposed to the same suspicion as other acts, and therefore a sale can reasonably be held to be an act of bankruptcy only where the circumstances under which it took place would have raised in the mind of a buyer of ordinary understanding the suspicion of its being effected to raise money in fraud of creditors.

Only payments,<sup>d</sup> as contradistinguished from set-offs, are protected by the 82d sec.;

and therefore where,<sup>e</sup> after an act of bankruptcy, the defendant accepted a bill for the accommodation of the bankrupt, who, at a subsequent part of the same day, sold and delivered to the defendant three horses in part satisfaction of the acceptance, it was held, that, even taking the acceptance as ready money, still it was not a payment, and consequently the sale was not protected by the 82d section. *Tindal*, C. J. said, “Not one of the bankrupt acts protects a sale by the bankrupt as a sale, but merely the payment of the price. But this case appears to us not to be so much a sale of goods with payment of the price, as a sale of goods with an agreement to set off the price against a liability on the part of the bankrupt. It would be dangerous to extend the application of the decided cases, so as to give effect to a set-off in consequence of a subsequent sale.” This was an acceptance by the defendant for a larger sum, without any reference to the sale of the horses; and treating it as an actual advance of money, the transaction amounts to no more than a set-off of the price of the horses against a by-gone debt, which set-off is agreed upon after a secret act of bankruptcy; and we do not think this can be considered a payment within the 82d section.”

So, a loan secured upon an assignment of personal effects was held not to be a payment within the 82d section,<sup>f</sup> and therefore that the assignment was void against assignees, the circumstances under which it was made being such as to take it out of the protection of the 81st section. “Here,” said *Tindal*, C. J., “there has been no payment to the bankrupt, but a loan for which the bankrupt has given a security. The case therefore falls within the 81st section; it is a conveyance by, or a contract with the bankrupt, before his bankruptcy, and the only question is, whether it was made and entered into more than two months before the date and issuing of the fiat against him. It is a conveyance of his property, of which the bankrupt retained the possession, and was to retain it until the month of March following. Without entering into any discussion which might arise<sup>g</sup> upon this state

<sup>c</sup> *Ward v. Clarke*, 1 Moo. & Mal. 499.

<sup>d</sup> Payment has been defined “a delivery over of money in discharge of an antecedent debt;” (*Per Gaslee, J.*, in *Cunham v. Deneu*, 3 Moo. & S. 770;) but under the corresponding provision in the statute of James, it was held that the giving of a bill *quod* payment to a bankrupt, was protected by that statute; (*Wilkins v. Casey*, 7 T. R. 711;) and the same construction is necessarily implied in *Bagnall v. Andrews*, 4 Moore & P. 839; where, a bill having been given in payment by a bankrupt, the question was not even raised whether it could be considered as “a payment,” but that was assumed, and the question was, whether it was a *bond fide* payment.

<sup>e</sup> *Carter v. Breton*, 4 Moo. & P. 424.

<sup>f</sup> *Cunham v. Deneu*, 3 Moo. & Scott, 761.

<sup>g</sup> The Chief Justice here alludes to the question, whether the assignees would not be entitled to recover on the ground that the goods were within the order and disposition of the bankrupt; but that question was unnecessary, as the other facts were such as not to bring the case within either the 81st or 82d section.

of facts, it is sufficient to say, that this was a transaction intended to be protected, if protected at all, by the 81st section; and that it does not fall within the protection, because it took place within two calendar months before the issuing of the fiat."

In *Farrall v. Alexander*<sup>s</sup> money was paid into Court in lieu of bail, under the 7 & 8 G. 4, c. 71, s. 2. Bail had not been put in, nor consequently had the money been received back under the 3d section of that act at the time the plaintiff obtained a verdict. *Littledale, J.*, held that it was then too late for the defendant to put in bail, as a matter of right, under this section. Before the trial the defendant became bankrupt; and his assignees, after the time at which the plaintiff might have obtained final judgment, applied to the Court to have the money paid to them. Upon this state of the facts, Mr. Justice *Littledale* decided two points: first,—and it is for this that we cite the case,—that this was not a payment by the bankrupt to a creditor, within the meaning of the 82d section; and, secondly, that neither party, as of legal right, under the 7 & 8 G. 4, were entitled to have the money: that consequently it was disposable under the equitable jurisdiction of the Court; and it having been ascertained that it was paid into Court after an act of bankruptcy, it was finally ordered to be paid to the assignees.

As to payments by a bankrupt, this subject is so mixed up with the question of fraudulent preference, and has usually arisen upon such complicated cases, that it would be difficult to make an intelligible abridgment, or to lay down any other general rule, than that the payment must be in the ordinary course and *bond fide*.<sup>h</sup> In a recent case,<sup>i</sup> the defendant having purchased of the bankrupt his interest in certain contracts for the purchase of timber of Lord Stradbroke, and having also made himself responsible to Lord Stradbroke, received from the bankrupt four hundred pounds in cash, and two bills of five hundred pounds

each, for the purpose,—not of delivering that sum and the two bills,—but for the purpose of paying fourteen hundred pounds to Lord Stradbroke. The defendant took the bills to his own banker, used them as his own, and paid Lord Stradbroke the sum of money: this payment was held to have been made by the defendant as the agent of the bankrupt, and, consequently, that it was protected by the 82d section. *Per Lord Denman*, "But for the provisions of this statute the assignees could certainly have recovered back both sums from Lord S., though the specific 400*l.* recovered from the bankrupt was not paid to him (*Allanson v. Atkinson*, 1 M. & S. 583), but the 82d section clearly protects this payment. If then the assignees could not recover from Lord S., and the payment to him be good, it cannot be permitted that they should recover from the defendant, who merely acts as agent in making a valid disposition of the bankrupt's property."

In *Hunt v. Martimer*,<sup>k</sup> the defendants advanced money to the bankrupts, to enable them to execute an order for the East India Company, and it was arranged that they should be repaid out of the bills which would be received by the bankrupts from the Company: the bankrupts accordingly, upon realizing the money, paid it to the defendants, and this was held a valid payment; and no doubt it would have been held valid, had it been a question under the 82d section; but the payment was before an act of bankruptcy, and therefore it was only a question of fraudulent preference.

Advances by a customer to his banker in order that the banker may honour his draft, and so enable him to go on for a time, are not payments, or if payments, are not protected by the 82d section.<sup>l</sup>

<sup>k</sup> 10 B. & C. 44.

<sup>l</sup> *Vacher v. Cocha*, 1 B. & Ad. 145.

The consideration of the following cases may be found useful. In *Bedford v. Perkins*, 3 Car. & P. N. P. C. 90, the defendant was broker for a person who afterwards became bankrupt: before any act of bankruptcy, the bankrupt, upon an application for the payment of a debt, authorized the defendant to pay the debt out of certain rents which he was about to realize by distress; the defendant consented to do so, and the consent was communicated to the creditor: he, however, had not made the payment when the commission issued, and the assignees now sought to recover the money. Lord *Tenterden* said, "As this was a *bond fide* transaction, the question is, whether, if there had been no bankruptcy, the bankrupt could have recovered this money

<sup>s</sup> 1 Dowl. Prac. Cas. 132.

<sup>h</sup> In *Bollen v. Jager*, Ry. & Moody, 265, it was held, that a payment by weekly instalments of small sums in discharge of a large purchase, was not protected by the 19 Geo. 2, c. 32, s. 1, which protected payments by bankrupts "in the usual and ordinary course of trade and dealing;" but the 82d section would, it seems, extend to such a payment, unless the jury should think the mode of payment precluded its being considered *bond fide* payment.

<sup>i</sup> *Shaw v. Batley*, 4 B. & Ad. 801.

## NOTICES OF NEW BOOKS.

*Addenda to the Bankrupt Acts: with the Practice before the Commissioner, Court of Subdivision and the Court of Review; the Orders in Bankruptcy, Costs, and numerous Practical Forms.* By Charles Sturgeon, Esq., of the Inner Temple, Barrister at Law. London: Maxwell.

THIS Book, comprising the *Practice* in Bankruptcy before the Commissioners, the Court of Subdivision, and the Court of Review, appears to have been needed, and must be useful to the profession. Mr. Sturgeon states that the time and trouble necessary for collecting, and the difficulty of correctly laying down the various details of practice before the Court of Review and before the Commissioner, have far exceeded his expectations; and he observes that the Reports published since the formation of the Court have equalled, if not exceeded, in size, any of the other Courts in Westminster Hall.

The author, after stating the recent Statutes and Orders relating to Bankruptcy, commences the practical part of his work with the admission of solicitors, and the jurisdiction of the Court over them. The following extracts may be usefully introduced here:

"The solicitor will not in general be charged with costs, unless guilty of such an abuse as amounts to a contempt; *ex parte Heywood*, 13 Ves. jun. 67. Where, however, it should appear that either from fraud or collusion, ignorance or negligence, any irregularity has occurred, he will in general be ordered to pay the costs of the motions or other proceedings that have arisen; *ex parte Arrowsmith*, 14 Ves. 209; *ex parte Conway*, 13 Ves. 62; *ex parte Heywood*, *ibid.* 67. And where an affidavit was taken off the file for scandal, the solicitor who filed it was held liable for costs and expenses, as between solicitor and client; *ex parte Wakeman*, Mon. & B. 259. In this case the party filing it

from the defendant: I am of opinion that he could not; and I think that what passed between the parties as to the paying it to the creditor, is such an appropriation of it as will prevent the plaintiffs from recovering."

In *Bennett v. Spackman*, 1 Car. & P. 274, where it appeared that the defendant had given the bankrupt a bill of exchange before the act of bankruptcy, but it did not become due till after the act of bankruptcy, *Best, C. J.*, ruled it to be a good payment to the bankrupt, the defendant not knowing at the time of the bankrupt's insolvency.

was only the agent of a country solicitor, and had not seen the scandalous matter; see also, *ex parte Simpson*, 15 Ves. 476; *ex parte Kirby*, Mon. 68. In *ex parte Lowe*, 1 Gl. & J., an application was made to strike a solicitor off the rolls. The Lord Chancellor said, the application that a solicitor may be removed from being or acting as a master extraordinary of the court, and may be struck off the rolls, may very properly be made by reason of his conduct in a matter of bankruptcy; but I doubt very much whether it should be made in the bankruptcy, it should rather be addressed to the court, in its general jurisdiction over its officers. The 10th sec. of the Bankruptcy Court Act would appear to settle this doubt. The solicitor to a commission cannot purchase under it, either for himself or another; *ex parte Bennet*, 10 Ves. Jun. 337. And when he did purchase, it was ordered to be set aside, and permission refused him to bid at the resale, even after he had ceased to be solicitor to the commission; *ex parte James*, 8 Ves. Jun. 337. In a recent case, where some reversionary property was held by a solicitor, whose bills of costs had not been paid, although the value of the property was far exceeded by the amount of his bills, and the parties who employed him were insolvent, so that he had no other resource to look to for payment, the court refused him leave to bid at the sale; *ex parte Towne, re Browne*, Nov. 8th, 1834. And in a sale of mortgaged property, where the same solicitor was employed for the assignee and the mortgagee, the court ordered that a separate solicitor should be employed for the purposes of the sale; *ex parte Rolfe*, 1 Dea. & Chit. 77.

"A solicitor may bring an action for his bill against the assignees for business done under a commission, although that bill has not been taxed; *Turn v. Hays*, 1 Stark. 278; and may maintain his action for his bill up to the choice of assignees; for the 24th sec. of the Bankrupt Act applies only to cases between the assignees and the estate; *Taylor v. M'Gaugan*, 4 C. & P. 96; *Crowder v. Davis*, 3 Y. & J. 433; *Fisher v. Filmer*, 5 C. & P. 92; and he may recover from any person who employs him, although he be not the petitioning creditor; *Pocock v. Russel*, 4 C. & P. 14. He may even sue out a commission upon a debt for costs, without having delivered a signed bill; *ex parte Horrell*, 1 Rose, 312; or prove such bill, *Eiche v. Noakes*, M. & M. 303, and he was held entitled on petition to have his bill of costs at law and in bankruptcy paid out of a fund in court, although his client had, since the money had been paid in, taken the benefit of the insolvent act; *ex parte Moule*, 5 Maddox, 462.

"A solicitor has no lien upon the proceedings for his costs; *ex parte Shaw*, 1 Gl. & J. 124. But this does not extend to the proceedings under a commission that has been superseded, *ibid.*; and he has a lien upon all papers of the bankrupt, that have come to his hands previous to the bankruptcy, even against the assignees; 1 Cook, 423; *Lambard v. Buckmaster*, 4 Dow. & Ryl. 125; but he has no lien upon any pa-

pers that have come to his hands since the act of bankruptcy; *ex parte Lee*, 2 Ves. 285. He has, however, a lien upon costs ordered to be paid to his client upon a petition in bankruptcy; *ex parte Bryant*, 2 Rose, 237. On the other hand, he may have his bill taxed by a creditor, and the motion is of course; *ex parte Hewitt*, Buck, 388. A petition seeking relief from costs must be served on him; *ex parte White*, 1 Dea. & Chit. 41. A petition to re-tax after payment, or after it has been taxed by the commissioner, must state objectionable items; *ex parte Bereford*, 2 Gl. & J. 259; *ex parte Bretherton*, 4 Mad. 479; and an assignee who is not a creditor may petition to tax his bill; *ex parte Barlow*, 1 Mon. 87. But the creditor cannot apply except on the ground of neglect of duty by the assignees; *ex parte Walker*, 1 Gl. & J. 95; in which case a bankrupt also may apply to the general jurisdiction of the court after he has settled with his creditors; *ex parte Bayley*, 1 Mon. 203. Where one-sixth of the solicitor's bill has been taxed off, and he applies to confirm the report, he must pay the costs of the appearance on such application, and of the petition and taxation; *ex parte Nutting*, 1 Mon. & B. 267; *ex parte Hetherway*, 2 Mad. 329; *ex parte Inman*, Buck, 129."

Mr. Sturgeon then proceeds to detail the practice of obtaining a *fiat*; the meeting to adjudicate; the first and second public meetings, and other examinations of the bankrupt. The Court of Sub-division Practice is next stated. From this part of the book we extract the following summary.

"It is not competent for a subdivision court to commit a person who is brought before them, for not answering to the satisfaction of the commissioners, unless they take the examination themselves; asking the party if he abided by his former answers will not be sufficient. The warrant must set forth such specification of the questions and answers, as will suffice to shew the court upon what grounds the commissioners were dissatisfied; but the commissioners are not bound to point out any particular answers; *ex parte Bardwell*, *re Penables*, 12 L. J.; 1 Mon. & Ayr. 202.

"A commitment by two commissioners of the Court of Bankruptcy is valid; *in re Smith*, 1 Mon. & B. 418. In this case three commissioners were present, but the warrant was only signed by two. But where a bankrupt was examined by one commissioner, and committed to the custody of the messenger, and after a short time brought before two commissioners, who asked him a few questions and then committed him, that commitment was held bad, *ex parte Lampon*, 1 Mon. & Ayr. 193.

"The examination of a third person by commissioners is not evidence for the formation of their judgment, but merely a brief to enable them to interrogate the witnesses; *in re Goodwin*, Mon. & B. 304.

"The commissioners have no power under

the 35rd and 34th sections of the 6 Geo. 4. c. 19. to examine the executor of a debtor to the bankrupt, as to the amount of assets that have come to the hands of such executor, *Ex parte Solarte*, 1 Dea. & Chit. 311. S. C. 1 Mon. & B. 495.

"The questions must be touching, and for the discovery of, the bankrupt's estate.

"But where goods had been sold by the bankrupt to a party for a price considerably lower than what he gave for them, the latter, when summoned before the commissioner, was held bound to answer the question, "to whom did you subsequently sell these goods?" for it materially concerns the estate of the bankrupt, to ascertain whether the sale by him was *bona fide*. *In re Falk*, 2 Dea. & Chit. 415.

"A bankrupt is bound to disclose what has become of his property, although an indictment is pending against him for concealing it, and although his answers may tend to criminate him, *ex parte Heath*, Mon. & B. 184. dis. Sir J. Cross; and although his answers may tend to convict him of perjury on a former occasion, *re Smith*, 2 Dea. and Chit. 230; Cross, J. dissenting on the ground of the assignee's motive in putting the question; or of concealing his effects; *in re Feaks*, 2 Dea. & Chit. 227; Mon. & B. 215.

"The commitment must be under the hands and seals of the major part of the commissioners, and directed to the messenger and his deputy; it embodies a history of the proceedings, such as the issuing of the fiat, the commissioners having qualified, the adjudication, the notice in the Gazette, the surrender of the bankrupt, and the several adjournments of his examination, and then his last attendance for the purpose of passing his examination; it then states, either that he refused to be sworn, or that he was sworn, as the case may be, and the questions put to him, and alleges either that he refused to give any answer, or "any other than the following answer, that is to say," and then setting out the answer, and alleging it not to be satisfactory to the commissioners; it concludes with ordering the messenger to take him into custody, and convey him to the prison, and ordering the gaoler to receive him, and keep him and detain him safely "without bail, until he shall submit himself to," &c., and full answers make to our or their satisfaction to the questions so put to him by us as aforesaid, and sign and subscribe such his examination.

"The words in the conclusion of the warrant must be narrowed so as to have direct reference to the offence imputed to the bankrupt in the preceding part. Thus, where it was, "till he conform to our authority," it was held to be bad. *Braycey's case*, 1 Salk. 348; 1 L. Raym. 99; "or otherwise be discharged by due course of law." *Hollingshead's case*, 1 Salk. 351; 2 L. Raym. 851. Even a commitment, till he should "full answer make to all such questions as shall be put to him as aforesaid," *Miller's case*, 2 W. Bl. 882, although these words were the general words in the statute.

"But when the commitment was for refusing to be sworn, there the words "until such time as he shall submit himself to us, or to the major part of the said commissioners by the said commission named and authorized, and take the oath prescribed by law for that purpose, and full answer make, to our or their satisfaction, to the questions which may be put to him by virtue of the said commission," were holden sufficient. *Nobes v. Mountain & al.* 3 B. & B. 233; 7 Moore, 39."

The Jurisdiction of the Court of Review is next considered, and finally the important subject of Costs. Under the latter head, we select the following.

"A liberal construction has been put upon this clause by the court, *ex parte Key*, Mon. 133; *ex parte Emery*, Buck. 422. It was formerly held necessary to point out objectionable items in the petition praying the re-taxation, but although it may be more safe or prudent to do so, it is not necessary, *ex parte Key*, Mon. 13; this provision, however, only applies as between the assignees and the estate, so that the solicitor may maintain his action without their being so taxed, *Fisher v. Fisher*, 2 Car. & P. 92; *Taylor v. M<sup>c</sup>Gaugan*, 4 Car. & P. 96. The court can order the bill of costs subsequent to the choice of assignees to be paid, although the assignees have no assets in their hands, *ex parte Cones*, 1 Mon. & A. 328; as the claim of the solicitor is founded upon the employment. This provision does not exclude the general jurisdiction of the court, so that an assignee who was not a creditor was allowed to petition, *ex parte Barlow*, Mon. 861.

"If the assignees neglect to have a solicitor's bill of costs taxed by the commissioners, the bankrupt may, after having settled with the creditors, apply to the general jurisdiction of the court, and obtain an order for taxation, *ex parte Bayley*, 1 Mon. 208.

"On an order made for taxation and one-sixth taxed off, the solicitor applying to confirm and giving notice to the petitioner, must pay the costs of the petitioner's appearance on such application, and also costs of the petition and of taxation, *ex parte Nutting*, 1 Dea. & Chit. 551. When several bills are taxed, one-sixth is calculated on the aggregate amount, *ex parte Barrett*, in *re Barrett*, 1 Mon. A. 447.

"A. employed B., a solicitor, to strike a docket against C., which is done, but afterwards abandoned. Subsequently A. employs D. to strike a docket, which is regularly followed up; held, that A. is not entitled to have B.'s costs taxed under the commission; *ex parte Neul*, 1 Dea. & Chit.

"Where an order has been made for the taxation of a solicitor's bill of costs, *semble*, that a subsequent petition for the costs of the taxation, cannot be heard until the master has made his certificate, nor unless the original petition is also set down in the paper, *ex parte Elsee*, 2 Dea. & Chit. 332.

"Upon a petition by a creditor, under the 6 Geo. 4. c. 16, s. 14, to re-tax a solicitor's bill, it is not necessary to serve the assignees, *ex parte Payne*, 1 Mon. & B. 456.

"The court will not allow a messenger's bill to be taxed after a lapse of five years, unless there be a charge of fraud lately discovered, *ex parte Wilment re Wilment*, Law Journ. xii. 173.

"By the 5th section of the B. C. A. it is enacted, that all costs of suit between party and party in the said Court of Review shall be in the discretion of the court, and shall be taxed by one of the masters of the High Court of Chancery.

"The court has decided that the costs of proceedings in this court under a London fiat, are to be referred to the deputy registrar for taxation, the duty of the commissioner being merely to tax the petitioning creditor's costs, and the costs of the assignees, *ex parte Reay*, in *re Leech*, 2 Dea. & Chit. 586.

"It is not necessary to obtain the leave of the court to except to the registrar's certificate of taxation, *ex parte Crockwell*, 1 Mon. & Ayl. 379."

Tables of Costs are given, on the authority of the taxing Registrar; and the whole work appears to be carefully and concisely written.

*A Treatise on the Disposition and Conveyance of Lands entailed; and of the Estates and Interests of Married Women; and on the several Acts of 3 & 4 Will. 4, regarding the Abolition of Fines and Recoveries, Limitations of Actions relating to Real Property, and the Title to Dower.*  
By John Tamlyn, Esq. Barrister at Law.  
London: Richards & Co.

AMONGST the numerous works on the late Real Property Acts, we have to notice one just published by Mr. Tamlyn, on the Abolition of Fines and Recoveries, the Limitation of Actions relating to Real Property, and the Title to Dower. The author has already published a work on the Inheritance Act.

In treating of the Fines and Recoveries Act, Mr. Tamlyn commences with Estates Tail and the Interests of Married Women. He then proceeds to Fines and Recoveries; their abolition; covenants or agreements to levy fines or suffer recoveries entered into before the 1st Jan. 1834; the tenure of ancient demeane; fines and recoveries requiring amendment: tenants to the precept; copyholds and customary freeholds.

The subject of Warranties under the act is next considered; and then the conveyance of estates tail, under which latter head are comprised the power of the actual tenant

In tail to dispose of lands in fee simple, and that whether the estate tail has or has not been divested or put to a right;—expectant heirs; in tail;—base fees;—confirmation of ~~voidable~~ estates;—mortgage;—and the mode of disposition of lands by tenants in tail, and the enrolment of the deed.

Protectors of Settlements form the next subject of consideration: including tenants of the freehold in possession, having conveyed his estate on or before the 31st Dec. 1833;—owners of fee simple in remainder or reversion in fee, who, on or before the 31st Dec. 1833, disposed thereof, and who, but for the 30th section of the act, would have been the protector;—trustees before the act.

Protectors of settlements not affected by the foregoing observations are then noticed, namely, tenants by the curtesy; protectors under resulting uses and trusts; leases and appointments for lives at a rent; the mode by which a protector is to give his consent; protectors of the estates of married women not limited to their separate use; protectors of the separate estates of married women; protectors being infants, their existence being doubtful—cases of a prior estate and no protector; protector being a lunatic or idiot; protector appointed by the settlor of the deed; other matters regarding the office of protector; Courts of Equity in regard to protectors. The following subjects are then treated of, in relation to the recent act:—Copyholds and customary freeholds; estates and interests of married women; bankruptcy—base fees in bankrupt tenant in tail; bankrupt tenant in tail; disposition under fiat after his death; bankrupt's lands in Ireland; rents and profits of lands of bankrupt; monies to be laid out in the purchase of land to be settled in tail, in England and Ireland; other matters as to acknowledgment, enrolment fees and charges, &c.

Mr. Tamlyn concludes this part of his book by the following observations.

"It has now been shewn how far this act for abolishing fines and recoveries has provided a substitution of more simple or other modes of assurance—it results that they produced effects which are not provided for by the act, as a title by non-claim; and rights might have been affected by them, for which no substitute has been given, particularly in relation to contingent remainders. (See *ante*, p. 2; *Fisk v. Edwards*, 3 Ves. 372; *In re Harrison*, 3 Ans. 836; and *Fearne's Cont. Rem.* 357, 6 ed.) It is however understood, that this measure will be perfected by other acts of the Legislature, and the late Statute of Limitations has provided a substitute for the title by non-claim."

In reference to the defect in the act relating to contingent remainders, a case has recently occurred in actual practice, stated vol. 9, p. 502.

The author then enters upon the late Statute of Limitations relating to Real Property, but has made no observation on its construction or effect that we deem necessary to extract.

Lastly, the Dower Act is brought under consideration:—1st, as to marriages since the 1st January, 1834; 2d, Gift or bequest out of personal estate or land, not liable to dower; 3d, Arrears of dower; and, 4th, Free-bench.

We have thus stated an outline of Mr. Tamlyn's labors on the present occasion, and must forbear instituting a comparison between his merits and those of his predecessors. Our duty is often best performed both to the author and the profession, in merely stating a correct and full analysis of a work, leaving our brethren to avail themselves of its contents, according to their several wants in the course of their study or practice.

*Lists of King's Counsel and Serjeants at Law, according to their Rank and Precedence; Barristers in the Metropolis and the Country, with the exact Dates of their Call; the Counsel attending each Circuit; Regulations of the Inns of Court, for the Admission of Students and Calling to the Bar; Special Pleaders, and Certificated Conveyancers.* London: published for the Proprietors of the Legal Observer, by Richards and Co.

It has been suggested, that a separate publication of the Lists of the Bar would be acceptable to the Profession, shewing the rank and precedence of the several King's Counsel and Serjeants, and the order of seniority of the Outer Bar, with the exact date of the call of each Member, and the Inn of Court to which he belongs. These portions of the Legal Almanack and Remembrancer have been accordingly detached from the Calendar and lists of a temporary nature. This separate publication also includes the Circuits of the Judges, and the several Counsel attending each, with the Regulations of the Four Inns of Court for the admission of Students and Calling to the Bar, and a List of the Benchers and Officers of the respective Inns.

## THE PRACTICE OF RETAINERS.

We gave some of the rules respecting the retainers of counsel, in our second volume, pp. 262—265. We now add the following case, which is of considerable importance, and has been recently reported.

This was a motion on the part of the defendants in the cause, one of the objects of which was to obtain an injunction to restrain Mr. *Kindersley* from acting as counsel for the plaintiffs, from whom he had received a retainer since his promotion to the rank of king's counsel, on the ground that Mr. *Kindersley* had drawn the answer to the bill, and had otherwise acted in the progress of the suit on behalf of the defendants.

Mr. *Bickersleith*, with reference to this part of the motion, said that, although the law or practice of retainer was subject not altogether free from obscurity, and there was some doubt as to the jurisdiction of the Court to interfere with matters relating to the retaining of particular counsel, yet, if any rule upon this subject could be held to be clear and reasonable, it was that where a counsel had, by reason of the part he had taken in a particular suit, possessed himself of a knowledge of the case of the party for whom he acted, he ought not to receive a retainer from, or afford his assistance to the opposite side, without giving notice to the party for whom he had previously acted. In *Cholmondeley v. Clinton*, 19 Ves. 261; *Coop. 80*; (and see *Ex parte Elsee*, Mont. Ca. in Bankruptcy, 69, and *Ex parte Lloyd*, in the note to that case, and given 2 L. O., 262) it was said by Sir *Samuel Romilly*, in the argument, that great laxity prevailed at the bar as to retainers, and that a difficulty, when it occurred, was usually referred to some other counsel; and Lord *Eldon*, in his judgment, made the following observations:—"The practice of the bar in my time was this; If a retainer was sent by a party against whom the counsel had been employed, the retainer being in a cause between the same parties, the counsel before accepting it, sent to his former client stating the circumstance, and giving him the option. That has, I believe, been relaxed; and the course is as it has been represented at the bar. I do not admit that he is bound to accept the new brief. My opinion is, that he ought not, if he knows anything that may be prejudicial to his former client, to accept the new brief, though that client refused to retain him." In the present case the defendants insisted that a particular counsel, who had acted on their behalf in the previous proceedings, had obtained such a knowledge of their case as could not but be prejudicial to them, if he gave his professional assistance to the other side; and in that state of circumstances, Lord *Eldon's* opinion went, undoubtedly, to a distinct recognition of the propriety and reasonableness of the present application.

The *Masser of the Rolls*, (Sir *C. Pepys*) without calling upon the other side to argue this part of the motion, said, that as the de-

fendants had not taken the usual means of securing the professional assistance of Mr. *Kindersley*, the Court would not interfere. The case cited went to show Lord *Eldon's* opinion, that the Court had no jurisdiction to interfere in questions arising upon the practice of retainer. *Baylis v. Groux*, 2 M. & K. 316.

## INJUSTICE OF THE TAX ON CERTIFICATES OF PRACTICE.

Sir,

I WAITED this morning on a member of parliament, with whom I am on terms of intimacy, to request him to present to the house of commons a petition for the repeal of the duty on certificates of practice. In the petition I had urged that the duty in question was unjust, because it operated at once as a tax upon parties, and as a burden of a very obnoxious description upon the profession:—an opinion I am happy to see expressed in your number of 25th April. My friend, who prides himself upon his skill in political knowledge, and wrangling, immediately exclaimed against the preposterous proposition, that a tax pressed upon a particular class, and at the same time upon the whole community; for so, by a vague generalization, he construed the allegations of my petition. I did not find fault with this construction, for indeed it was tolerably correct; but as he thought by an apparent and sudden *reductio ad absurdum* to induce me to abandon my views upon the subject, I felt it a duty to myself and my brother professional men, to argue the matter with him; and the following debate ensued.

My friend, perceiving that he had not my assent to the mode of meeting the allegations of my petition by the argument he had used, proceeded by demanding me to admit, that universally, where a tax is imposed on an article dealt in by a trader, the tax, although levied actually upon him, is nevertheless in fact paid by the customer's giving an advanced price for the article in question.

To this proposition I offered no other objection, than that it did not decide the question of the duty on certificates, which I affirmed is not a tax upon an article dealt in by a trader, but a tax upon him personally for dealing in such article.

"Of course," replied he, "but that is merely a verbal distinction. The consumer of the commodity equally pays the impost; and the tax is levied at once and in gross upon the attorney, because it would simply be impossible to collect it in detail from the clients." "I contend that the difference between us is not merely verbal," said I in return: "The annual incomes of attorneys vary from thousands to hundreds, as the quantity of law sold by them to their clients varies. The clients of the wealthiest member of the profession may amount to 500, whilst those of a less prosperous practitioner will not exceed fifty." "And what?"—interrupted he—"has that to do with the matter?" I answered that it was of the very essence of the matter; for if the duty paid by the two attorneys is alike, it follows, in or-

der that each may be reimbursed its amount, that the one will have to divide it amongst the bills of his five hundred clients, whilst the other will have but fifty to charge it against. "Yes," said my friend, and it is so that the public pays the duty in both cases." "You do not"—observed I, in reply—"make strict application of ordinary political reasoning to this part of the question. You must admit, at all events, that if the poorer attorney is reimbursed the duty imposed upon him, that his charges must be larger than those of the more extensive practitioner, who has a larger number of clients to divide it amongst. I see you admit this: and you will not hesitate to allow that where there exists a difference in charges (*ceteris paribus*) customers resort to the tradesman or professional man whose prices are the lowest." "I admit it," interrupted my friend, "and that this leads to the inevitable conclusion, that the poorer attorney *cannot* charge all the duty to his clients, but that some part must be borne by himself;—and upon reflection, the greater part." "Precisely so," I continued; "and the residue is paid by his clients—the public. So much as is charged by the most extensive practitioner to each of his clients on account of the duty, is paid by every client throughout the kingdom, whether his professional man be of small or large practice; and this furnishes the measure of the portion which is paid by the public, or which—in language more calculated to attract attention—is 'the tax upon justice.'"

My friend, with his usual candour, admitted his first views to have been incorrect. The remainder of the interview was occupied by an investigation of the whole matter, or, in other words, by his "getting up the case." He finally adopted my view, that the duty presses upon the practitioner in an inverse ratio to the income derived from his practice; so that one extreme (*viz.* the wealthiest attorney) is repaid the whole of the tax by his clients, whilst the other extreme (*viz.* the poorest attorney), without a single client, pays the whole of the impost himself. We agreed that the opinion (although regarded by us as erroneous) that the tax in question falls upon the attorneys as a class, without being even partially reimbursed by their clients, also furnishes an argument for its repeal, since nothing can be more palpably unjust than to tax a particular body of individuals towards the maintenance of the state. We also agreed that the allegation urged by some, that the duty is paid entirely by the public, is only another reason for its being abrogated, since the spirit of the times and the policy of the legislature are favourable to "cheap justice."

J. R. S.

#### AMENDMENTS IN IMPRISONMENT FOR DEBT BILL.

THE following are the clauses added by the Special Committee of the House of Commons, to whom this bill was referred :

(A.)—That if the plaintiff in an action against the drawer, acceptor, maker, or indorser of a

bill of exchange, or promissory note shall, after suit commenced in any Court, show by affidavit that the sum specified in such bill or note, or any part thereof, is due to him from the defendant, and that the bill or note was drawn, accepted, made, or indorsed by the respective persons purporting to be the drawer, acceptor, maker, or indorser thereof, and that demand before action brought was made upon the defendant, for the payment of the sum so due; such plaintiff shall, after service of process on the defendant, be entitled to a rule of the Court in which such suit is commenced, or the order of a Judge of such Court, giving the defendant notice that final judgment will be signed against him for the sum sworn to be due, unless such defendant shall, within ten days after the service of the rule or order, give security, to be approved by an officer of such Court, for the payment of the debt and costs, in case final judgment shall be given against him, or unless the defendant shall within the said time show on oath sufficient cause to the said Court or Judge of such Court why final judgment should not be signed against him, and that such judgment shall be so signed unless the said defendant shall either give such security or show such sufficient cause; and that it shall be incumbent on the defendant, in showing cause, either to admit or deny on oath in writing, the drawing, accepting, making, or indorsing of the said bill of exchange or promissory note.

(B.)—That if the property so assigned shall not be sufficient to satisfy the judgment and expenses, it shall be lawful for the said commissioner, on application of the plaintiff, to bring up and examine the defendant or other person in like manner, and in like manner to make other specifications or memorandums, and assign such other property of the defendant as to him shall seem fit, to be sold, disposed of, and applied in like manner, until the judgment is satisfied: provided always that when the judgment shall be satisfied, and the expenses incurred as aforesaid shall be paid, the assignment of the defendant's property, as to such part as remains unsold or undisposed of, shall be thenceforth void.

(C.)—That if any defendant shall be a trader within the meaning of the laws now in force respecting bankrupts, and shall have final judgment signed against him, and shall not, within twenty-one days after demand, satisfy such judgment, he shall be deemed to have committed an act of bankruptcy: Provided, that when any writ of error is brought upon any judgment, such act of bankruptcy shall only be committed on a like default after confirmation of such judgment.

(D.)—That it shall be lawful for the Lord Chancellor from time to time, as any vacancy may occur in the number of the before mentioned official assignees, to appoint some other person as aforesaid to fill any vacancy so occurring; and in case of the death or removal of any official assignee who may have been appointed to act in the proceedings under any petition, it shall be lawful for the commissioner under this act, subject to any rules to be



made by virtue of this act, or under any of the acts relating to bankrupts, to appoint another official assignee in the place of the official assignee who shall have so died or been removed.

(E.)—That a certificate of the appointment of such assignees, purporting to be under the hand of a commissioner, shall be received as evidence of such appointment in all Courts and places without further proof.

(F.)—That the commissioner by whom any official assignee may be appointed may order and allow to be paid out of the petitioner's estate to the official assignee thereof, as a remuneration for his services, such sum of money as shall appear to such commissioner, upon consideration of the amount of the petitioner's property, and the nature of the duties to be performed by the official assignee, to be just and reasonable.

(G.)—That nothing in this act contained shall entitle a trustee appointed by a commissioner, or the assignee of the estate and effects of any such petitioner, being or having been an officer of the army or navy, or an officer, clerk, or otherwise employed or engaged in the service of his Majesty in the customs or excise, or any civil office or other department whatsoever, or being or having been in the naval or military service of the East India Company, or an officer or clerk, or otherwise employed or engaged in the service of the Court of Directors of the said Company, or being otherwise in the enjoyment of any pension whatever under any department of his Majesty's Government, or from the said Court of Directors, to the pay, half-pay, salary, emoluments or pension of any such petitioner, for the purposes of this act: Provided always nevertheless, that it shall be lawful for the said commissioners to order such portion of the pay, half-pay, salary, emoluments or pension of any such petitioner, as on communication from the said commissioners to the Secretary at War, or the Lords Commissioners of the Admiralty, or the Commissioners of the Customs or Excise, or the chief officer of the department to which such petitioner may belong, or have belonged, under which such pay, half-pay, salary or emoluments may be enjoyed by such petitioner, or the said Court of Directors, he may, under his hand, or under the hand of his chief secretary or other chief officer for the time being, consent in writing, to be paid to such assignee, in order that the same may be applied in payment of the debts of such petitioner, and such order or consent being lodged in the office of the Paymaster of his Majesty's Forces, or the Treasurer of the Navy, or of the Secretary of the said Court of Directors, or of any other person appointed to pay or paying any such pay, half-pay, salary, emoluments or pension as shall be specified in such order and consent, shall be paid to the said assignee or trustee, until such commissioner shall order to the contrary.

(H.) That every petitioner shall (if thereto required) forthwith deliver up to the official assignee, upon oath before the commissioner, all books of account, papers, and writings relating to his estate in his custody or power,

and discover such as are in the custody or power of any other person; and every such petitioner not in prison or custody, shall at all times after filing the petition, attend such assignee upon every reasonable notice in writing for that purpose given to him, or left at his place of abode, and shall assist such assignee in making out the accounts of his estate; and such petitioner may at all reasonable times before the expiration of the said forty-two days, or such further time as shall be allowed to him to finish his examination, inspect his books, papers, and writings in the presence of his assignee, or any person appointed by him, and bring with him each time any two persons to assist him; and every such petitioner, after he shall have obtained his certificate, shall, upon demand in writing given to him, or left at his usual place of abode, attend the assignee to settle any accounts between his estate and any debtor to or creditor thereof, or attend any court of justice, to give evidence touching the same, or do any act necessary for getting in the said estate, for which attendance he shall be paid five shillings per day by the assignee out of his estate; and if such petitioner shall, after such demand as aforesaid, not attend, or on such attendance refuse to do any of the matters aforesaid without sufficient cause shown to the commissioners for such refusal, and by him allowed, the assignee making proof thereof upon oath before the said commissioner, the said commissioner may, by warrant directed to such person as he shall think proper, cause such petitioner to be apprehended and committed to such prison as he shall think fit, there to remain until he shall conform to the satisfaction of the said commissioner.

[To be continued.]

## PRACTICAL POINTS OF GENERAL INTEREST. No. LXXVIII.

### HABEAS CORPUS.—VOTER.

The following case decides a new point.

*Maule*, on the 13th of Jan. moved for a *habeas corpus*, to bring up the body of Jones, who was in the custody of the sheriff of Hereford, under sentence of imprisonment for a misdemeanour, upon an affidavit, which stated that he was a freeholder of the county of Radnor, and was desirous of being allowed to go to give his vote at the poll expected to be taken on the 17th instant.

Lord Denman, C. J.—We think that there is no foundation for this motion. A similar application was made to me some time ago in chambers, and I then inquired whether there was any precedent for taking such a course, and I found that there was none.

*Littledale*, J.—There is no precedent, and the consequence of granting the rule prayed for would be to expose the sheriff to an action for an escape; for the party at whose suit the applicant is in custody might dispute the authority of the Court. *Williams*, J. concurred.

Rule refused.—*Ex parte Jones*, 4 N. & M. 340.

SUPERIOR COURTS.

Equity Jurisdiction.

PLEADING.—PLEA.

*To a supplemental bill filed by the plaintiffs to the original bill, the defendant pleaded, that he was informed and believed that one of the complainants had, before the filing of the supplemental bill, parted with all his interest in the subject matter of the suit: Held, that this plea is insufficient, and it is accordingly overruled.*

*Held also, that a party who parted with his interest in the subject matter before the filing of the supplemental bill, may still for many purposes be made a proper party to it.*

This cause has been reported in the Legal Observer, in three of its most important stages—first, the judgment of Lord Lyndhurst, C. B. upon the first hearing<sup>a</sup>; secondly, the same learned Lord's judgment for impounding the purchase money traced to the defendant's broker and converted by him into stock<sup>b</sup>; and thirdly, his Lordship's judgment upon exceptions to the Master's report, and upon a motion for payment of money out of Court, both arising on the plaintiff's supplemental bill.<sup>c</sup>

A plea was put in by the defendant to that supplemental bill, on the ground that one of the plaintiffs therein had no interest in the suit; which plea was overruled by the late Lord Chief Baron, holding, that as that plaintiff was still liable to the costs of the suit in the event of a reversal of the first judgment by the House of Lords, where an appeal from it is lodged, he was still to be considered a proper party to the supplemental suit, although he had parted with his interest in the subject matter.

There has been now a rehearing of that plea before the present Lord Chief Baron; before whom the matter was argued by Mr. Wakefield and Mr. Lovatt for the defendant, and Mr. Knight, Mr. Wigram, and Mr. Sharpe, in support of the supplemental bill.

Lord Abinger, C. B., having taken time to consider the question, gave the following judgment.—This was a plea to the supplemental bill, the original bill being filed by the plaintiffs, Messrs. Small and others, to set aside an agreement entered into with the defendant, upon the grounds suggested in that bill; and requiring Mr. Attwood to refund a sum of money paid on that agreement, which was charged in the bill as being void, by reason of misrepresentation and fraud. The bill was filed by several persons, and amongst others by Mr. Bailey, as trustee with them as well as in his own right. The prayer of the bill was that the money paid to the defendant by the Company, might be paid to those trustees on behalf of the Company of which they formed a part. An answer was put in, and the matter was heard, when a decree was pronounced,

setting aside the agreement, and directing the defendant to account, and referring it to the Master, to take an account of the carrying on of the trade in the meantime, and of the profits arising therefrom, and that the balance should be placed to the one side or the other, as it was found to exist. After the decree, a supplemental bill was filed by the same parties; and that bill suggests, that a portion—a very considerable portion—of the £225,000*l.*, which had been paid to the defendant, had been specifically traced by means of certain securities, which he need not specify; and, after giving the history of this money, the bill called upon the defendant to discover the fact, and it ended with this prayer,—"that the Court would declare, under the circumstances in the bill mentioned, that the property in certain bank notes specified had never absolutely passed from the plaintiffs or the British Iron Company; and that—without prejudice to the lien on the iron-works, &c. to secure the whole amount due to them from the defendants, and which lien the plaintiffs claimed—it might be declared that they were entitled to the aforesaid sum in the three and a half per cents., which was purchased with the said bank notes, the plaintiffs offering and undertaking to make such allowance to extend to such notes, in respect of their demand upon the defendant, as the Court should direct." To this bill a plea was put in. The plea was this:—"That Francis Bailey, one of the complainants, did, some time in or about the year 1828, absolutely sell, dispose of, and transfer, to some person or persons unknown, the whole of his shares, rights, interest, &c. in the partnership or company in the said bill mentioned, and called the British Iron Company; and that he (the defendant) was informed, and verily believed, that from that time F. Bailey did cease to be a proprietor or member of the said company, and was from thenceforth acquitted and discharged from all obligations in respect of being a proprietor of shares in, and a member of such company; and that from that time he ceased to have any right, title, or interest in such partnership, and the matters which were the subject of the bill, and which were mentioned in the original bill; and that F. Bailey for some time previous, and at the time of the filing of the supplemental bill, was not a proprietor or member of the said partnership, or had any interest therein, or was liable in any manner in respect of any matters in the said supplemental bill mentioned." This plea, in effect, was intended for the purpose of setting up a short answer to the bill, by stating facts which, if true, and incapable of denial, would put an end to the case, without the delay and expense of putting in a full answer. He conceived that this was the only rational object of a plea to a bill, whatever might be the nature of such bill, because, as the whole matter of the plea might be introduced and taken advantage of in the answer, it was obvious that there was no occasion to admit of the plea at all, unless for the sake of convenience, and the saving of expense, by putting the matter to a

short lease, and thus making further investigation unnecessary. In that case, it became important that the plea should contain very specific allegations incapable of denial. He knew very well that it had been said, in cases where the matters were not precisely within the knowledge of the party alleging them, that it would be a sufficient ground of allegation to state, to the best of his knowledge, information, and belief. This might be true, as a general proposition; but it appeared to him that a plea of this sort must be tried by this criterion:—Supposing the plaintiff were to take issue upon this plea, what would be the result? The *onus probandi* would be cast upon the defendant, who pleads, because he undertook to show that the plaintiff, Bailey, had not any further interest in the suit; and having no further interest, the bill, as to him, must be dismissed; therefore, the *onus probandi* falls upon the defendant. Now, what was the plea in this case? The whole rests upon information and belief, and the issue of this plea, if properly taken, must be upon information and belief; and if so, this would not be an answer to the bill. It appeared to follow, from what he had said, that the plea ought to be clear and specific, so as to require no further investigation than simply to ascertain the truth or falsehood of the facts, from whence it followed, that there must be a direct affirmative of the charges alleged. Here there was no alleged conveyance; they only stated their belief that there was a conveyance. He would conclude that the matters aforesaid were true; it struck him, in that case, that the *onus probandi* would be cast upon the defendant, because he pleaded a negative to matters of which the plaintiff showed the affirmative. In this case, it fell upon the defendant, who was bound to state his facts in such a way as he would be capable of proving them; and he ought to set forth before the Court such distinct matter as, upon the face of the plea, would be a complete answer to the bill. There might be nothing in the plea but what was perfectly true, and yet it was not an answer: it only stated, upon information and belief, that a conveyance had been made to some person or persons unknown at the time. What would be the legal consequences of this, if some of the facts were true and others false? It struck him that a mere suggestion of a party could not be any sufficient answer to the bill. He wished to be fully understood as not laying down any general rule for pleading upon facts, which, from their nature, must be unknown to the defendants, but upon the criterion that the *onus probandi* was thrown upon the defendant, and that what he was about to prove he ought to be capable of stating, and was bound to state. The defendant did not state how he became possessed of this information, or what was the nature of it, or from whom he got it. It appeared to him, that in this particular, the plea was not sufficiently clear and specific to put an end to further inquiry. There was another ground upon which Bailey might have parted with his interest, so as to produce very different results—he might have assigned his

interest in such a manner as to keep it alive in the suit, and to bind him to the consequences of it. The plea did not state the specific mode of assignment, but merely stated, upon information and belief, that an assignment had taken place. The real question was, whether supposing Bailey to have parted with his interest after the bill was filed, whether still he had not a continued interest in the suit, as entitled him to prosecute it; and if he had, then he also had an interest in filing the supplemental bill, for the purpose of modifying the rights of the parties under the suit. On these grounds, therefore, it appeared to him that F. Bailey was a proper party to the supplemental bill, and the plea must be overruled, with costs.

*Small and others v. Attwood.* Sittings at Grays Inn Hall, Feb. 10th and 21st, 1836.

### Common Pleas.

NEW RULES OF PLEADING.—ASSUMPSIT.—GENERAL ISSUE.—ILLEGALITY OF CONTRACT.—LITERARY PROPERTY.

*Where an action is brought by an author for the price of a dramatic composition bargained and sold by him to another person, and the defendant seeks to avoid the contract for the purchase on the ground that the assignment ought to have been in writing, that objection must be pleaded specially, and cannot be taken advantage of by the defendant under the plea of non-assumpit.*

In this case cause was shewn against a rule for setting aside the verdict found for the plaintiff in this case, and entering a nonsuit. It was an action brought by the plaintiff to recover the sum of 15*l.*, as the price of a certain dramatic piece, and the sole right of acting it, bargained and sold to the defendant. The defendant pleaded non-assumpit.

At the time of the trial, before the under-sheriff of the county of Middlesex, a verbal agreement on the part of the defendant to pay the sum of 15*l.* to the plaintiff for the piece in question was proved.

On the part of the defendant, it was objected, that such agreement ought to be in writing in order to entitle the plaintiff to recover.

On the part of the plaintiff, it was contended, that according to the new rules of pleading such a defence ought to have been put on the record.

The under-sheriff would not decide that question, but left the case to the jury upon the facts, leaving the defendant to move the Court above should it become necessary by the finding of the jury, in order to take the opinion of the Court as to the construction of the rule of pleading.

The jury found a verdict for the plaintiff, damages 15*l.*; and leave was then given to the defendant to move to enter a nonsuit.

A rule *nisi* having been obtained for that purpose, and, in the alternative, for a new trial,—

Cause was now shewn against it. It was contended, that whatever might be the con-

struction of the 8 Ann. c. 19, s. 1, or of the 3 & 4 W. 4, c. 15, s. 2, in rendering the agreement for the sale of the dramatic piece void because it was not in writing, advantage must be taken of that defect by special plea, and could not be rendered available under the plea of non-assumpsit. A contract, in fact, was here alleged and proved, and it could only be some provision either of the common law or of the statute, which could render it unavailable. Such matter, by the express provisions of the new Pleading Rules, under the title of Assumpsit, must be made the subject of special plea.

In support of the rule it was submitted, that the pleading rule in question only referred to those cases where the plaintiff sought to enforce a contract which was in itself good, but which became bad in consequence of some legal provision. Here, however, the plaintiff did not stand *rectus in curia*, except by proving that the contract or assigning was in writing.

The Court was of opinion that in this case a contract, in fact, having been alleged and proved, whatever was to render it ineffectual in point of law must be specially pleaded. The objection here made was such as therefore it ought to have been specially pleaded.

Rule discharged.—*Barnett v. Glossop*, E. T. 1835. C. P.

\* Whether this supposed defence ought or ought not to have been pleaded, it is conceived, that the defendant would have been entitled to recover in this action. The declaration was for the piece in question, and the sole right of acting it bargained and sold. No assignment therefore of it was alleged, and therefore none need to have been proved.

But supposing any such assignment to have been necessary, it need not to have been shewn to have been in writing.

By the common law, according to the opinion of ten out of the eleven Judges who gave their opinions in *Millar v. Taylor*, 4 Bur. 2303, the author of a book had the sole right of first publishing it. Then came the 8 Ann. c. 19, the preamble and provisions of which clearly shew, that it was the intention of the Legislature to afford additional protection to the property of authors, although it in some degree limited the length of time during which the authors should be entitled to possess the absolute property in their works. The provisions of the first section are—"Whereas printers, booksellers, and other persons, have of late frequently taken the liberty of printing, reprinting, and publishing, or causing to be printed, reprinted, and published, books and other writings without the consent of the authors or proprietors of such books and writings, to their very great detriment, and too often to the ruin of them and their families: for preventing therefore such practices for the future, and for the encouragement of learned men to compose and write useful books, be it enacted, that from and after the tenth day of April, 1710, the author of any book or books

already printed who hath not transferred to any other the copy or copies of such book or books, share or shares thereof, or the bookseller or booksellers, printer or printers, or other person or persons, who hath or have purchased or acquired the copy or copies of any book or books in order to print or reprint the same, shall have the sole right and liberty of printing such book and books for the term of one-and-twenty years, to commence from the said tenth day of April, and no longer; and that the author of any book or books already composed and not printed and published, or that shall hereafter be composed, and his assignee or assignees, shall have the sole liberty of printing and reprinting such book and books for the term of fourteen years, to commence from the day of the first publishing the same and no longer; and that if any other bookseller, printer, or other person whatsoever, from and after the tenth day of April, 1710, within the times granted and limited by this act as aforesaid, shall print, reprint, or import, or cause to be printed, reprinted, or imported, any such book or books, without the consent of the proprietor or proprietors thereof first had and obtained in writing, signed in the presence of two or more credible witnesses; or knowing the same to be so printed or reprinted without the consent of the proprietors, shall sell, publish, or expose to sale, or cause to be sold, published, or exposed to sale, any such book or books, without such consent first had and obtained as aforesaid: then such offender or offenders shall forfeit such book or books, and all and every sheet or sheets being part of such book or books, to the proprietor or proprietors of the copy thereof, who shall forthwith damask and make waste paper of them; and further, that every such offender or offenders shall forfeit one penny for every sheet which shall be found in his, her, or their custody, either printed or printing, published, or exposed to sale contrary to the true intent and meaning of this act; the one moiety thereof to the Queen's most excellent Majesty, her heirs and successors, and the other moiety thereof to any person or persons that shall sue for the same, to be recovered in any of her Majesty's Courts of Record at Westminster, by any action of debt, bill, plaint, or information, in which no wager of law, essoin, privilege, or protection, or more than one imparlance shall be allowed."

It will be seen from reading this section, that no new provision was introduced for the purpose of limiting to any particular form of conveyance the mode in which an author should convey his right of property to another, although to entitle the assignee of the author to recover for an injury done to his supposed right of property under the assignment, it would be necessary to have the assignment in writing. All the cases which have been decided on this statute, have proceeded on the question, as to whether the assignee has a right without such assignment in writing to recover against a third person for an alleged infringement on the publication of the book assigned.

In the case of *Power v. Walker*, 8 M. & G. 7, it was held, that an assignment of copyright of a song must be in writing, in order to entitle the assignee to maintain an action on the case for pirating it. There Lord *Ellenborough*, C. J. said, that the statute having required that the consent of the proprietor, in order to authorize the printing or reprinting of any book by any other person, shall be in writing, the conclusion from it seemed almost irresistible, that the assignment must also be in writing; for if the licence, which is the lesser thing, must be in writing, *a fortiori*, the assignment, which is the greater thing, must also be.

*Clementi and others v. Walker*, 2 B. & C. 861. An author publishes his work in a foreign country in 1814, and afterwards agrees to sell to A. the exclusive right of printing the same work in this country, but no agreement or consent in writing was then entered into. A. publishes the work in September 1814, in England. In 1818, B. publishes the same in England. In 1822, the author, by an agreement in writing, assigns to A. the exclusive right of printing the work in England: Held, that A. did not by the parol consent given by the author in 1814, acquire the exclusive right of publishing the work in England; secondly, that that could not be deemed a publication by the author, not being made on his account or for his benefit; thirdly, that the publication by B. in 1818, was a lawful publication; and, fourthly, that the author could not afterwards in 1822, by making a valid assignment to A. enable him to maintain an action against B. for selling a copy of the same work after such assignment was executed.

The case of *James Poyer v. Walker*, 4 Camp. 8, was to the same effect.

*Latour v. Bland and another*, 2 Stark. 382, depended on similar circumstances. There it was held, that evidence of the plaintiff in an action for pirating a musical work, acquiescing in the defendant's publication of it six years ago, does not prove that the plaintiff has transferred his interest in the copyright. A receipt given by the plaintiff for money received by him as the price of the copyright, will not preclude the plaintiff from maintaining the action.

Although these cases thus render an assignment in writing necessary, where the assignee seeks to enforce his rights against third persons; that by no means shews that, as between the author and his immediate assignee, such an assignment is necessary. In such cases the assignment might be by parol, as it might clearly at common law. By the common law surely no such necessity could have existed.

The 54 G. 3, c. 156, only granted additional facilities to the author, and extended the period of his title in his work.

Next came the 3 & 4 W. 4, c. 15, s. 1, placing the authors of published and unpublished dramatic pieces on much the same footing as the authors of other works, under the 54 G. 3, c. 156. And by sec. 2 of that act it is provided, "That if any person shall during the continuance of such sole liberty as aforesaid, contrary to the intent of this act or right

of the author or his assignee, represent, or cause to be represented, without the consent in writing of the author or other proprietor first had and obtained, at any place of dramatic entertainment within the limits aforesaid, any such production as aforesaid, or any part thereof, every such offender shall be liable, for each and every such representation, to the payment of an amount not less than forty shillings, or to the full amount of the benefit or advantage arising from such representation, or the injury or loss sustained by the plaintiff therefrom, whichever shall be the greater damages, to the author or other proprietor of such production so represented contrary to the true intent and meaning of this act, to be recovered, together with double costs of suit, by such author or other proprietors, in any Court having jurisdiction in such cases in that part of the said United Kingdom or of the British Dominions, in which the offence shall be committed; and in every such proceeding where the sole liberty of such author or his assignee as aforesaid shall be subject to such right or authority as aforesaid, it shall be sufficient for the plaintiff to state that he has such sole liberty, without stating the same to be subject to such right or authority, or otherwise mentioning the same."

This section rather refers to the second branch of the plaintiff's cause of action, namely, the exclusive right of performing alleged to have been conveyed by the plaintiff to the defendant. But it will be seen, that although a person could not justify a performance of a piece without consent of the author, as against him, without a consent for that purpose in writing; yet it by no means follows that the author or assignee might not, if he chose, give his consent to such performance by parol. If the author or assignee did not interfere with the defendant in performing the piece, it would surely be such an advantage to the person performing it as would enable the plaintiff to maintain his action for the transfer of that sole right.

Were such a necessity imposed by the Legislature on authors, those statutes, instead of being for the benefit of authors, would prove to their injury.

It is, however, to be remembered, the remedies provided by the statute of Anne have been held to be only cumulative on the remedies which the author might have at common law; and therefore, in *Beckford v. Hood*, 7 T. R. 628, Lord *Kenyon* held; that authors may bring an action for the recovery of damages for the injury done to their copyright, notwithstanding the penalties imposed by the 8 Anne.

## NOTES OF THE WEEK.

### LAW BILLS IN PARLIAMENT.—IMPRISONMENT FOR DEBT.

We refer to our last Number, p. 13, for the statement of the several stages in which

the various Law Bills before Parliament still remain. The Bill for abolishing Imprisonment for Debt, as amended in the Special Committee, stands for consideration on Friday next, the 15th instant. We have given part of these amendments, which are very numerous, and shall complete them in the next number. We understand the Bill will be re-committed, and it remains to be decided whether the evidence of traders and shopkeepers should not be taken by the Special Committee. It appears that the witnesses who gave their opinions before the Common Law Commissioners, were chiefly Bankers, Merchants, and Wholesale Dealers; and as the proposed abolition will most materially affect the retail traders, their case ought to be fully heard. Sir John Campbell is very energetic in following up his measures. His zeal as an advocate in behalf of his clients is very proper; but zeal as a legislator, acting without sufficient evidence, is any thing but commendable.

#### BANKRUPTCY APPOINTMENT.

The Lords Commissioners of the Great Seal have reinstated Mr. Vizard in the office of Secretary of Bankrupts.

#### ATTORNEYS IN THE EXCHEQUER.

We understand that the decision of Mr. Justice Alderson, against London attorneys, not admitted in the Exchequer, practising there in the name of an attorney of that Court, is not intended to apply to attorneys residing in the country who practise by their town agents.

### ANSWERS TO QUERIES.

#### Property and Conspawning.

DEVISE, CONTINGENT OR EXECUTORY. VOL. 9, p. 464.

Had your correspondent "*Spec*" taken the trouble to read the whole of p. 2, in Mr. Fearn's Treatise, he would have found among the instances given in illustration of Mr. F.'s positions, the following: "If *A.* convey or devise land to *C.* for life, and after *C.*'s decease to *B.*, *B.*'s estate is vested in him in interest." Now, apparently, this does not point out that *B.* is to take any thing until *A.*'s decease; but the Courts, anxious to make all estates certain, and not contingent, hold that these words are only an inaccurate way of expressing, that on the determination of the preceding estate, by any event, it shall be enjoyed by another. In strictness, the party in remainder could only take in case the estate determined by effluxion of time, as the death of the party, and not in case the estate determined by forfeiture; and in such case the remainder would come within

the first order of remainders, viz. where the remainder depends entirely on a contingent determination of the preceding estate itself. Now, if the estate limited to take place on the decease of *C.*, be considered a vested one; what would be the effect of a limitation to the children of *C.* on his decease, omitting the words *then living*? In such case it would be a contingent remainder, according to the doctrine of "*Spec*," because those children could not take, except on a particular determination of the succeeding estate, viz. by death, but not by forfeiture. On the contrary, however, the position is too clear to require authority, that if I limit an estate to *A.* and after his decease to his children, the children on their births, (of course until their births it is contingent, from it being uncertain whether there will be any children) take vested interests, which on their deaths would be transmissible to their representatives. But if it be intended that only such children as may be living at the parent's decease shall enjoy the property in possession, nothing is more natural than to add, if *then living*; and these words would, of course, prevent the estate vested in interest from having a determinable nature, as regards such of the class dying before the time at which it is to come into possession. In defiance of "*Spec*" finding fault with the case of *Doe v. Nowell*, as an authority for this position, I must add, that it puzzles me how he gets over that case.

It is difficult to suppose that a testator meant that if a previous estate determined by forfeiture (wrongful acts never being presumed by the law, it would be equally wrong to presume such an intention to be in the testator's mind); that those in remainder should never take. If this much be clear, we have only the difference in this case of the words *then living*; and if it be clear, (of which I do not conceive there can be two opinions) that if an estate be limited to *A.* for life, and after his decease to his first son in tail, the son would on his birth take a vested interest, the adding the words *then living*, would only make the estate previously vested in interest, liable to be divested in case of the son's death during the existence of the particular estate. T. O. B.

#### POWER OF APPOINTMENT. VOL. 9, p. 464.

The case of *Robinson v. Hardcastle*, 2 T. R. 241, 380, 781, appears to me to be in point. Where a power was given to *A.*, on his marriage with *B.*, to appoint to and amongst the children of the marriage, in such proportions, &c., and *A.* by will appointed to *C.* for life; remainder to trustees to preserve, &c.; remainder to the first and other sons, &c. of *C.*; and in default of such issue, to *D.*, another child of *A.*: it was held, that *C.* took an estate tail. See also *Beard v. Westcott*, 5 Taunt. 403. It is to be observed also, that a power under a marriage settlement to appoint to the children of the marriage—in other words, "on the body of *B.* his wife," is strictly confined to those children. See *Goodtitle d. Russell v. Weal*, 2 Wils. 369. ASPIRO.

**LORD CHANCELLOR'S JURISDICTION.**  
VOL. 9, P. 464.

This question of your correspondent, "W. Y. C.," involves so nice a point of constitutional law, that I can only venture to hazard an opinion upon its merits, as grounded on the following historical reference. The dispute which arose in the time of Lord *Ellesmere*, in the year 1616, between the Courts of Law and Equity,—whether the latter could give relief after or against a judgment of the former,—and which ended, first in the suspension, and afterwards in the removal, of Sir Edward Coke from his office,—called forth from James 1st this declaration: "For that it appertaineth to our princely office to judge over all Judges, and to *discern and determine* such differences as at any time may and shall arise between our several Courts, touching their jurisdictions, and the same to *settle and determine*, as we in our princely wisdom shall find to stand most with our honour, &c." (1 Chanc. Rep. App. 26.) The remedy, therefore, in my opinion, is, a memorial by the party aggrieved to the King in Council. The Vice Chancellor, on the other hand, holds his office subject to removal, upon the address of both houses of parliament.

ASPIRO.

**QUERIES.**

**Law of Attorneys:**

**ADMISSION.—CERTIFICATE.**

If a party is admitted in the Court of King's Bench, within what time is it necessary that he should take out his certificate, to prevent the necessity of a re-admission?

F. G.

**Law of Property and Conveyancing.**

**INHERITANCE.—3 & 4 W. 4, c. 106.**

*H. H.* devised his real estates by will, dated March 1834, to *W.* in fee, who, having survived the testator, died intestate, leaving two daughters, *A.* and *B.* In the life-time of *B.*, who is still living, *A.* died intestate, leaving two daughters, *C.* and *D.*, the latter of whom is just dead, also intestate. Who is entitled to *D.*'s share of the estate? Sec 3 & 4 W. 4, c. 106.

M. T.

**MISCELLANEA.**

We lately noticed Mr. Thornton's excellent work on India (vol. ix. p. 440). The following extracts are interesting.

**MAHOMETAN RULES OF EVIDENCE.**

The rules which, in the Mahometan code, govern the reception or rejection of evidence, are remarkably capricious. In capital cases, the testimony of slaves is inadmissible, and some arguments might be brought forward to show the reasonableness of the disqualification; but the Mahometan law does not reject the evidence of slaves because it is likely to be unduly influenced by fear, but because "their state of bondage precludes them from exercising any act of authority, which the delivery

of evidence is considered to be." The exclusion of slaves, therefore, is not the dictate of legislative prudence, but a mere point of taste and etiquette. The testimony of women is rejected: and, as reason can say nothing in favour of such a rule, tradition steps in, and pleads the example of the prophet and of his two immediate successors. In minor cases, the testimony of women may be received; but the evidence of two women is only equivalent to that of one man. If the accused person is a Mussulman, the witnesses against him must be of the same faith. The testimony of infidel subjects, with regard to each other, is admissible, whatever variety of belief they may profess; it is also good against an infidel stranger; but the evidence of the latter is invalid, except against one of his own countrymen.—*Thornton's India.*

**LEGISLATION FOR INDIA.**

With India we must probably be content to follow the example of the Grecian legislator, who affirmed that he had given his countrymen not the best laws that could be framed, but the best that they could bear.—*Ibid.*

**CORPORATIONS.**

The principle of corporations is one admirably adapted to stability, and though a certain class of political reasoners may take a different view, the stability of social institutions will ever be regarded by the reflecting as an object which it is one of the first duties of the legislator to secure. A corporation, or an associated community like an Indian village, may be dispersed by accident: but it is not thereby destroyed. When its members come together again, each man knows his place, and each man falls into it as a matter of course. The effects of a convulsion thus scarcely outlast the convulsion itself; whereas a long period must elapse, and many failures probably take place, before a number of individuals, accidentally thrown together in a disorderly manner, could be formed into a tolerably regulated society.—*Ibid.*

**THE EDITOR'S LETTER BOX.**

The Title-page, Contents, and Index to the Ninth Volume, were published last week, including a separate Index to the subjects of the Decisions in the Superior Courts, reported originally in this work. The half-yearly volume comprises upwards of 270 reported cases.

The recent appointment of Perpetual Commissioners will be included, with the other professional lists, in the Supplement.

The suggestion of J. S., on registering Bills of Sale, shall be attended to.

The Queries and Answers of H. M. S.; J.; T. W. H.; "Aspiro;" J. W. L.; "Common Sense;" B. Y. Z.; "Gradus;" and B. B., have been received.

The communication of A. B., on Copyright, shall receive early attention.

A. Z.'s letter, on the Practice under the New Chancery Orders, shall be inserted.

# The Legal Observer.

Vol. X.

SATURDAY, MAY 16, 1835.

No. CCLXIX.

— "Quod magis ad nos  
Pertinet, et nescire malum est, agitamus.

HORAT.

## THE REPORT OF THE CORPORATION COMMISSIONERS.

We have already\* given a summary of the evidence taken by the corporation commissioners, and we shall now briefly recur to the Report itself; and without passing an opinion on its merits, shall give a short abstract of its contents.<sup>b</sup>

The commissioners commence by stating that they were unable to find any correct list of corporations extant; but from various sources of local information, they have found satisfactory reasons for believing, that there are two hundred and forty-six corporations in England and Wales, possessing or exercising municipal functions. These corporations were divided by the commissioners into eleven circuits, which were distributed among the assistant commissioners, who transmitted to Mr. Blackburne, the chief commissioner, a digested report of the evidence collected in each of the places visited by them, giving a detailed account of each corporation.

The commissioners state, that with few exceptions, much readiness was shewn by the corporate authorities to promote the objects of the inquiry, but that in some places, the names of which they give, the desired information was wholly or partly refused.

These preliminary matters being mentioned, the early constitution of the corporation is traced, and the following account of the present state of their charters is given :

"The greater number of the governing charters of corporations was granted between the reign of Henry VIII. and the revolution; the

general characteristic of these documents is, that they were calculated to take away power from the community, and to render the governing class independent of the main body of the burgesses. Almost all the councils named in these charters, are established on the principles of self-election. The criminal jurisdiction of the boroughs received still further enlargement; and numerous instances occur in which a recorder was created, which office had been before that time confined to some of the larger boroughs. There is little reason to doubt that the form given to the governing classes, as well as the limitation of the burghership, during this period, was adopted for the purpose of influencing the choice, or nomination, of members of parliament. At this time the honorary office of High Steward was created in many boroughs, by which the borough became connected with the aristocracy or with the Crown. Some of these charters contain clauses by which the right of electing members of the House of Commons is limited to the select bodies which they created.

"During the reigns of Charles II. and James II. many corporate towns were induced to surrender their charters, and to accept new ones, containing clauses giving power to the Crown to remove or nominate their principal officers. After the proclamation by James II., dated 17th Oct. 1688, the greater number of these towns returned to their former charters. The charters which have been granted since the Revolution are framed nearly on the model of those of the preceding era; they show a disregard of any settled or consistent plan for the improvement of municipal policy, corresponding with the progress of society. The charters of George III., do not differ in this respect from those granted in the worst period of the history of these boroughs. It has become customary not to rely on the municipal corporations for exercising the powers incident to good municipal government. The powers granted by local acts of parliament, for various purposes, have been from time to time conferred, not upon the municipal officers, but upon trustees or commissioners, distinct from them; so that often the corporations have hardly any duties to perform. They have the nominal government of the town; but the efficient duties, and the responsibility, have been transferred to other hands."

\* See 9 L. O. 488.

<sup>b</sup> We quote from the Report as reprinted by us, in an Appendix.



The nature of the several corporate bodies is next examined, and their peculiarities stated, and the existing rights of freedom particularized. The Report then adverts to the governing body, that is to say, the mayor, bailiff, &c., and the common council; and the following account is given of the mode of electing this body:

"There are very few instances in the corporations of indefinite number, in which, as at Berwick-upon-Tweed and Ipswich, the general body of the freemen have the power of choosing whomsoever they please of themselves as the head of the corporation. Sometimes, he is chosen by the freemen from the aldermen, or from the members of the common council. In some boroughs he is chosen by the body at large from among two or more nominated by the select body. The most common case is, that he is elected either from the aldermen or common councillors, by the court of aldermen or common council. In London, and some other towns, he is elected by a popular assembly from the aldermen, subject in London to confirmation by the court of aldermen. In some places, he is presented by the jurors of the court leet. In several boroughs the same person is re-eligible only after a given interval. In all cases the election is for a year.

"The members of the common council are elected in the great majority of instances by the common council, or by that division of it commonly comprised under the name of aldermen. In some cases, they are nominated by the mayor. The election is generally for life. Residence is sometimes a necessary qualification: often it is little attended to. The aldermen generally fill up vacancies in their own body from the other division of the common council: in other cases this class consists of all who have passed the chair. The aldermen also are usually chosen into that class for life. London and Norwich afford instances, among others, of elections by large bodies of freemen. In both these cities, the aldermen are elected for life, and the common councillors annually. In London, they all are elected by the freemen, who for a year have occupied houses of a certain value, and who pay local taxes to a certain amount. In Norwich, all are elected by the freemen, without any qualification of residence, property, or local taxation."

The corporate officers are next mentioned; the high steward, when there is one, the mayor, the recorder, the sheriff, the bailiff, the coroner, the town clerk, the chamberlain, and the magistrates.

The Report then proceeds to consider the corporation criminal courts, their jurisdiction, judges, juries, and costs: then the civil courts, and their jurisdiction, practice, judges and officers, attorneys and juries; next the gaols, the police, management of poor, and extent of local jurisdiction.

The important inquiry of property is next entered into; and we shall extract the portion of this head which relates to their income.

"Many of the corporations have considerable revenues derived from various sources; from lands, leases of tithes, and other property; from tolls of markets, and fairs; from duties or tolls imposed on the import or export of goods and merchandize, usually called town dues; from other duties, as from quay dues, anchorage, &c.; and from fees payable on the admission of officers and burgesses, as well as from fines imposed on persons refusing to perform the duties of corporate offices.

"In many of the corporations the revenues are sufficient for the maintenance of all necessary municipal institutions. In many, though amply sufficient for supporting the various purposes for which municipalities were instituted, they are but partially applied to them. In most, however, the revenues would be inadequate to these purposes, though they should be entirely expended upon them. In several boroughs a rate is levied on the inhabitants, in the nature of a county rate. There are many instances among the boroughs returning members to parliament, in which the revenues are inadequate to the wants of the municipality, and in which the deficiency has been supplied either from the funds of the patron, or by the members for the borough. In some, before the passing of the Reform Act, the members for the borough or the patron paid all the municipal expences. Since that epoch, these contributions have ceased, and such corporations have no longer the means of maintaining municipal institutions of any kind.

"Extensive commons often belong to the freemen of corporate towns, the benefits of which are shared by them in various modes. Sometimes, as at Lancaster and Bath, the whole is farmed out, and the profits are divided among all or a certain number of them; more frequently, they themselves exercise, under restriction, the rights of common of pasturage. At Berwick-upon-Tweed, where the affairs are administered by the whole body of burgesses, the value of the lands of which the profits are taken by the freemen, is near 6,000*l.* per annum.

"Some corporations hold their estates charged with the duty of repairing bridges and other works in their neighbourhood. Others have the control of funds appropriated to specific objects connected with the welfare of the town. In numerous cases, they are the trustees of property vested in them for charitable purposes."

The Commissioners having thus examined into the constitution of the municipal corporations in England and Wales, proceed to state that they do not consider that the terms of the commission authorise them to

recommend specific measures for the improvement of the corporate system; but they simply state what they consider to be its defects, leaving the legislature to apply the remedy.

They proceed, however, with an unsparing hand, to point out in detail the defects of the present system; but for these we must refer our readers to the Report itself, which we recommend to their attentive perusal, having only room for the concluding remarks of the Commissioners, which they give by way of summing up. It is only fair, however, to mention, that one of their body (Sir F. Palsgrave) has dissented from their conclusions, and stated his objections at length. These objections we have appended to the Report. The conclusion of the other Commissioners is as follows:

"We have now laid before your Majesty, as concisely as possible, an enumeration of the principal defects which we have found in the constitution and management of the municipal corporations in England and Wales. We humbly certify to your Majesty, that the statements contained in this Report are amply confirmed in detail by the results of the inquiries instituted in the several corporations, which results are embodied in the separate reports to which we have already referred. Even where these institutions exist in their least imperfect form, and are most rightfully administered, they are inadequate to the wants of the present state of society. In their actual condition, where not productive of positive evil, they exist, in the great majority of instances, for no purpose of general utility. The perversion of municipal institutions to political ends has occasioned the sacrifice of local interests to party purposes, which have been frequently pursued through the corruption and demoralization of the electoral bodies.

"In conclusion, we report to your Majesty that there prevails amongst the inhabitants of a great majority of the incorporated towns a general, and, in our opinion, a just dissatisfaction with their municipal institutions; a distrust of the self-elected municipal councils, whose powers are subject to no popular control, and whose acts and proceedings being secret, are unchecked by the influence of public opinion; a distrust of the municipal magistracy, tainted with suspicion the local administration of justice, and often accompanied with contempt of the persons by whom the law is administered; a discontent under the burthens of local taxation, while revenues that ought to be applied for the public advantage are diverted from their legitimate use, and are sometimes wastefully bestowed for the benefit of individuals, sometimes squandered for purposes injurious to the character and morals of the people. We therefore feel it to be our duty to represent to your Majesty that the existing municipal corporations of England and Wales neither

possess nor deserve the confidence or respect of your Majesty's subjects, and that a thorough reform must be effected, before they can become, what we humbly submit to your Majesty they ought to be, useful and efficient instruments of local government."

## ON THE RIGHT TO PUBLISH THE REPORT OF A TRIAL.

### DEFAMATION.

It is a question not clearly settled, whether a correct report may be published in a newspaper, of a trial in a Court of Law, in which evidence was adduced defamatory to the character of a party who was not present at the time, nor in any way concerned in the action.

The following MS. nisi prius decision bears on the point. Court of Exchequer, Feb. 20, 1826. *Jones v. Chester*. Before Mr. Baron Gurney and a common jury. Action brought by Mr. Thomas Jones, against the editor of the Pottery Gazette, to recover compensation in damages for an alleged libel which appeared in that newspaper in the early part of the year 1820. The defendant pleaded the general issue, and that the libel complained of was a full, fair, and impartial account of a trial which had taken place before the chairman and magistrates of the quarter sessions. The circumstances were as follows: At the Epiphany quarter sessions for the county of Bedford, the plaintiff prosecuted his clerk, who was convicted. The witnesses on behalf of the clerk gave evidence defamatory of the character of Mr. Jones. This was reported by the defendant in the Pottery Gazette, and for this report an action was brought. Baron Gurney, after commenting upon the conduct of the plaintiff, and the time which he had allowed to elapse before bringing his action, said, "That the question for the jury to decide, in the first place, would be, was this a fair, full, just, and impartial account of what had taken place upon the trial? If not, then he was bound to tell them that the publication was a libel; but if it was a fair account of it, the defendant would in that case be entitled to their verdict; for he (B. Gurney) was clearly of opinion that a party had a right to give a fair, full, and impartial account of whatever took place in a court of justice, and for this reason, that the public were entitled to be present in court, and hear all that was going forward; and that being the case, it was absurd to say, that because the court was too small to hold all the public they were thereby the less entitled to be made acquainted with its proceedings. He was quite satisfied they had such a right; and indeed it was necessary for preserving public respect towards the administration of justice, by the opportunity it afforded them of constantly observing that its proceedings were conducted with purity and decorum. He repeated, therefore, that a party had a right of

publish a fair and just account of what took place in court; nor was it necessary that he should state every word that was uttered, provided he omitted no material part likely to prejudice either of the parties. He must not, however, give a heading to his account, as had been done in the case of *Lewis v. Clement*, 3 B. & Al. 702; 3 B. & B. 297; where the report was headed "Infamous Conduct of an Attorney;" because that gave a sting to the publication, and not being part of what had taken place at the trial, was therefore not justifiable."—Verdict for the defendant.

The following cases bear upon this question: *Rex v. Abingdon*, 1 Esp. 226; *Rex v. Greeney*, 2 M. & S. 273; *Huire v. Wilson*, 9 B. & C. 643; *Saunders v. Mills*, 6 Bing. 213; *Flint v. Pike*, 4 B. & C. 473; *East v. Chapman*, 1 Moo. & Mal. 46; *Duncan v. Twaites*, 3 B. & C. 556; *Rex v. Fisher*, 3 Camp. 571; *Rex v. Lee*, 5 Esp. 123; *Rex v. Hunt*, 1 B. & Al. 379; *Stiles v. Nokes*, 7 East, 493; *Rex v. Curdile*, 3 B. & Al. 167; *Curry v. Wolter*, 1 B. & P. 525; *Rex v. Wright*, 8 T. R. 298; and *Roberts v. Brown*, 10 Bing. 519. W. Y. C.

## ATTORNEYS TO BE ADMITTED,

Trinity Term, 1835.

### Clerks' Names.

Adams, Francis, the Younger, Clifton, Gloucester.  
 —, Percival, Leeds.  
 Addison, Leonard, Liverpool.  
 Adcock, Henry Joseph, 12, South Square, Gray's Inn.  
 Ainsworth, William, Preston, Lancaster.  
 Asprey, Frederick, 28, Carey Street, Lincoln's Inn.  
 Ayerst, Francis, 2 Millnan Street.  
 Baker, William, Ilminster, Somerset.  
 Barnes, Henry Eugene, 36, Lincoln's Inn Fields.  
 Bates, Thomas Holden, Bow Church Yard.  
 Bayley, William Shewsbury.  
 Bayley, Francis Wilson, Bishopstrow, near Warminster.  
 Beckingsale, William Jefferies, 8, Took's Court.  
 Beckington, Charles, 9, Bow Church Yard.  
 Benn, Thomas, 14, Featherstone Buildings.  
 Bird, William Frederick Wratistaw, 20, Bennett Street, Stamford Street.  
 Bohner, Charles Foster, Garden Place, Lincoln's Inn Fields.  
 Bradley, Henry, Cambridge.  
 Browne, Thomas Brame, East Dereham, Norfolk.  
 Browne, John, 12, Everett Street.

Bulmer, John, Leeds.  
 Burbidge, Edward, 1, Field Court, Gray's Inn.  
 Burnell, B. Bloomfield, 57, Haymarket, St. James's.  
 Busby, Charles Stanhope Burke, 28, Carey Street.  
 Calvert, John, Masham, York.  
 Cannock, Joseph, Newent, Gloucester.  
 Carr, Wm. John, 6, Tokenhouse Yard.  
 Chatham, William, 10, Upper Brunswick Terrace, Islington.

### To whom articulated.

James Brooks, Odiham, Southampton.  
 Thomas Townend Dibb, Leeds.  
 Joseph Mallaby, Liverpool.  
 William Plater Bartlett, Nicholas Lane.  
 Thomas Ainsworth, the Elder, Blackburn.  
 Thomas Gamlen, 7, Furnival's Inn.  
 John Clipperton, 17, Bedford Row.  
 John Baker, same place.  
 Jackson Walton, 8, Warrford Court.  
 Joseph Bainbridge, Newcastle-upon-Tyne, deceased, assigned to Frederick William Tappenden, same place.  
 Williams Hill Watson, Whitchurch, Salop, deceased, assigned to John William Watson, Shrewsbury.  
 James Boor, Warminster.  
 Henry Coombs, of the Close of New Sarum, Wilts.  
 Henry Ingledew, Newcastle-upon-Tyne, assigned to Francis Seymour, same place.  
 George Harris, Rugby, Warwick.  
 Adam Yates Bird, Kidderminster, Worcester.  
 Charles Bonner, Spalding, Lincoln.  
 John Edward Robinson, Cambridge.  
 Frederic Browne Bell, Downham Market.  
 Edward Coode the Younger, St Austell, Cornwall, assigned to Henry Coode, 8, Guildford Street.  
 George Bulmer, York.  
 John Woodman, Marlborough, Wilts.  
 Henry Pellat, Ironmongers Hall, now a pupil of Thomas Coventry, Lincoln's Inn, Esq.  
 Jacob Boys, Brighton.  
 John Prest, same place.  
 Thomas Cadle, same place.  
 William Spours, Alnwick, Northumberland.  
 John Collinson, Doncaster.

*Clerks' Names.*

Clarkson, James Wakefield, York.  
 Compigné, Horatio, 1, New Square, Lincoln's-Inn.  
 Constable, Charles, 35, Myddleton Square.  
 Cooper, Stafford Moore, Starminster, Dorset.  
 Cook, John, Scarborough, York.  
 Cook, Richard, Herne Bay.  
 Corlass, Wm., Kingston upon Hull.  
 Cottle, Frederick, Hill Street, Walworth.  
 Coward, William, 4, New Bridge Street, Blackfriars.  
 Cridland, Richard John, Box Cottage, King's Road, Chelsea.  
 Croft, George Anderson, of Cheltenham.  
 Cufaude, John Lomas, Halesworth, Suffolk.  
 Dally, Thos. Yarrall Johnson, Arundel, Sussex.  
 Dangerfield, Abraham, Craven Street, Strand.  
 Davis, John, 15, New Ormond Street.  
 Densham, Thomas Row, 40, Chapman Street, Islington.  
 Dew, Samuel Llangifin, Anglesea.  
 Dodgson, James, Blackburn.  
 Eastham, Thomas Kirkby, Lonsdale.  
 Edmonds, George, 15, St. Mary's Square, Birmingham.  
 Elton, John Johnston, 4, Princes Street, Bedford Row.  
 England, Thomas, Huddersfield, York.  
 Ferns, George Morton, Stockport, Chester.  
 Firth, Charles, Birstall, near Leeds.  
 Fisher, George Healy, Waltham.  
 Fitzjohn, George Wells, Baldock, Herts.  
 Flook, William Land, Bristol.  
 Floud, Thomas, 17, Bedford Row.  
 Fox, William, Bow Church Yard.  
 Freer, Edward Major, Westcotes, Leicester.  
 Gaisford, William, 28, Wilmington Square.  
 Garnett, Henry John, Middlewich, Chester.  
 Goddard Alfred, Edmund Place, Aldersgate Street.  
 Goodford, Henry, 87, Great Russell Street.  
 Goolden, James, Heaton Norris, Lancaster.  
 Griffiths, Edwin, Newport.  
 Hall, Henry, 5, Berners Street.  
 Hall, John, Mill's Bridge, near Huddersfield.  
 Hamel, Felix John, Tamworth, Warwick and Stafford.  
 Hancock, Walter, 11, Bugle Street, Southampton.  
 Harper, William, the Younger, Selby, York.  
 Hargreaves, John, 24, Seymour Place, Euston Square.

*To whom articulated.*

George Robinson, same place.  
 David Compigné, Gosport.  
 Francis Smedley, 12, Ely Place.  
 George Dolling, Chudleigh, assigned to Edmund George Randall, 56, Welbeck Street.  
 Arthur Levett, Kingston upon Hull.  
 Thomas Thorpe Delasaux, Canterbury.  
 Samuel Scholefield (now Samuel Lightfoot), same place.  
 Robert Augustus Cottle, 7, Furnival's Inn.  
 Robert Francis Yarker, Ulverston, Lancaster.  
 John Payne, Milverton, Somerset.  
 Edwin William Smith, Borough, Leeds.  
 John Cufaude, same place.  
 Richard Dally, of Chichester and Bognor, assigned to William Duke, Arandel.  
 Jackson, King Hunt, Verulam Buildings.  
 John March Hodding, New Sarum; assigned to John Houseman, Essex Street.  
 William Rose, Whetstone.  
 Owen Owens, Holyhead.  
 John Dodgson, same place; assigned to Thomas Entwistle Swift, Blackburn.  
 William Preston, same place.  
 John Palmer, Birmingham & Coleshill; assigned to John Francis Dalby, Birmingham.  
 Thomas Morecroft, Liverpool; assigned to Richard Whitehouse, 30, Castle Street, Holborn.  
 William Jacomb, same place.  
 John Harrop, same place.  
 William Batty, same place.  
 William Fisher, same place.  
 John Hawkins, Hitchin, Herts.  
 Henry Meredith Ambury, Bristol.  
 Charles Brutton, Exeter.  
 Thomas Carr, Newcastle-upon-Tyne.  
 William Freer, New Street, St. Martin, Leicester.  
 John Bush, Bradford, Wilts.  
 Charles Clarke, Derby; assigned to Thomas Shackleton, Liverpool; assigned to Robert Few, Henrietta Street.  
 Charles Deane, Lincoln's Inn Fields; assigned to John Henry Cromwell Russell, Sittingborne, Kent.  
 William Martin Foster, late of Lincoln's Inn, deceased; assigned to Samuel Foster, Lincoln's Inn.  
 Thomas Newton, same place; assigned to Richard Wright, same place; and by him assigned to Robert Taylor Grundy, Bury, Lancaster; and by him assigned to Thomas Grundy, same place.  
 Thomas Phillips, the Younger, Newport.  
 Edward Savage Bailey, same place.  
 John Clayton, Wetherby, County of York.  
 Thomas Willington, same place, deceased; assigned to Edward Wheeler, Tamworth and Oldbury, County of Salop.  
 Augustus Pulsford Browne, Dulverton, Somerset.  
 Edward Parker, same place.  
 John Hargreaves, Blackburn, Lancaster.

*Clerks' Names.*

Hastle, Benjamin, the Younger, Calthorpe Place, Gray's Inn Road.  
Hay, Duncan, 14, Queen's Place, Kennington.

Heron, William, of 19, Chadwell Street, Middleton Square.

Hicks, Henry, Shrewsbury, Salop.  
Hilder, Edward Augustus, 16, Three Crown Square, Southwark.

Hillyard, Charles, Upper Clapton.  
Holbeche, Francis, Olney, Bucks.

Holmes, Henry, the Younger, Romsey, Hants.  
Holloway, John Hendy, 81, Bermondsey Street.  
Hotson, John, Long Stratton, Norfolk.  
Hughes, Thomas, 248, Strand.  
Hull, Charles, London, in the County of Middlesex.

Hull, Warner, Uxbridge.  
Hunt, Walker, 32, Finsbury Circus.

Ings, Thomas Godden, Devizes.

Jackson, William James, 33, Bedford Row.

Jekyll, Nathaniel, West Coker, Somerset.  
Jenkins, Frederick John, City, Peterborough.

Johnson, Thomas, 7, Furnival's Inn.

Jones, Charles Thomas, 35, East Street, St. George's.

Kemp, James, the Younger, 16, Tavistock Place.

Kenmir, George Johnson, Gateshead.  
King, Samuel, the Younger, Liham, Norfolk.  
King, Richard Henry, 32, Finsbury Circus.  
Landor, Edward Wilson, Rugeley, Stafford.  
Latimer, John Edward, 43, Southampton Buildings.

Leuthall, Edmund Henry, Lawrence Street, Chelsea.

Lock, Henry, 7, Great Thomas Street, East Borough.

Marriott, Robert, 5, Islington Terrace.  
Massey, Francis Wood, 40, Nelson Square.  
Mason, Henry, Rye, Sussex.

Matthews, James, Everton, near Liverpool.

Mellers, Henry, Symond's Inn, Chancery Lane.

Miller, Ingleby Thomas, 12, Upper Bedford Place.

Moody, John James Paul, 10, Upper Brunswick Terrace.

Moorhouse, Thomas Halifax, York.

Morris, William, Leigh Street, Burton Crescent.

Morden, William, 5, Stanhope Street, Clare Market.

Motteram, James, 23, Arundel Street, Strand.

*To whom articulated.*

George Williams, Great Russell Street, Bloomsbury.

Benjamin Hall, 42, Great James Street, Bedford Row.

George Hadfield, Manchester.

Christopher Hicks, same place.

James Martin, Battle, Sussex.

George Hillyard King, 13, Tokenhouse Yard.  
Thomas Holbeche, Sutton Coldfield, Warwick; assigned to Edward Thomas Cardale, Bedford Row.

Henry Holmes, same place.

John Butler, Havant, Southampton.

Daniel Calver, same place.

John Bush, Bradford, Wilts.

William Casson, Manchester.

Thomas Hurry Riches, same place.

William Anthony Lewis, Basingstoke, Southampton.

Edward Ings, same place; assigned to James Weekes James, Devizes.

Thomas Swarbreck, Thirsk, York; assigned to Thomas Porrett Hayes, Bedford Row.

Thomas Moore, same place.

William Wise, Rugby, Warwick; assigned to William Waterman, Essex Street, Strand.

Edward Richardson, Wetherby, York; assigned to John Cartwright, East Stockwith, Lincoln; assigned to Frederick Hawksley Cartwright, Bawtry, York.

Thomas Dax, 35, Lower Bedford Place.

John Kemp, now of Bath.

Abraham Dawson, Newcastle-upon-Tyne.

Samuel King, the elder, same place.

William Henry Prickett, Odiham, Southampton.

Walter Landor, same place.

Henry Moore Griffiths, Birmingham, Warwick; assigned to Campbell Wright Hobson, Gray's Inn.

Francis Broderip, 9, Lincoln's Inn.

Thomas Gould Read, Dorchester.

Edward Farn, Gray's Inn Square.

Henry Kelsall, Chester.

Ralph Lindsey, No. 16, St. Thomas Street, Southwark.

William Tristram Keightley, Liverpool.

William Ebenezer Burke, New Inn.

Thomas Miller, 22, Ely Place.

Thomas Henry Blackwell Mason, Doncaster.

Lewis Alexander, same place.

Thomas Finchett, Maddock, Chester.

Henry Hughes, Northampton.

Henry Norton, Gray's Inn Square.

[To be concluded in our next.]

# AMENDMENTS IN IMPRISONMENT FOR DEBT BILL.

[Concluded from p. 26.]

(I).—That any meeting of the creditors after the second public meeting of the commissioners, (whereof and of the purport of which twenty-one days' notice at least shall have been given in the London Gazette,) if the petitioner or his friends shall make an offer of composition, or security for such composition, which nine-tenths in number and value of the creditors present at such meeting agree to accept, another meeting for the purpose of deciding upon such offer shall be appointed, whereof such notice as aforesaid shall be given; and if, at such second meeting, nine-tenths in number and value of all the creditors who have proved their debts shall agree to accept such offer, the said commissioners may, upon such acceptance being testified by them in writing, dismiss the petition of such petitioner; and all proceedings had thereunder shall thereupon become void, except so far as regards any sale or disposition of the estate and effects of such petitioner previously completed under the power and for the purposes aforesaid; and all and every the creditors of such petitioner shall be bound to accept such composition, and the same shall be in full discharge of their respective debts.

(K).—That in deciding upon such offer as aforesaid, any creditor whose debt is below five pounds shall not be reckoned in number, but the debt due to such creditor shall be computed in value; and that any creditor residing out of England shall not be bound by such composition, unless such creditor or his attorney shall assent thereto; and if any creditor shall agree to accept any gratuity or higher compensation for assenting to such offer, he shall forfeit the debt due to him, together with such gratuity or composition; and the petitioner shall, if thereto required, make oath before the Commissioner that there has been no such transaction between him, or any person with his privy, and any of the creditors; and that he has not used any undue means or influence with any of them to obtain such assent as aforesaid.

(L).—That no creditor who has brought any action, or instituted any suit against any petitioner in respect of a demand prior to filing of the petition, or which might have been proved as a debt against the estate of such petitioner, shall prove a debt against the estate of such petitioner, or have any claim entered upon the proceedings, without relinquishing such action or suit; and the proving or claiming a debt against the estate of such petitioner by any creditor, shall be deemed an election by such creditor to take the benefit of such petition with respect to the debt so proved or claimed, provided that such creditor shall not be liable to the payment to such petitioner, or his assignees, of the costs of such action or suit so relinquished by him; and that where any such creditor shall have

brought any action or suit against such petitioner, jointly with any other person, his relinquishing such action or suit against the petitioner shall not affect such action or suit against such other person.

(M).—That in all cases where any petitioner shall be liable for any debt, in respect of which interest would now, by law, be payable or allowable, in the nature of damages, the creditor to whom such debt shall be due shall be entitled to prove the interest upon the same, to be calculated to the day of filing the petition, at such rate as is allowed by the Court of King's Bench, in actions upon bills of exchange.

(N).—That in all petitions by one or more of the partners of a firm, any creditor to whom the petitioner is indebted, jointly with the other partner or partners of the said firm, or any of them, shall be entitled to prove his debt against the estate of such petitioner, for the purpose only of voting in the choice of assignees under such petition, and of assenting to or dissenting from the certificate of such petitioner, or of either of such purposes, but such creditor shall not receive any dividend out of the separate estate of the petitioner, until all the separate creditors shall have received the full amount of their respective debts.

(O).—That when any petitioner shall have been indebted, at the time of filing his petition, to any servant or clerk of such petitioner, in respect of the wages or salary of such servant or clerk, it shall be lawful for the commissioner, upon proof thereof, to order so much as shall be so due as aforesaid, not exceeding three months' wages or salary, and not exceeding twenty pounds, to be paid to such servant or clerk out of the estimate of such petitioner, and such servant or clerk shall be at liberty to prove against the estate of the said petitioner, for any sum not exceeding such last-mentioned amount.

(P).—That when any petitioner shall have been indebted, at the time of filing his petition, to any labourer or workman of such petitioner, in respect of the wages of such labourer or workman, it shall be lawful for the said commissioner, upon proof thereof, to order so much as shall be so due as aforesaid, not exceeding one week's wages or labour, and not exceeding thirty shillings, to be paid to such workman or labourer out of the estate of such petitioner, and such workman or labourer shall be at liberty to prove against the estate of the petitioner for any sum exceeding such last-mentioned amount.

(Q).—That where any person shall be an apprentice to a petitioner, at the time of filing the petition, if any sum shall have been really and *bond fide* paid by or on the behalf of such apprentice to the petitioner, as an apprentice fee, it shall be lawful for the commissioner, upon proof thereof, to order any sum to be paid to or for the use of such apprentice which he shall think reasonable, regard being had, in estimating such sum, to the amount of the sum so paid by or on behalf of such apprentice to the petitioner, and to the time during which such apprentice shall have resided with

the said petitioner, previous to the filing of such petition, and the commissioner may, by writing under his hand, assign the said apprenticeship to any person, at the desire of the parent or guardian of such apprentice, and such assignment shall be good and valid without any stamp being affixed thereto.

(R.)—That the assignee so to be chosen by the creditors of the petitioner as aforesaid, and the official assignee, shall have the like powers and authorities as the assignees of bankrupts' estates have, under the laws now in force concerning bankrupts, and nothing herein contained shall extend to authorize any official assignee to interfere with the assignees chosen by the creditors in the appointment or removal of a solicitor, attorney, or auctioneer; or in directing the time and manner of effecting any sale of the estate and effects of any petitioner.

(S.)—That if any petitioner, being at the time insolvent, shall (except upon the marriage of any of his children, or for some valuable consideration,) have conveyed, assigned, or transferred to any of his children, or any other person, any hereditaments, offices, fees, annuities, leases, goods, or chattels, or have delivered or made over to any such person any bills, bonds, notes, or other securities, or have transferred his debts to any other person or persons, or into any other person's name, the assignee shall have the power to sell and dispose of the same as aforesaid, and every such sale shall be valid against the petitioner and such children and persons as aforesaid, and against all persons claiming under him.

(T.)—That no distress for rent, made and levied after filing a petition, upon the goods or effects of any petitioner (whether before or after the filing of the petition) shall be available for more than one year's rent, accrued prior to the filing of the petition; but the landlord or party to whom the rent shall be due, shall be allowed to come in as a creditor under the petition for the overplus of the rent due, and for which the distress shall not be available.

(U.)—That when any petitioner is in prison, or in custody for any cause whatsoever, the commissioner may, by warrant under his hand, directed to the person in whose custody such petitioner is confined, cause such petitioner to be brought before him at any sitting, and the expense thereof shall be paid out of his estate; and such person shall be indemnified by the warrant of such commissioner for bringing up such petitioner; provided that the assignees may appoint any person to attend such petitioner from time to time, and to produce to him his books, papers, and writings, in order to prepare an abstract of his accounts, and a statement to show the particulars of his estate and effects previous to his final examination and discovery thereof; a copy of which abstract and statement the said petitioner shall deliver to them, ten days at least before his final examination.

(X.)—That the said commissioners may, in all matters within their respective jurisdictions, have power to take the whole or any part of the evidence, either *visu voce* on oath, or upon affi-

davits to be sworn before a Judge of the Court of Review, a commissioner of the Court of Bankruptcy, or commissioner under this act, or a Master Ordinary or Extraordinary in Chancery, as the said commissioner under this act may direct, or as may from time to time be prescribed by any general rule to be made by virtue of an Act of Parliament passed in the first and second year of his present Majesty, intituled, "An Act to establish a Court of Bankruptcy."

(Y.)—That the Court of Review, the Commissioners of his Majesty's Court of Bankruptcy, and the Commissioners appointed under this Act, may award in all matters before them such costs as to them shall seem fit and just.

(Z.)—That in any case in which the said Court of Review, or a commissioner of his Majesty's Court of Bankruptcy, or a commissioner under this act, is or are by this act authorized to award costs against any persons, it shall and may be lawful for such Court, or such commissioner, to cause such costs to be recovered from such person in the same manner as costs awarded by a rule of any of the superior Courts at Westminster may be recovered.

(AA.)—That at the meeting of creditors for the choice of assignees, the major part in value of such creditors there present may direct how and with whom, and where the money received from time to time out of the estate shall be paid in, and remain until it be divided; and if such creditors shall not make such direction as aforesaid, the commissioners shall, immediately after such choice, and at the same meeting, make such direction; but no money shall be directed to be paid into the hands of any commissioner, or of the solicitor to the petition, or into any banking-house, or other house in trade in which any such commissioner, assignee, or solicitor is interested; provided that it shall be lawful for the assignee of the petitioner's estate, or of any bankrupt's estate, to deposit the money or securities of such estates respectively into any joint-stock bank, notwithstanding such assignee may be a share-holder in such bank, provided the said bank be duly registered.

(BB.)—That if any assignee shall retain in his hands, or employ for his own benefit, or knowingly permit any co-assignee so to retain or employ any sum to the amount of 100*l.* or upwards, part of the estate of the petitioner, or shall neglect to invest any money in the purchase of Exchequer bills, when so directed as aforesaid, every such assignee shall be liable to be charged in his accounts with such sum as shall be equal to interest at the rate of 20*l.* per cent. per annum, for all such money for the time during which he shall have so retained or employed the same, or permitted the same to be so retained or employed as aforesaid, or during which he shall have so neglected to invest the same in the purchase of Exchequer bills; and the commissioner is hereby required to charge every such assignee in his accounts accordingly.

(CC.)—That if any assignee indebted to the

estate of which he is such assignee, in respect of money so retained or employed by him as aforesaid, either as assignee to any petitioner under this act, or assignee of any bankrupt according to the bankrupt laws, shall have a petition filed under this act, and obtain his certificate, it shall only have the effect of freeing his tools of trade, necessary household goods, and the necessary wearing apparel of himself, his wife, and children; and he shall remain liable for so much of his debts to the estate of which he was assignee, as shall not be paid by dividends under his petition, together with lawful interest for the whole debt.

(DD.)—That if the petitioner's estate shall not have been wholly divided upon the first dividend, the commissioner shall, within eighteen calendar months after the filing of the petition, appoint a public meeting, (whereof, and of the purport whereof he shall give twenty-one days' notice in the *London Gazette*), to make a second dividend of the petitioner's estate, when all creditors who have not proved their debts, may prove the same; and the commissioner at such meeting, after taking such audit as hereinbefore directed, shall order the balance in the hands of the assignee to be forthwith divided amongst such creditors as have proved their debts, and such second dividend shall be final, unless any action at law or suit in equity be depending, or any part of the estate be standing out, not sold or disposed of, or unless some other estate and effects of the petitioner shall afterwards come to the assignee, in which case they shall, as soon as may be, convert such estate and effects into money, and within two calendar months after the same shall have been so converted, divide the same in manner aforesaid.

(EE.)—That no action for any dividend shall be brought against the assignees by any creditor who shall have proved under the petition; but if the assignees refuse to pay any such dividend, the Commissioner may order payment thereof, with interest for the time it shall have been withheld, and the costs of the application.

(FF.)—That if the assignees of any petitioner's estate shall agree to refer any matter in dispute with any party to arbitration in such matter as in law they are empowered to do, such agreement shall be made a rule of the court of the commissioner wherein the matter of the petition is depending, and thereupon all such rights, remedies, duties and liabilities shall accrue from such reference so made a rule of the said court, in respect of arbitration and award, and non-performance of such award, and otherwise howsoever, as by law at present accrue upon any submission of reference made a rule of any of his Majesty's other courts of record.

(GG.)—That no petitioner shall be entitled to his certificate, if he shall have wilfully misrepresented, in his affidavit made on presenting his petition, that he had assets to the value of fifty pounds.

(HH.)—That if any person who shall have been so discharged by such certificate as afore-

said, or who shall have compounded with his creditors, or who shall have obtained his certificate under the laws relating to bankrupts, shall be a petitioner, and obtain such certificate as aforesaid, unless his estate shall produce, (after all charges sufficient to pay every creditor fifteen shillings in the pound), such certificate shall only protect his tools of trade and necessary household furniture, and the wearing apparel of himself, his wife and children.

(II.)—That no petitioner, after his certificate shall have been allowed, shall be liable to pay or satisfy any debt, claim, or demand from which he shall have been discharged by virtue of such certificate, or any part of such debt, claim or demand upon any promise, contract, or agreement, made or to be made after the filing of the petition, unless such promise, contract, or agreement be made in writing, signed by the petitioner or some person thereto lawfully authorized, in writing, by such petitioner.

(KK.)—That it shall be lawful for the Lord Chancellor, upon the petition of the assignee, or of any purchaser from them of any part of the petitioner's estate, to order the petitioner to join in any conveyance of such estate, or any part thereof; and if he shall not execute such conveyance within the time directed by the order, such petitioner, and all persons claiming under him, shall be stopped from objecting to the validity of such conveyance; and all estate, right or title which such petitioner had therein, shall be as effectually barred by such order, as if such conveyance had been executed by him.

(LL.)—That if any petitioner shall, as trustee, be seised, possessed of, or entitled to, either alone or jointly, any real or personal estate, or any interest secured upon or arising out of the same, or shall have standing in his name as trustee, either alone or jointly, any government stock, funds, or annuities, or any stock of any public company, either in England, Scotland, or Ireland, it shall be lawful for the Lord Chancellor, on the petition of the person or persons entitled in possession to the receipt of the rents, issues and profits, dividends, interest or produce thereof, on due notice given to all persons (if any) interested therein, to order the assignee, and all other persons whose act or consent thereto is necessary, to convey, assign, or transfer the said estate, interest, stock, funds or annuities, to such person or persons as the Lord Chancellor shall think fit, upon the same trusts as the said estate, interest, stock, funds, or annuities were subject to before the filing the petition, or such of them as shall be then subsisting and capable of taking effect, and also to receive and pay over the rents, issues and profits, dividends or produce thereof as the Lord Chancellor shall direct.

(MM.)—That divers large sums of money and other property have been given by deed, will, or otherwise, by many individuals, for the relief of persons imprisoned for debt.—That from the passing of this act, all such money and other property shall be paid to and



vested in the accountant general, who is hereby directed to receive the same, and carry it to the credit of the fee fund; and every person so paying or transferring such monies or property, is hereby indemnified and saved harmless for so doing.

(NN).—That all sums of money now being in the possession of the provisional assignee, or vested in government securities in the Insolvent Court, shall be paid to and vested in the said accountant general, and shall be by him carried to the account of the fee fund: provided always that the said monies and securities shall continue liable to the same trusts as they now are.

(OO).—That all power, jurisdiction, and authority of the commissioners named in any commission or fiat not before the commissioners of his Majesty's Court of Bankruptcy, shall cease and determine; and that every such commission or fiat shall be thereupon removed to the commissioner appointed under this act, within whose jurisdiction it would have been if originally commenced after the passing of this act; and that all further proceedings therein shall be thenceforth prosecuted and carried on in like manner as if they had been originally commenced in the court of the said commissioner.

(PP).—That the commissioners of his Majesty's Court of Bankruptcy, and the commissioners appointed by this act, shall have the same powers and authority as to all insolvent debtors who have petitioned the Court of Insolvent Debtors, their estates and assignees, as they have by this act as to debtors making cession of their property, and may appoint official assignees to such estates.

(QQ).—That all sums of money forfeited under this act, or by virtue of any conviction for perjury committed in any oath hereby directed or authorized, may be sued for, by the trustee or assignee in any of his Majesty's courts of record, and the money so recovered (the charges of suit being deducted), shall be paid to the creditor, or, in case a petition has been filed, shall be divided amongst the creditors, as part of such petitioner's estate.

(RR).—That whenever any attachment shall be issuable from any Court for any contempt of such Court, for nonpayment of any sum of money, or of costs, charges or expenses, the party liable thereto shall not be arrested or imprisoned, except the person entitled to such money, costs, charges and expences make oath that he believes the person liable is about to abscond; and all persons entitled to such money, costs, charges, and expences, shall have the same rights and privileges as persons who have obtained judgment in the courts of common law; subject nevertheless to such ascertaining of the amount of the said demands as may be had by taxation or otherwise, and to such examination thereof as is provided for the examination of other claims under this act.

(SS).—That out of the said fund shall be paid the salaries of the judges of the Court of Review, the commissioners of his Majesty's

Court of Bankruptcy, the usher of the Court of Review, and of the commissioners of his Majesty's Court of Bankruptcy.

(TT).—That money may remain which has not been claimed by the creditors of a petitioner. That it shall and may be lawful for the Court of Review to cause the same or any part thereof to be invested in government securities, and to apply the interest and profits arising therefrom to the credit of the accountant general, to the credit of the fee fund; provided always, that no such money shall be so invested until the same shall have been unclaimed for twelve months at the least.

(UU).—That in every action, suit, or issue, office copies of any original instrument or writing, filed in the Court of the Commissioner, shall be evidence to be received of every such original instrument or writing respectively; and if any such original instrument or writing shall be produced on any trial, the costs of producing the same shall not be allowed on taxation, unless it appears that the production of such original instrument or other writing was necessary.

(XX).—That all the records, papers, and documents belonging to the different courts of the commissioners, shall be in the custody of the registrars of the said courts.

(YY).—That it shall be lawful for the Court of Review, by order in writing, to licence and authorize one or more of the commissioners to act and exercise all the authority hereby given, for another commissioner named in such order, for such time as shall be specified in such order, for reason specified in such order; and such order shall be filed in the court of the commissioners for whom such other commissioner or commissioners is or are thereby so authorized to act.

(ZZ).—That no commissioner, registrar, official assignee, or other officer to be appointed by virtue of this act, shall, during their respective continuance in such offices, be capable of being elected or of sitting as a member of the House of Commons.

(AAA).—That no registrar, official assignee, or other officer to be appointed under this act, shall be compellable to serve as a juryman on any inquest or trial whatsoever.

(BBB).—That no commissioner or registrar appointed under this act shall, during their respective continuance in such offices, practise as a barrister, and that no attorney or solicitor whose name shall be on the rolls of any Court shall be appointed to or hold any of the said offices.

(CCC).—That if any commissioner, registrar, clerk, messenger, assignee, or any other officer or person whatsoever, shall, for any thing done or pretended to be done under this act, or any other acts relating to bankrupts, or under colour of doing any thing under this act, or any other such acts, fraudulently and wilfully demand or take, or appoint or allow any other person to take for him, or on his account, or for or on account of any other person by him named, any fee, emolument,

gratuity, or sum of money, or any thing of value whatsoever, other than is allowed by this act, and any other such act as aforesaid, such person, when convicted thereof, shall forfeit and pay the sum of five hundred pounds, and be rendered incapable of holding any office or place whatsoever under his Majesty, his heirs or successors.

(DDD).—That this act may be amended, altered, or repealed during the present session of parliament.

We have thus given the clauses marked in the reprint of this bill, "as amended by the committee;" but it is necessary to inform our readers, that some of these clauses are not wholly new, and that some of the alterations made by the committee are not included in the clauses so marked. Thus it appears, that clause A, empowering plaintiffs in actions on bills of exchange to enter judgment against the defendants after notice, was included in the last bill; and the following new clause has not been marked, whereby the plaintiff in any action for any debt is empowered to enter judgment against the defendant after notice; and consequently extending the provisions for speedy judgment on bonds and bills to all other debts.

"That if the plaintiff in any action for any debt shall, after suit commenced in any court, show by affidavit, that the sum sought to be recovered in such action, is due to him from the defendant, and on what account, and that demand before action brought was made upon the defendant for the payment of the sum so due, such plaintiff shall, after service of process on the defendant, be entitled to a rule of the court in which such suit is commenced, or order of the judge of such court, giving the defendant notice that final judgment will be signed against him for the sum sworn to be due, unless such defendant shall within ten days after the service of the rule or order give security to be approved by an officer of such court, for the payment of the debt and costs in case final judgment shall be given against him, or unless the defendant shall, within the said time, shew sufficient cause on oath, why final judgment should not be signed against him, and that such judgment shall be so signed, unless the said defendant shall either give such security, or show such sufficient cause."

We add the following, from a correspondent:

It will be observed, that the recently formed bankrupt commissioners' lists for the country are to be replaced at the pleasure of the Crown, by one county itinerant judge. The practice of country barristers and solicitors as commissioners in bankruptcy was somewhat arbitrarily taken away a short time ago, and given to

select lists; all these are now cashiered on a new caprice. There is to be only one commissioner in any county, and he will make circuits. It will be for country readers to say, whether in Lancashire, Yorkshire, and other large and populous counties, the bankruptcy business can conveniently thus await periodical visits of a sole commissioner. How is a bankruptcy to be declared in an emergency at one end of a county, with an extent of execution impending, when the commissioner may be travelling at the other end?

By clause 112 (which by the bye long precedes the provision for a *new* system,) the power of all existing commissioners is virtually repealed, absolutely and instantaneously; and is not made to depend on his Majesty's appointing the vagrant judges; and there is no direct repeal or modification of the various provisions of former acts, which this clause appears to supersede. Nothing is said about the fees now payable under existing commissions; probably they will be eventually preserved, and given to the new court, in order to assist in supporting the speculation, as was done in the London commissioners' case. Bills in parliament generally now develop themselves gradually. Their proposers bring them forward in a modest form at first; strengthening them by degrees, as they feel their way, in the different stages; till at last the project assumes a tolerable degree of pretension.

The cities and commercial towns should, without loss of time, consider whether the business of bankruptcy *can* be worked on this scheme. The great difficulty in the local court plan (which this bill *is* in fact, in disguise,) was to find any means for transacting the interlocutory business of suits, before an itinerant judge. The difficulty was sought, on that occasion, to be driven through, by allowing no interlocutory proceedings; but no one can surely imagine that there is such a royal road over bankruptcy, and much other of the business intended to be given to the moveable authority now before us. How are warrants and summonses to be obtained, bankrupts and holders of property to be examined on emergency, and a hundred other affairs to be transacted, with the commissioner and his officials at the other side of the county? The effect of destroying the present inducements to the residence of a respectable local bar, acting as commissioners, &c., must also be considered.

The immense patronage which the proposed establishment will create, renders that point one of urgent importance. Legal patronage, which has of late been so enormously increased, should be confided to a public and responsible board, not to the caprice of a political officer.

The amount of cost of the new establishments is also of great importance. Is 250,000*l.* a year ready for this speculation?

One remark more:—This bill forms a strong illustration of the barbarous and disreputable style of our legislation. No sort of order or arrangement subsists; the whole is a bungling chaos. Why, for instance, should there be

three long clauses, such as 1, 2, and 4, where one (shorter probably than either of the three), might comprise the whole? Any one who wished to make the plan intelligible, or had the faculty of doing so, would have begun by erecting his court, providing his officers, assigning them powers and duties; would then have applied his provisions, properly arranged and classified; erecting, in short, in a straightforward and direct manner, a new code of debtor and creditor law, consistent in its parts, and intelligible in itself.

## SUPERIOR COURTS.

### Rolls.

#### LEGACY.—PERPETUITY.

*A testator bequeathed the residue of his estate to his wife for life; and after her death, four parts of it to four nieces, one part to each, and to the heirs of her body in the female line, and for want of such heirs, to a charitable institution. The widow died, and afterwards one of the nieces, without issue; Held, that her share vested in her absolutely, and upon her death belonged to her personal representative, and that the gift over was void for remoteness.*

Andrew Young, a lieutenant colonel in the service of the East India Company, by his will gave his residuary property to his wife for life, and subject to her life interest, he directed it to be divided into six equal parts, four of which he gave to four nieces by name, "to each a share, and in reversion to their lawful heirs in perpetuity in the female line, and considering that in the course of providence they may die unmarried, consequently without lawful female heirs," in that event he directed the shares of interest in his property, that would thus, as he thought, revert on the death of any one, or all of them, to be disposed of as follows:—The first share to the use of the Bible Society; the second vacant share to the Church Missionary Society; and the third to the Society for the Promotion of Christianity among the Jews. On the death of the widow and one of the nieces, the suit was instituted in order to have the interest of the several parties claiming under the will ascertained by the decree of the Court.

Mr. Tynney and Mr. Seton for the plaintiffs, and Mr. Pemberton and Mr. Munro for the defendants, having the same interests with the plaintiffs, contended, that the bequest in favour of the testator's nieces was expressed in language which vested in them an absolute interest in their respective shares; and therefore, although one of them had died unmarried, the bequest over in favour of the Bible Society was void for remoteness, and could not take effect, but went to her representatives.

Mr. Garratt, Mr. Stenton, and Mr. Wood, appeared for the different religious societies, and contended, that upon the true construction of

the clause, the nieces took only a life interest in their respective shares; if they took an absolute interest, still they took it subject to a valid executory bequest over, in the event of their leaving no female issue living at their death; and that as one of the nieces had died unmarried, her share devolved, according to the express directions of the testator, upon the Bible Society, for which the testator had destined the first share which should fall vacant.

The *Master of the Rolls* held, that upon the true construction of the will, according to his view of it, the nieces, upon the testator's death, took absolute interests in their respective shares, subject to the widow's interest. The testator had probably intended, as might be collected from the language he had used, to tie up the property in perpetuity, and that the gift over in favour of the Bible Society and other religious institutions, should come into operation at any period, however remote, at which there happened to be a failure of heirs of his nieces in the female line. That, however, was an intention which the law would not allow to be carried into effect; and as the testator had in the preceding gift to the nieces, made use of words which were strong enough to vest the property in them absolutely, the necessary consequence must be, that the bequests over limited upon those absolute interests failed on the ground of being too remote, and the share of the deceased must go therefore to her personal representative.

*Warren v. Coley*, at the Rolls, Chancery Lane, Thursday, Feb. 19th, 1835.

### Equity Eschequer.

#### PRACTICE.—APPEARANCE.

*A party who has not entered an appearance to a subpoena for costs, has no right to be heard against a motion for an attachment against him for the costs, although he has been served with notice of the motion.*

Upon a motion for an attachment against a plaintiff for not paying costs—

Mr. *Girdlestone* rose on behalf of the plaintiff, to object to the motion. The objection was a point of form.

Mr. *J. Russell*, for the motion, insisted that the defendant had no right to be heard against this motion, as he had not yet appeared to the *subpoena* for the costs.

Mr. *Girdlestone* urged, that as the defendant had served the plaintiff with a notice of this motion, which he might make *ex parte* if he had so chosen, he could not now object to his being heard by his counsel to oppose it.

Lord *Abinger*, C. B. was of opinion, that the plaintiff had no right to be heard in the motion, until he submitted himself to the Court, by putting in an appearance to the *subpoena*.

*Roe v. Beechey*, Sittings in Gray's Inn, Feb. 9th, 1835.

**Common Pleas.**

**SERVICE OF NOTICE OF DECLARATION.—AFFIDAVIT OF DEFENDANT.**

*Where the Court will not set aside the service of a notice of declaration, although it is not quite clear that it has come to the hands of a defendant.*

This was an application to set aside a judgment signed by the plaintiff, for want of a plea.

On making the application, it was sworn that no declaration or notice thereof, had been served on the defendant; but the affidavit did not deny that any such had come to his knowledge.

When cause was shewn against the rule, it was sworn, that on calling at the defendant's usual place of abode, and inquiring of the servant who opened the door, he was informed that the defendant was not then at home. The notice was then left with her, with directions to give it to him when he returned. This, it was contended, was sufficient to entitle the plaintiff to have the rule discharged.

On the other hand, it was submitted that the plaintiff was bound to shew that the defendant had come into possession of the notice in order to entitle him to sign judgment for want of a plea.

The Court thought, that as the defendant had not in his affidavit chosen to deny that the notice of declaration had come to his knowledge, as he might have done if the fact were so, the present rule must, under all circumstances, be discharged.

Rule discharged, with costs. — *Rolfe v. Brown*, E. T. 1835. C. P.

**Exchequer at Pleas.**

**LOCAL ACT.—TREBLE COSTS.—PENALTY.**

*When a local act gives treble costs against an unsuccessful plaintiff, it does not apply to actions for penalties under it.*

In this case, an action was brought under a local act of parliament, constituting certain persons commissioners for the purpose of carrying it into effect, against such commissioners, to recover certain penalties alleged to have been incurred by them in their mode of proceeding. By a clause of the same act it was provided, that where an action was brought against such commissioners for any thing done in pursuance of such act, and the party bringing it should either have a verdict pass against him, or become nonsuit; he should pay treble costs to the defendant. In the action for penalties, the plaintiff was nonsuited. On taxation of costs the Master allowed the defendant his treble costs.

A rule nisi for referring it back to revise his taxation was then obtained, on the ground of an action for penalties not being an action such as was contemplated by the clause, which gave treble costs against plaintiffs unsuccessful in actions for things done in pursuance of the act.

Cause was then shewn against such rule. It was insisted that the terms of the section giving the treble costs, were general, and would clearly embrace a case such as the present. If the commissioners who were appointed for the purpose of carrying the act into effect, were guilty of an act which rendered them liable to a penalty, and an action was brought against them for such penalty, they must be considered as having an action brought against them for something done in pursuance of the act. They must therefore be considered as being entitled to the treble costs provided by the section in question.

In support of the rule, it was submitted that the section which mentioned actions brought for matters done in pursuance of the act, could not mean matters done contrary to the provisions of the act, so as to render the commissioners liable to penalties.

The Court, having taken time to consider, was of opinion that the section entitling successful defendants to treble costs, was only intended to apply, and did apply, to cases in which acts of the commissioners had been done in pursuance of the act of parliament, and which were shewn to have been only in pursuance of it. The subject of the action here, however, was clearly not within the meaning of the act, as that which was alleged to be so clearly contrary to the provisions of it as to render the commissioners liable to penalties. The rule therefore, for reviewing the Master's taxation, must be made absolute, with directions to him to disallow the defendant the treble costs given by the *allocatur*.

Rule absolute accordingly. — *Charlesworth v. Rudgard*, E. T. 1835. Excheq.

**PLEADING.—DEMURRER.—REPUGNANCY.—BILL OF EXCHANGE.—DRAWER AGAINST ACCEPTOR.—CONSIDERATION.**

*What is a good plea of accord and satisfaction.*

*Where an allegation of want of consideration is repugnant.*

This was an action on a bill of exchange, by the drawer against the acceptor. The declaration was in the common form. The defendant pleaded, that when the bill had been accepted by him, it was agreed between the parties that the plaintiff should consign certain goods to a person who was then out of the country, and that out of the proceeds of those goods a sufficient sum to meet the bill should be remitted to the defendant. It was then alleged, that although the bill became due, the proceeds of the goods had not arrived. The defendant then offered the plaintiff a renewed bill to the same amount, and which was refused; but plaintiff requested the defendant to write a letter to the correspondent abroad, relinquishing his claim to the proceeds of the goods. This, the plea averred, was done by the defendant. The defendant concluded his plea by averring, that he had received no consideration for the bill.

To this plea there was a special demurrer, on the ground of duplicity and repugnance.

After hearing the demurrer argued on both sides,

The Court was of opinion that the plea was not bad for duplicity, as it altogether amounted only to a plea of accord and satisfaction. The last allegation was, however, repugnant.

On receiving this intimation from the Court, the defendant agreed to amend.

Amendment allowed.—*Byass v. Wylie*, E. T. 1835. Excheq.

**POSTPONEMENT OF TRIAL.—COSTS OF THE DAY.—DEFENDANT'S COSTS.—MASTER'S DISCRETION.**

*Costs of the day only extend to costs properly and strictly incurred on the day on which the trial should take place.*

This was an application for a rule to review the Master's taxation, upon the ground of his having improperly disallowed certain costs to the defendant. The facts appeared to be these. The cause having been set down for trial, it was agreed between the parties that it should be postponed, on the plaintiff paying the costs of the day, which he did, and the cause was accordingly postponed. It, however, was set down a second time for trial, and remained in the paper three days, when the plaintiff obtained a verdict. It was now submitted, on the part of the defendant, that as the delay and expences consequent thereon, were occasioned entirely by the postponement, the defendant was entitled to the costs of the three days.

The Court was of opinion, that the Master had acted very properly in making the disallowance.

Rule refused.—*Walker v. Lane*, E. T. 1835. Excheq.

**JUDGMENT FOR NOT PRODUCING RECORD.—PLEA OF NUL TIEL RECORD.**

*A four day rule must be given to compel a party to produce a record, on a plea of nul tiel record.*

Motion for judgment for plaintiff, for the non-production of the record by the defendant, the plaintiff having served him with a notice requiring the production of the same. This it appeared was an action of trespass for false imprisonment, to which the defendant pleaded a justification, under a judgment upon which an issue of *nul tiel record* was taken by the plaintiff. The roll was produced by the plaintiff.

On the part of the defendant, it was contended that the plaintiff's proceedings were irregular.

*Per Curiam*.—The proper course was for the plaintiff to move for judgment on production of the record, and for that purpose, he should have given a four day rule.

Application was then made, on the part of the defendant, for the costs of appearing, but which

The Court refused; as it also did to pro-

nounce any judgment, considering the plaintiff's proceedings irregular.

*Begbie v. Grenville*, E. T. 1835. Excheq.

**PLEADING ISSUABLY.—DEMURRER.—REPLYING DOUBLE.—AGREEMENT.**

*A plaintiff cannot plead double, where a defendant is under terms to plead issuably.*

This was an application to set aside a judgment, which, it was alleged, had been improperly signed by the plaintiff in this case. The facts appeared to be these:—It was an action of trespass, and the declaration contained two counts, for two trespasses, in seizing the plaintiff's goods. The defendant, to the first of these counts, pleaded a justification, under a warrant of certain commissioners, to take the plaintiff's goods, as a distress for £800.; and to the second count, that he was justified for a sum of 40l. Upon these pleas the plaintiff took issue, and new assigned that the plaintiff complained of a taking of his goods for a further sum of 300l. The defendant specially demurred, and alleged, as one ground, duplicity.

On shewing cause, it was contended that the judgment had been properly signed, the defendant being under terms to plead issuably, and, therefore, was not entitled to demur specially to the replication.

The Court was of opinion that the plaintiff ought not to be allowed to reply double. That the special causes must be all struck out, except duplicity, and the demurrer come on for argument. The costs of this rule must be paid by the defendant, as he ought not, properly, to have demurred specially.

Rule absolute, on payment of costs.—*Glaborne v. Wyatt*, E. T. 1835. Excheq.

**EXAMINING WITNESSES ON INTERROGATORIES IN INDIA.—MANDAMUS.—JURISDICTION.**

*In granting a mandamus for the examination of witnesses in India, the place in which the cause of action arose is immaterial.*

In this case application was made to the Court, for a rule for a *mandamus* to examine a witness in India, the cause of action having arisen in England. The only difficulty in the case was, whether the power of the Court as to India, was more extended by 1 W. 4, c. 22, s. 1, than by the former statute of 13 Geo. 3, c. 63, which merely applied to actions the cause of which arose in India.

Rule granted, which was afterwards made absolute, without cause being shewn.—*Bain v. De Vetry*, E. T. 1835. Excheq.

**REMOVAL OF CAUSE FROM PALACE COURT.—PROCEDENDO.—TRIAL.—JUDGMENT.**

*After final judgment, a superior Court cannot remove, by habeas corpus, a cause from an inferior Court.*

In this case a rule had been obtained, calling on the plaintiff in this cause, and a person

named *Taylor*, the plaintiff in another action against the same defendant, in the Palace Court, to shew cause why a writ of *habeas corpus* should not issue, directed to the justices of the Palace Court, for the removal of the cause from that Court into this, and the defendant's body also, and why the bail should not have fourteen days' time to render the defendant. The cause of *Taylor v. Hutchison* had been removed once from the Palace Court to this Court, and was sent back again to the former Court.

Cause was shewn against this rule, when it was contended that it was contrary to the provisions of 21 Jac. 1, c. 23, s. 3, to remove the cause again into this Court, after having been once remanded to the inferior Court. In addition to this obstacle, there was another objection, which was, that the writ had not been delivered in pursuance of the 43 Eliz. c. 5, which directs that a writ of *habeas corpus*, issuing under circumstances similar to the present, must be delivered to the judges or officers of the Court to which the same is directed, before the jury have appeared, and one of them is sworn. It is clear, therefore, that this motion is too late, the cause being so far advanced, that nothing now remains but to enter up final judgment. Under these circumstances, it was submitted that the present rule must be discharged.

*Per Curiam.*—We have no power to remove a cause after judgment. That can only be done by writ of error. We can do nothing more than enforce execution under the act, except by *certiorari*, with a writ of error. With respect to the bail, they must be considered as the legal guardians of the defendant, and it is for them to look after their own prisoner. The rule, therefore, as regards *Taylor*, must be discharged with costs.

Rule discharged accordingly.—*Lawes v. Hutchison*, E. T. 1835. Excheq.

**SETTING ASIDE PROCEEDINGS FOR IRREGULARITY.—STAY OF PROCEEDINGS.—ATTORNEY'S BILL.—VEXATIOUS PROCEEDINGS.**

*When the taking out a summons does not operate as a stay of proceedings.*

*The costs of writs unnecessarily sued out, will not be allowed on taxation.*

In this case a rule *nisi* had been obtained, calling on the plaintiff to shew cause why the writs issued by him in this case against the defendant, should not be set aside, with subsequent proceedings thereon; or why the last writ should not be set aside, and why the plaintiff should not pay the costs. The facts of the case appeared to be these. The action was brought by the plaintiff to recover the amount of an attorney's bill, which was delivered in February, 1834. On the 27th March, the defendant took out a summons, requiring the plaintiff to shew cause why his bill should not be referred to be taxed, and why he should not deliver up all bills, &c. This summons was returnable on the 29th March, upon which day the plaintiff issued his writ, which was

returned *non est inventus*, when he immediately issued another writ. There were two grounds why the plaintiff should pay the costs; the first was, that the first writ was issued after the summons was returnable, which it was contended operated as a stay of proceedings, and that consequently the proceedings were irregular; and secondly, the return of *non est inventus* was improperly made to the first writ when the plaintiff was about, and might have been personally served.

On shewing cause against this rule, it was contended that although a summons to tax was taken out, no undertaking had been given by the defendant to pay; and the plaintiff's object in suing out a writ, was to save the operation of the Statute of Limitations.

*Per Curiam.*—We are of opinion that the summons in the case ought not to operate as a stay of proceedings.

It was further urged in support of the rule, that the second writ was clearly irregular, as a plaintiff could have no right whatever to issue a writ, and not proceed upon it, and thereby put a defendant to unnecessary and vexatious expenses.

*Per Curiam.*—As to the second writ, we think the plaintiff was justified in issuing it, the defendant not having signed a consent to pay. With respect to the costs of those unnecessary writs, the Master says he should disallow them to the plaintiff.

Next, with respect to the return to the first writ of *non est inventus*,—we are of opinion, upon looking at the words contained in the proviso of s. 10 of the 2 W. 4, c. 39, and the first part of that sect. that personal service is immaterial, and that a proper return was made to the writ. We think, therefore, that the plaintiff's proceedings were quite regular; and the present rule must be discharged with costs, as the rule was moved with costs.

Rule discharged with costs.—*Williams v. Roberts*, E. T. 1835. Excheq.

**KING'S BENCH SITTINGS,  
After Easter Term, 1835.**

**MIDDLESEX.**

Saturday . May 16 | Common Juries.

**LONDON.**

Monday	May 18	} Common Juries.
(the Adj. Day)		
Tuesday	May 19	
Wednesday	20	

**COMMON PLEAS SITTINGS,  
After Easter Term, 1835.**

**MIDDLESEX.**

Saturday . May 16 | Common Juries.

**LONDON.**

Monday	May 18	} Common Juries.
Tuesday	19	
(Adj. Day)		
Wednesday	May 20	

# EXCHEQUER OF PLEAS SITTINGS, After Easter Term, 1835.

## MIDDLESEX.

Saturday	May 16	{ Revenue and Com-
Monday	18	{ mon Juries.
Tuesday	19	{ Common Juries.

## LONDON.

Friday	May 15	{ Common Juries.
Wednesday	20	
(Adj. Day)		

# EXCHEQUER EQUITY SITTINGS, After Easter Term, 1835.

Saturday	May 16	{ Causes.—Mr. Baron
Monday	18	{ Alderson.
Wednesday	20	{ Petitions & Motions.
		{ Lord Abinger.

## CHANCERY SITTINGS,

After Easter and previous to Trinity Term, 1835,  
BEFORE THE LORDS COMMISSIONERS,  
At Lincoln's Inn.

Saturday	May 16	{ Lunatic Petitions, Bank-
Tuesday	26	
		{ rupt Petitions, Mo-
		{ tions by Date, and
		{ Appeals.

Trinity Term.

At Westminster.

Saturday	May 30	{ Motions by Date and
Monday	June 1	
		{ Re-hearings and Ap-
		{ peals.
Saturday	6	{ Motions by Date and
Monday	8	
		{ Re-hearings and Ap-
		{ peals.
Saturday	13	{ Motions by Date and
Monday	15	
		{ Re-hearings and Ap-
		{ peals.

BEFORE THE VICE CHANCELLOR.

Trinity Term.

At Westminster.

Wednesday	May 27	{ Motions.
Thursday	28	
Friday	29	{ No Sittings.
Saturday	30	
Monday	June 1	{ Pleas, Demurrers, Ex-
Tuesday	2	
Wednesday	3	{ ceptions, Causes,
Thursday	4	
Friday	5	{ and Further Direc-
Saturday	6	
Monday	8	{ tions.
Tuesday	9	
Wednesday	10	{ Motions.
Thursday	11	
Friday	12	{ Pleas, Demurrers, Ex-
Saturday	13	
Monday	15	{ ceptions, Causes, and
Tuesday	16	
Wednesday	17	{ Further Directions.
		{ Short Causes and ditto.
		{ Motions.

# ANSWERS TO QUERIES.

## Rate of Property and Conveyancing.

WILL.—POWER.—VOL. 9, PP. 399, 496.

The mother and daughter, I submit, take as tenants in common in fee. The words, "*all my property I die possessed of, both real and personal,*" I think, there is no doubt, carry the fee. See *Wiles v. Wilce*, 7 Bing. 664, in which case it was decided, that under the words "*all the rest of my worldly goods, bonds, notes, book debts, and ready money, and every thing else I die possessed of, I give to my son George,*" George took a fee in lands of the testator, not specifically devised by the will. At the present day, the Courts put a very liberal construction on doubtful passages in wills, and always endeavour to carry into effect the intention of the testator. SPER.

## Common Law.

LOGDINGS.—TRESPASS.—VOL. 9, P. 432.

I think *C.* has committed an unjustifiable trespass. It is stated in *Bac. Abr.* vol. 7, p. 680, (vide also *Bro. Tresp.* pl. 118; *Cro. Eliz.* 246,) that if *L. S.* have unlawfully got goods of *J. N.* into his house, and *J. N.* go there, *the door being open*, to take them away, an action of trespass does not lie. In the query put, the taking by *B.* was not unlawful in the sense above used; the detainer only can be so considered. It was the act of *C.* himself, (viz. the loan to *B.*) which was the occasion of the piano coming into *B.*'s possession. It was delivered to *B.* by a person whom *C.* had allowed, in some measure, to have the control over it. The judgment delivered by *Tindal, C. J.*, in *Anthony v. Haney*, 8 Bing. 186, seems conclusive against *C.*, if *B.* brings trespass against him for entering the dwelling-house. *C.*'s act had a tendency to a breach of the peace, and he seems liable to another course of proceeding, besides a civil action. G. BR.

## THE EDITOR'S LETTER BOX.

The letter of *B. B.*, on the suggested amendment of the Fine and Recovery Act, is acceptable.

The name of the solicitor should be communicated in the case stated, regarding the enrolment of Articles of Clerkship.

The suggestion of *T. T. T.* shall be attended to, though we think he should state briefly the advantages he expects from the alteration.

The Queries and Answers of *W. B.*; *S. H.*; *J. H. H.*; *W. W.*; *Y.*; *W. C. J.*; and *T. W.*, have been received.

The Second Part of the Quarterly Digest of all reported cases for the year 1835, will be published on the 23d instant.

The letter of "*A Constant Reader*" shall be attended to.

Numerous Queries and Answers are unavoidably deferred.

# The Legal Observer.

Vol. X.

SATURDAY, MAY 23, 1835.

No. CCLXX.

— "Quod magis ad nos  
Pertinet, et nescire malum est, agitamus.

HORAT.

## LETTERS OF A HEIDELBURG STUDENT.

### LETTER X.

#### THE LAWYERS IN THE HOUSE OF COMMONS.

My dear Friend,

My correspondence has been interrupted by a variety of circumstances, which I need not now detail. Let me rather endeavour to make up for past inattention by sending you a short account of what is doing here among the lawyers in Parliament.

The present session, if it is said, is to be short in its duration. As much is to be deferred as possible; and it is certain that we are now in the middle of May, and that nothing has yet been done. No novel measure has yet been proposed; and few of the old plans of reform have made any progress. The friends of Local Courts and a General Registry, do not seem to have sufficiently recovered their former defeats to renew the contest. One or two voices have mentioned the former measure, but the latter is now never heard of. The Attorney General has seen so little prospect of carrying through his Bill for the Abolition of Imprisonment for Debt in its present state, that he has referred it a second time to a Committee of the House of Commons; and this is almost the only thing that has been done. But the fight is now to begin: each party is summoning its strength, and pluming itself on its champions. Let us glance at some of these last,—which I do, of course, without the slightest reference to their politics. You must take my simple opinion of their merits, untinted by any bias of this nature; nay, I am at present in so ill a humour, that I may be a little harsh on all.

Of the professional merits of the lawyers in the House of Commons I know nothing:  
no. cclxx.

they are often in a converse ratio with their parliamentary abilities; so that you must not suppose that because a man fails in the House, he is not often the very best advocate you can employ: oftentimes, perhaps, his very failure may conduce to his greater practice at the Bar,—as clients sometimes fear that the business of the Advocate may be forsaken by the Parliamentary Leader. There are, however, some splendid instances of men shining alike in both fields, but these are rare.

There are, as usual, a good many lawyers in the present House,—some for the first time, others who are veterans in parliament. Dr. Lushington, for instance, a forcible, but heavy speaker, well acquainted with all the set phrases of oratory, but never creating or expanding the stock. His political feeling force him into extravagant declarations, which are generally delivered with a voluble monotony. While the House admits his right to address it, it wishes it was not so often exercised.

Sir Frederick Pollock, the late Attorney General, is of the same school. His only fault is, that he cannot be found fault with.—You will understand what I mean: all is elaborate correctness. Precise and logical, you see without difficulty afar off the point at which he intends to arrive by his own method.

Let me turn from them, and others of the same class, to Sir William Follett, who made a most successful *debut* this session. His is a steady flight: he does not soar too high. Collected in his own strength, he wields only those weapons of which he is completely the master. The language of passionate eloquence he lays aside: persuasive argument is his great *forte*. He labours no point: he proceeds step by step, naturally and easily. There is an earnest sincerity which appears to shine in all he says, that renders him a captivating speaker—in which his beautiful



voice assists him. I place him very high in the present House,

Mr. Pemberton, also, is made of the true stuff. He has much fire and spirit. He frequently rises into real eloquence, and stirs the hearts of his hearers. His phrases are well chosen; his language easy and appropriate; but his voice is weak, and his manner sometimes over-strained.

Serjeant Wilde does not altogether succeed in the House. The sentence which would win a jury, is here unapplauded. It might gain a verdict, but it does not get a cheer. There is, perhaps, something too vehement, too overbearing in his manner. A jury, like a woman—

————— “born to be controll’d,  
Stoops to the forward and the bold.”

Not so the House of Commons. A manly modesty is the “young man’s best companion” at first. When he has once made way in it, he may, I dare say, treat it as he pleases; but this will not do at first. This, I think, is the reason why Serjeant Wilde, a ready, fluent, forcible, nay at times an eloquent speaker, has never succeeded, and probably never will succeed, in the House of Commons.

There are two other serjeants in the House, both for the first time, and each has only spoken, I think, but once. The one may be said to have succeeded, the other to have failed; but as so little has been seen of them, it would be unfair to name them, or to judge of the future by the past. The one delivered a blunt, unpretending, straight-forward speech, and carried the house quite along with him; the other made a schoolboy piece of declamation, which fell dead and flat even on his own party.

I do not mention the Attorney-General (Sir John Campbell), as I have described him in a former letter; and I am sure that I now omit some one I ought to tell you about.

There are some promising young barristers in the house. Mr. Roebuck I consider a very able speaker. Mr. Donald Maclean has a showy fluency, and Mr. Praed is an able debater. This is all I can recollect at present. Love to all the brethren. Farewell. \* \* \*

## DEFECT IN THE BANKRUPT LAWS.

### SUPERSEDING A FIAT.

A case has recently fallen under my observation, in which the present practice of the Court of Review appears to be defective.

The circumstances are as follows:—

Some weeks ago a fiat in bankruptcy was issued against a gentleman in the country, and immediately afterwards one of the principal creditors on the estate, having first had the property fairly valued, offered a composition, which was agreed to by the whole of the creditors. Application was shortly afterwards made to the Court, upon the petition of the petitioning creditor, with the consent of the bankrupt, for an order for a supersedeas, which was refused until after the first public meeting under the fiat had been held. That meeting was in due course held *pro forma* accordingly, and in consequence of the creditors having agreed to the composition offered, no debts were proved. Another application was then made to the Court, when the prayer of the petition was refused *until after the second meeting had been held*, and in consequence of such decision the bankrupt has been prevented carrying on his business.

This appears fraught with injustice both to the bankrupt and his creditors; to the former, because it is difficult to conceive any reasonable objection there could be for depriving the bankrupt of so much valuable time in his business, since the approval of the creditors testified their concurrence of his transactions having been honest; and secondly, on account of the great expense attending the delay, occasioned by the commissioners’ fees, &c. for the second meeting.

And it may here be observed, that the solicitors to the fiat exerted themselves praiseworthily in order to obtain the deed of composition executed by the creditors, and to avoid the great sacrifice of property and time which would necessarily have resulted had the fiat been proceeded in.

When an insolvent causes his estate to be valued, and offers a composition to the full amount of the valuation; and the creditors being satisfied of his good intentions, accede thereto, what earthly objection can be raised to granting an order for a supersedeas? The present practice of the Court calls strongly for an alteration; and when so many changes, mis-called reforms, of the law, are continually springing up, it seems strange that no reform is thought of where it is wanted: and the decision of the Court in the above case is obviously at variance with every principle of equity. Had an order agreeably to the application of the petitioning creditor (who is alone positively interested in keeping the fiat in existence) been granted, the insolvent might have renewed his business without the unpleasantness of his misfortunes having been brought before the public.

J. W. D.

## THE PROPERTY LAWYER.

No. XLIV.

## SPECIFIC PERFORMANCE.

The following case decides, that the Court of Bankruptcy has jurisdiction to compel the specific performance of a contract for the purchase of lands.

This was the petition of the assignee of the bankrupt, and of the two executors of a mortgagee for a term of years granted by the bankrupt, praying for the specific performance of a contract by the purchaser of the mortgaged property, under the following circumstances: The bankrupt being seised in fee of a piece of land on Sandbach Heath, in the county of Chester, by indenture dated the 3d of February, 1825, demised this property to Samuel Beech, for one thousand years, by way of mortgage, for securing the sum of 400*l.* and interest at 4*l.* 10*s.* per cent. Samuel Beech, the mortgagee, died on the 18th of December, 1828, leaving the two petitioners, George Beech and John Allcock, his executors. On the 22nd of February, 1833, a fiat issued against William Barrington. The usual account was taken by the commissioners, of the mortgage debt and interest, under the general order; when it was found that 490*l.* was due from the bankrupt for principal and interest up to the date of the fiat; and the commissioners made the usual order for the sale of the property. In pursuance of this order, the property was put up to sale by auction on the 5th of June, 1833, when William Barrington, the bankrupt's son, attended the sale, and became the purchaser at the sum of 370*l.*, and gave his promissory note for 37*l.*, the amount of the deposit. On the 6th of June, an abstract of the title was delivered to the attorney of William Barrington, who shortly afterwards executed a lease of the property to one Ralph Arden, who was in the occupation of it previous to the bankruptcy, and continued so at the time of presenting this petition. The promissory note was never paid by William Barrington, nor any part of the purchase-money; and on the 5th of October last the petitioners called upon him to fulfil his contract, and offered to execute a proper conveyance to him, on payment of the purchase-money. The petition prayed that William Barrington might be ordered to pay the 370*l.*, with interest at four per cent. from the 1st of October, 1833, into the Bank of England, in the name of the Accountant General; and that the same might be applied in paying the costs of the sale, and afterwards in satisfaction as far as it would extend, of what was due to Beech and Allcock in respect of the mortgage; and that William Barrington might be ordered to pay the costs of this application. The objection on the part of the respondent to complete the purchase, was, that the bankrupt in the year 1829, had taken the benefit of the Insolvent Debtors' Act, and that the petitioning

creditor's debt under the present fiat had been then included in his schedule. It was contended, therefore, that the fiat was invalid; and that the bankrupt's assignee could not make a good title to the purchaser, as all the property of the bankrupt (which comprised the equity of redemption of the estate in question), was by law vested in the provisional assignee of the Insolvent Court, and the assignee under the bankruptcy could have no controul whatever over it.

*Erskine, C. J.*—Many objections have been raised by the counsel for the respondent, to this Court entertaining jurisdiction in the present case, by reason of the alleged difficulty that might arise in enforcing our order against some other party to be affected by it, and our want of proper officers to investigate questions of title. There is no ground, however, for such objections on the present occasion; and when any case hereafter may arise, which involves such difficulties, it will be then time enough for us to consider, whether we will take the burthen of deciding the case on ourselves, or send it to another tribunal, where greater facilities may exist. With respect to the alleged inconvenience, arising from a want of officers of the Court to inquire into questions of title, that inconvenience does not arise in this case, because we think that the title has been already accepted. It might have been contended, with some show of reason, that if the sale of this property had taken place merely by directions of the assignee, the Court would then have had no jurisdiction over the purchaser; but as the property was sold under the general order in bankruptcy, it is in effect under an order of the Court; and therefore the purchaser is clearly brought within the jurisdiction. This is the distinction that has always been drawn, and is amply supported by *ex parte Gould*, 1 G. & J. 231. But the main question in this case is, has the respondent waived the objections to the title? For if he has not, it must be admitted that they would be tenable. It might, indeed, be difficult to prove, that the title was elsewhere than in the assignees under the bankruptcy; but the validity of the fiat is very questionable, and the equity of redemption seems to be unquestionably in the provisional assignee of the Insolvent Court. If it could be reasonably said, that nothing but a shadow has been bought by the respondent, then indeed a very serious question might be raised,—whether, notwithstanding the waiver, we ought to order a specific performance of the contract. But it is clear that some estate or property has been sold; and the question is, how much? for it must be remembered, that this is a sale, not by the assignees alone, but conjointly with the mortgagee, whose title admits of no dispute. The question of waiver, however, is not one of law, but of fact, depending on the special circumstances of the case. The mere taking possession of the property sold, undoubtedly, cannot of itself be construed as a waiver of objections to the title, but operates only as evidence of an intention to waive them. Looking, however, at all the

facts of this case, it is impossible to doubt, that when Barrington the younger executed the lease to Mr. Arden, he did so, meaning to adopt the contract, and waive the objections to the title; all of which he must have well known from the very commencement of the transaction. It is said, that the purchaser never took possession of the premises; but is not the possession of the tenant the possession of the landlord? I cannot help suspecting, that the objections insisted upon, have not been taken *bonâ fide*, but that they arise from circumstances studiously concealed from our view, which have rendered the purchaser anxious to get rid of the contract altogether. I am of opinion, under all the circumstances, that the purchaser has waived the objections to the title, and that the prayer of this petition must be granted.

Mr. Justice Rose said, that there would be no difficulty in referring a title to the registrars, who were experienced barristers; or if not to them, to one of the Judges of the Court. *Ex parte Sidebotham, in re Barrington*, 3 Dea. & Ch. 818.

#### NOTICES OF NEW BOOKS.

*Parochial Settlements an Obstruction to Poor Law Reform.* By John Meadows White, Esq. London: Fellowes.

THIS is an able pamphlet, by a gentleman peculiarly well acquainted with the subject to which it relates. He observes that—

“During the long and laborious discussions on the Poor-Law Amendment Act, the system of parochial settlements seems scarcely to have met with the consideration which its importance deserves. The Commissioners of Inquiry, it is true, in their very able Report, detailed the origin, and many of the evils produced by this system; but their inquiry was confined to its effect on the poor rate, and to suggestions for its alteration, with reference alone to the pecuniary burthens which its unequal operation imposed upon different parishes. Yet even these suggestions were not considered worthy of entire adoption. One of the worst kind of settlements, that by apprenticeship, was retained, although the House of Commons had passed a clause for its abolition, and although its evils, and the fraud to which it led, had been so strongly stated by the commissioners. Parochial settlements, however, not only form one of the greatest obstructions to poor-law reform, but are mixed up with, if they do not directly tend to, results of a still more extensive nature. Originally, birth, or dwelling for a certain period in a place, seem to have been considered the grounds for declaring a man settled there. But the 43d Elizabeth, which established a permanent fund for the relief of the poor, had the effect of conferring parochial rights of no little importance on the class for whom that fund was provided. Before that statute, the object of the legislature was to restrain paupers from begging beyond certain limits. And so early

as 12 Rich. II. c. 7, (1386)—the first act cited by the Commissioners,—labourers were restrained from going beyond the hundred, rape, wapentake, city, or borough, where they were dwelling, without a testimonial of justices shewing reasonable cause for their going; and impotent persons were to remain in the towns where they were dwelling when the act was passed; or if the inhabitants were unwilling or unable to support them, to withdraw to other towns within the hundred, rape, or wapentake, or the towns where they were born, and there abide during their lives. This was, in effect, a district settlement; but subsequent statutes in the reigns of Henry VII. and Henry VIII. restrained beggars to their place of birth, or where they last abode for three years.

“Originally, therefore, settlements were restrictions on the liberty of those to whom these statutes were intended to apply, and those who transgressed the limits within which they were confined, were punished like runaway slaves,—a name given them in the statute 1 E. VI. c. 3.

“After the 43d Elizabeth, with a view to check the poor from flocking to the parishes which, in compliance with the provisions of the act, provided the best stock, powers were given to justices, on the complaint of parochial officers, to remove paupers under certain circumstances, to the places where they were last legally settled as natives, householders, sojourners, apprentices, or servants, for forty days.

“This power of removal (which the Commissioners observe it was the object of subsequent statutes to limit, until the 35 Geo. III. c. 101, which prevents a person being removed until actually chargeable) was evidently intended as a protection to the funds, or poor-rates of the removing parish, and the battle thus begun between parishes and paupers has continued without intermission to the present day.”

After this statement of the law, Mr. White proceeds to make several remarks on its effect both on landlords and labourers, and to point out the sort of remedy afforded by the late statute:

“In the Poor-Law Amendment Act there is a power which would assist in reconciling the difficulties, and provide a remedy as far as the nature of the case will admit. This is to be found in the 33d clause, giving the power of making a district settlement. By this plan, a certain average of past expense for settled poor being ascertained and fixed, the amount is taken as the future invariable proportion of contribution of each parish to a common fund, the management of which is entrusted to guardians, chosen from the landlords and occupiers of the union. And the three following clauses carry this principle still further, by enabling such a union to have a common valuation and rate.

“This plan, as it is laid down in the Poor-Law Amendment Act, can only be adopted

voluntarily by the parishes of any union; and it is to be hoped that its adoption is not far distant. In Bristol, under the Local Act, it is already in force as between the several parishes of the city; though as between them and foreign parishes, the distinction of separate parochial settlements is kept up."

Our business is rather to notice amendments in the law which affect the administration of justice in our superior courts, than the policy of laws in general; but the following observations of Mr. White, on the subject of making the Poor Law burthens *national*, are worthy of the attention of those members of the profession who are engaged in advising on and conducting the legal part of parochial affairs.

"The statistics of pauperism, as affected by parochial settlements, and the unequal, and hence unjust, taxation which they impose on different parts of the country, will furnish ample support to the arguments of those, who say the state should bear this burthen. And they furnish no less strength to those who argue that the poor laws should be brought within their natural limits, and no longer be allowed to tax industry for the support of idleness; to call on the hard-working man to maintain those who do not work; or those who can find work for themselves, to impart its fruit to others who cannot find it; or those who give work to a fair number of labourers, to pay for labourers they do not want, and whom others, with occupations requiring them, will not employ, except at wages paid from the parish purse. At present, a man may say, "I am willing to work; you confine me to this spot, and therefore you must find work, or maintain me and mine without it." True policy would answer,—"If you cannot find it here, go and seek it elsewhere; if this parish is too small, go to the next; search through the kingdom; and if still work be wanting, facilities shall be given for finding it abroad." Government, to protect its subjects in the enjoyment of their earnings, must take care to secure for all the means of finding food by work, without intrenching on their neighbours; and all have a right to claim protection in seeking for these means at home, before they have recourse to another country. In the present state of the poor laws this is not done. Not only do they deny this right to the poor man, but upon those who are more favoured, or more fortunate in finding scope for industry, and in accumulating its fruits, they impose what amounts to an agrarian law; and that portion of the territory which is nearest the seat of government, is in a course of unjust division, whilst the colonies at a distance are either peopled with convicts, or lie waste for want of hands to till them. Let the poor rate be made a substitute for the private charity of those who cannot or will not give voluntary alms, but let it not remain a heavy clog on industry. And to effect this, begin, as an encouragement to industry, by giving it room for

free circulation at home, and the exorcism of pauperizing honest labourers, able to work, but unable to find it; willing to seek for it, but restricted from seeking; treated almost as criminals if they remain idle at home, and as vagabonds if they are found abroad; will cease.

"Meanwhile, it may be suggested, whether great good would not even now be effected by an extended adoption, under the direction of the commissioners, of the system already alluded to, of parishes giving certificates, acknowledging paupers to have settlements with them. By such means, labourers would have a wider range in seeking work, and the masters a better choice of workmen. Such a course would also lay the foundation of a further extension of the system, by giving labourers a right to claim this certificate. Settlements by residence in a district for a certain number of years might then be introduced with advantage, making a distinction between those who have resided under a certificate of settlement from another parish, and those who have not; and imposing on all a condition, that no recourse should have been had to the poor rate of any parish, during the prescribed term of residence. A prohibition against granting relief, except to paupers resident in the parish or union where the rate is raised and the relief given, would also be required; and this would be an important stage in reference to the final abolition of the law of settlement. There would then remain but few steps to a county or national rate for maintaining the poor;—a plan which, under an altered management, would be free from most of the objections now raised against it.

"One of the greatest difficulties of a national rate is the improvidence caused by a public fund, to which all may have recourse, without a sufficient check on the demand for its aid. This objection is one of detail, rather than of principle. If the principle be right, there would not be much difficulty in finding out a safe mode of application.—A maximum of demand; a minimum of assessment; an obligation to relieve, so as to protect the poor applicants; a proportion to be paid by the relieving districts or parishes, so as to keep up local interest and promote economy; a discouragement to rely on the rate, but a certain claim on it in cases of destitution, free from fraud, idleness, or improvidence; are points essential to be attended to, but mere postulates in good legislation."

*Cases illustrative of the Conflict between the Laws of England and Scotland with regard to Marriage, Divorce and Legitimacy; designed as a Supplement to an Essay upon the Law respecting Husband and Wife.* By Henry Prater, Esq., of the Middle Temple, Barrister. London: Saunders and Benning.

MR. PRATER published not long ago an Essay on the Law respecting Husband and

Wife, of which we gave a notice in our eighth volume, p. 36. The present collection of cases is designed as a supplement to that work, and the author states the following as the course he pursued in executing his task :

"I resorted to the Scotch treatises on the subject, and particularly to the valuable collection of cases published by Mr. Fergusson, one of the commissaries of the Consistorial Court of Edinburgh, in 1829. These reports I have abridged and divested of those technicalities which render them uninteresting to an English reader, and I have drawn from them a few conclusions, I trust not unfairly, which appear to me objections to the marriage law of Scotland.

"The Profession are indebted to Mr. Fergusson for another work entitled "Reports of some recent Decisions in Actions of Divorce," and published in 1823. From this source I have derived as much assistance as from the former.

"The English cases on the law of adulterine illegitimacy are collected by Mr. Le Marchant, in his "Report of the Proceedings on the Claim to the Barony of Gardner," and the Scotch cases on the law of legitimacy in general are pointed out by Mr. Bell, in his treatise on the "Principles of the Law of Scotland."

After a brief introduction, Mr. Prater proceeds to consider the Law of Marriage under the following heads :

The Marriage-law of Europe during the middle ages—The Civil Law—The Canon Law—The Law of England—The Law of Scotland—Cases illustrative of its inconveniences—The cause of them—The act of the Scotch Parliament in 1661—The opinions of Lord Hardwicke—of the Judges of the Consistory Court of Edinburgh—and of Lord Kames—The conflict between the Laws of England and Scotland with regard to Marriage—An assimilation of them proposed—If that be impracticable, a rule suggested for abolishing the conflict."

The Law of Divorce is then treated of as follows :

"The Law of Divorce in Scotland—In England—Assumption of jurisdiction by the Scotch to grant divorces from English Marriages—Arguments for and against it—Its consequences illustrated by several cases—Conflict between the Laws of England and Scotland—A Rule by which it would be abolished suggested—General assimilation of the Laws of England and Scotland on this subject proposed—Suggestion that recrimination ought not to be a bar to divorce in England—Suggestion that divorce ought not to be granted in Scotland for obstinate desertion."

And lastly, the author enters into an examination of the Law of Legitimacy.

"An assimilation of the Law of Legitimacy

in England and Scotland proposed—The difference in the Laws of England and Scotland with regard to adulterine illegitimacy—The mode in which the legitimacy of Children is affected by irregular marriages in Scotland—The mode in which it is affected by the different practice in England and Scotland with regard to the administration of divorces—The Consequences of the Scotch Law of Legitimation."

Mr. Prater, after going through the previous topics, says :

"The next subject for the reader's consideration would be the differences existing in the rights of property between husband and wife in England and Scotland. Of these none is more prominent than the English rule, which deprives a married woman after her husband's death, as well as during his life, of all interest in her own personal property. "I remember," says Lord Ellenborough, "a case some years ago, of a sailor who made his will in favour of a woman with whom he cohabited, and afterwards went to the West Indies, where he married a woman of considerable substance; and it was held, notwithstanding the hardship of the case, that the will swept away from the widow every shilling of the property." This was the necessary consequence of our law with regard to the wife's personal property, and could not have occurred, with reference to the same subject in Scotland, nor with respect to her real estate in England. Other differences, perhaps no less interesting to families or important to the public, might be presented by a careful comparison of the two systems : but we must return to the immediate object of this essay,—the assimilation of the laws of England and Scotland with regard to legitimacy, divorce, and marriage. With a view to this end, I have ventured to suggest the expediency of abolishing the law of legitimacy in Scotland; of remedying the cases of illegitimacy arising from the Scotch divorces of parties domiciled in England, as well as those of disputed legitimacy arising from irregular marriages in Scotland; of adopting the canon-law rule that a child shall be legitimate if born of a marriage, which, although void, was contracted *bond fide* by either parent; and of rendering the law with reference to adulterine bastardy uniform in the two countries. On the subject of divorce I have proposed that adultery shall be the sole ground of absolute divorce in Scotland as well as in England; that the procedure for obtaining an absolute divorce shall be the same in both kingdoms; that recrimination shall not be a bar to an English suit for absolute divorce; that when the wife is divorced for adultery, she shall forfeit whatever interest she has by settlement or otherwise in her husband's property; that if she have property of her own settled on herself, the settlement shall be referred to the Lord Chancellor to be remodelled; that if the husband be divorced for his adultery, he shall forfeit his interest in the real and personal property of his wife; and that after divorce, the wife shall not be allow-

ed to intermarry with the adulterer, nor the husband with the adulteress. With regard to marriage, I have taken the liberty of recommending the abolition of irregular marriages in Scotland; a revision of the law relative to the prohibited degrees; a reconsideration of the English marriage-act, and an extension of it to Ireland and the colonies; a settlement of the doubts respecting the marriages of the Quakers; the removal of the anomalies respecting the marriages of the Jews; and a general provision for the marriages of Dissenters. These are some of the points to which I have solicited the attention of the profession in England and Scotland. If the laws of the two kingdoms be susceptible of assimilation, consolidation and amendment, the attempt to amend, consolidate and assimilate them, cannot be made without previous investigation and discussion. To indicate the sources of my own information and prepare, in some measure, materials for the use of others, more able than myself, have been the principal objects of this inquiry; and its purpose will be answered, if it induces the Scotch in particular to turn their attention to this department of their jurisprudence."

The pamphlet is ably written, and the details of the subject judiciously and carefully considered. We particularly recommend the author's suggestions to the attention of those who are engaged in proposing or investigating any alterations relating to the laws in question.

## SELECTIONS FROM CORRESPONDENCE.

No. XCIX.

### DISTRIBUTION OF INTESTATE'S EFFECTS.

SIR,

If G. G. (vol. ix. p. 506,) had made further extracts, he would have perceived that the apparently contradictory rules was a mere clerical error. The extract made by him was, "But though there be issue of brothers or sisters, yet if they do not claim by representation, but in their own right, the grandfather shall be preferred, he being nearer in degree." He ought to have continued, and extracted, "for, as the grandfather is nearer than the uncle, he therefore shall exclude him." Again, a brother's child is in the same degree as the uncle; the grandfather must, for the same reason, exclude him. Again, if G. G. (instead of extracting the latter part of the succeeding title) had referred to the former part, he would have had his doubts removed, and must have perceived that the words "when claiming in their own right," ought to have been "when claiming by representation." The former part

of this title states, "If no grandfather, then great grandfather, uncles, nephews, and nieces, (or brothers' or sisters' children, claiming in their own right) shall take together, being in equal degree," thereby clearly showing that grandfathers exclude nephews and nieces, claiming in their own right. In fact, I cannot perceive the least doubt on the subject, the whole current of authorities being, that "if the nephews and nieces do not claim by representation, the grandfather must be preferred. The authorities will be found in my former article, vol. ix. p. 411. J.

To the Editor of the Legal Observer.

SIR EDWARD SUGDEN.

SIR,

I observe, from a paragraph in this day's Times, that Sir Edward Sugden is likely to resume practice as a chamber counsel, and I am glad of it. We do not like to see even an efficient inanimate machine standing idle; such a one, however, though it may rust from inaction, may be set in motion again, and restored at almost any time; but the human machine, unfortunately, loses its powers from age, and nothing can compensate for its time lost. I hope and trust Sir Edward Sugden will not delay a single hour, unnecessarily, in giving the community all the benefit of his great talents, which circumstances will permit him to give. He may constitute himself a tribunal of the highest value, to which parties will, no doubt, freely resort, to the great saving of time and money. I have not leisure to refer to the lectures of the late Professor Park; but, if I remember correctly, there may be found in them just appreciations of such domestic tribunals. And, if a record were kept of the points raised, and Sir Edward Sugden's solutions of them, that would form a most valuable addition to our store of legal knowledge.

12th May, 1835.

A. R.

[We understand that Sir E. Sugden has altogether declined resuming his practice, either in court or at chambers.—ED.]

### NEW ORDERS IN CHANCERY.—REFERENCE TO MASTER.

To the Editor of the Legal Observer.

SIR,

As, notwithstanding 15th and 17th of the new Orders of the Court of Chancery of 21st December, 1833, a considerable number of solicitors, or their clerks, are still in the practice of getting references to a Master in rotation, marked upon interlocutory orders and decrees, whilst other solicitors are of opinion that such practice is incorrect, it may be as well that, through the medium of your pages, the profession should be induced uniformly to adopt the proper practice.

The 15th Order directs (amongst other matters) that as to all bills filed or to be filed, whenever it shall be necessary to make any reference to any master, and no previous reference has been made in the cause, the name of the master in rotation shall be ascertained in manner thereafter mentioned, and every such reference shall be made to the said master in rotation.

The 17th Order prescribes the mode of ascertaining the master in rotation, for the purposes of the two preceding Orders, viz. getting the name of the master marked on a certificate of the bill filed; that certificate, after being shown to the master, to be filed in the Six Clerks' Office, and the name of the master to be entered in the Six Clerks' book.

These Orders plainly do away altogether with the old practice, and for good reasons, viz. saving the necessity of the name of the master in rotation being marked more than once in any cause, besides the advantage of enabling any one searching for information as to an old cause, to find at once to what master the cause and all proceedings in it were referred.

If any authority be thought necessary, where the Orders are so plain, I may mention that the late Mr. Jackson, amongst others, on conversing on the subject, expressed his opinion that by the 15th Order the old practice was put an end to.

The point seems material, as it is suggested that where the old practice is followed, a party to a cause who is out of the jurisdiction of the Court, or from any other reason, does not attend before the master, may subsequently set aside all previous proceedings in the master's office, or successfully treat them as entirely nugatory and void.

As some persons seem to suppose that the 15th Order is only directed to applications made under the act of 3rd and 4th William 4, if any of your readers should seriously be of that opinion, and that the old practice is still correct, perhaps some of them will favour the profession with their reasons for entertaining such opinions.

A. Z.

#### LAW OF INHERITANCE.—WILLS, &c.

I certainly was not aware of the fact, as stated by your correspondent, vol. ix. p. 518, that the custom of giving away property to strangers in preference to relatives, was so prevalent. Perhaps he will mention a case, in which the "immediate relatives of the affluent have been necessitated to seek parochial relief," from such a cause. His recommendation is, that some plan should be adopted, by which individuals might be obliged to leave some portion of their property to their relations. He should state some *specific plan*.

Does he wish the plan to extend to all relatives, no matter how remote, or only to certain near ones?

Does he mean to limit it to the next of kin, in which case it might only relieve one person;

or how far, and in what proportion, does he wish the bounty to be extended?

Does he wish to prevent persons alienating their property in their lifetime, for fear none should be left for the relatives at their death?

If such schemes as this were to be entertained, it would lead the generality of people to imagine, that law

\_\_\_\_\_ "was intended,  
For nothing else than to be mended."

SPEE.

## SUGGESTIONS FOR IMPROVING THE LAW.

No. VI.

To the Editor of the Legal Observer.

### REGISTRATION OF BILLS OF SALE.

Sir,

Knowing your readiness at all times to give publicity to any suggested improvement in the law, I shall feel much obliged by your devoting a space in your journal to the insertion of this.—

It happens too frequently, as you are aware that *bond fide* creditors are defeated of their just claims by virtue of "*Bills of Sale*," which turn out too often to be of a merely colourable description between the parties, and made solely with a view to defraud honest creditors of their just demands; to prevent which, I would suggest that some legislative enactment be made for bills of sales to be registered within four days after the execution thereof; and in default thereof the same to be deemed fraudulent and void against *bond fide* creditors; and for execution creditors to be entitled to recover back and receive the effects, or the money that the goods sold for from the assignee, in case of his withholding or disposing of goods.

The plan suggested is with a view that creditors may know whether the property and effects on their debtor's premises belong to the latter, or any one else; creditors generally considering that the property belong to their debtors, if on the premises, whereby the former reckon the same as some security for the satisfaction of their demands.

The legislature, by statute of 3 Geo. 4, cap. 39, endeavoured to prevent frauds on creditors; but that does not extend far enough, as creditors are more often defeated by *secret bills of sale* than *secret warrants of attorney*.

J. S.

**ATTORNEYS TO BE ADMITTED.—[Concluded from p. 38.]**

*Clerks' Names.*

*To whom articulated.*

Nance, William, Portsmouth, Hants.  
Neate, Rowland, 16, Thornton Street, Ken-  
sington.  
Newton, Morris, Cambridge Street, Edgeware  
Road.

Norris, John, 45, Great Ormond Street.  
Norton, William, 58, Great Queen Street,  
Lincoln's Inn Fields.  
Nuttall, John, Nottingham.  
Orlebar, John Charles, 31, Red Lion Square.

Orred, John, 63, Lincoln's Inn Fields.

Owen, Charles Spencer, 22, Wakefield Street,  
Regent Square.  
Owens, John, Newtown, Montgomery.

Parker, Edward, 3, Gray's Inn Square.  
Parkes, Thomas William, 17, Mabledon Place,  
Burton Crescent.  
Pinchard Thomas, 10, Edmund Place, Alders-  
gate Street.

Pinckard, John Thomas, 3, Pekin Place,  
Poplar.  
Pinckney, William Philip, East Sheen, Surrey,  
and Trinity College, Cambridge.  
Poole, James, St. Asaph, Flint.

Postlethwaite, John Pearson, Beckside, near  
Ulverston, Lancaster.  
Preston, Francis Wheatley, New Millman  
Street.  
Price, Arthur Munton, 7, Staple Inn.  
Rea, Robert Tomkins, St. Peter the Great,  
Worcester.  
Richards, William John, 27, King Street,  
Cheapside.  
Rising, Robert, the Younger, 22, Essex Street.  
Robertson, Charles, 42, Great James Street,  
Bedford Row.  
Robinson, Samuel, Fenchurch Street.

Robinson, Edward Brees, 13, Cooper's Row,  
Trinity Square.  
Rogers, John, 11, Dyer's Buildings.

Rogers, Edward, of Petersfield, County Hants.  
Intends to apply by Special Motion to  
Rooks, Samuel Nicholas, 17, Great Dovor  
Street, Surrey.  
Rudall, Simon, 5, Furnival's Inn.  
Russell, William, Cirencester, Gloucester.  
Rymer, William Henry, of No. 7, King's Row,  
Pentonville.  
Simmons, George Nicholls, 9, Gower Street.

Stanistreet, John Frederick, Liverpool.  
Stedman, John Ellis, 63, Russell Square.

Stephens, Edward, Llandaff, Glamorgan.

Daniel Howard, Portsea.  
William Graham, Abingdon; assigned to  
James Currie, Lincoln's Inn.  
Charles Isaacs, Mansell Street, Goodman's  
Fields; assigned to Charles Lewis, 6, Ber-  
nard Street, Russell Square.  
Robert Norris, Liverpool.  
Thomas Frederick Cole, Godalming, Surrey;  
assigned to Gills Clarke, Sadler's Hall.  
Zachry Hubbersty, London.  
George Walford, 8, Grafton Street, Bond  
Street; assigned to George Whittington,  
Devonshire Street, Queen Square; assigned  
to Thomas Fdye, 14, Clement's Inn, and by  
him reassigned to George Whittington.  
John Whitley, Liverpool; assigned to James  
Lowe, late of Liverpool, deceased; assigned  
to John North, the Younger, Liverpool.  
Alexander Dobie, 5, Palsgrave Place.

Thomas Yates, Welshpool; assigned to Samuel  
Evans, of Newtown aforesaid.  
Thomas Holden, Kingston upon Hull.  
William Parkes, 10, South Square, Gray's Inn.

Henry Parker Collett, Chancery Lane; as-  
signed to Archibald Low, Portsea, South-  
ampton.  
Lawrence Desborough, Size Lane.

Edward Hillier, Raymond Buildings.

Richard Humphreys, Rose Hill, St. Asaph;  
assigned to William Jones, St. Asaph.  
Isaac Dickinson, Ulverston aforesaid; assigned  
to John Woodburn, Preston.  
Matthew Brettingham Kingsbury, Bungay,  
Suffolk.  
Charles Smale, Bideford, Devon.  
John Dickens, late of Worcester; assigned to  
Charles Bedford, same place.  
Thomas Andrews Minchin, Gosport, South-  
ampton, deceased.  
William Foster, Norwich.  
William Berham Bishop, same place.

Richard Thomas, Fen Court, Fenchurch  
Street.  
Michael Smith Parnter, London Street, City.

Sir William Robert Sydney, 11, New Palace  
Yard.  
William Mitchell, Petersfield, County Hants.  
Notice 5th May, 1835.  
John Allwood, Bloomsbury Square; assigned  
to George Batham, Bedford Place.  
Benjamin Bodenham, of Kingston, Hereford.  
Joshua Russell, Lant Street, Borough.  
Christopher Rymer, Wolsingham, Durham.

William Paul, the Younger, Kenwyn, Corn-  
wall; assigned to George Simmons, the  
Younger, same place.  
Henry Byron, Liverpool.  
William Smith Stedman, Horsham, Sussex;  
assigned to Michael Clayton, 6, Lincoln's  
Inn, New Square.  
George Berkin Meakham Lish, Landaff.



*Clerks' Names.*

Stringfellow, Peter, Preston, Lancaster.

Taunton, John, Oxford.

Thomas, George Evan, 16, Furnival's Inn.

Thring, William Andrews, Shrewsbury, Salop.

Thurgood, William, 41, Bedford Row.

Thurlow, William Henry, 70, George Street, Portman Square.

Tilt, Charles Perceval, 13, Duke Street, Manchester Square.

Tottie, John William, Leeds.

Tripp, Stevens, Wilson Street, Gray's Inn Lane.

Venables, Rowland Jones, 1, Furnival's Inn.

Waite, Paul, Greenwich, Kent.

Walters, William, 14, Swinton Street, Gray's Inn Road.

Walton, Charles, East Pier, London Dock.

Webb, Frederick, of the Park Foy, Hereford.

Wells, Robert, Humber Bank House, Myton, Kingston upon Hull.

Welton, Richard Brown, 18, Lodge Road, Marylebone.

Wilkin, James, Spring Gardens.

Williams, John Pryce, Shrewsbury.

Wilson, Robert Henry H., 6, Tokenhouse Yard.

Wilson, Thomas Kirkman, 167, Albany Street, Regent's Park.

Winstanley, Henry, Paternoster Row.

Woodgate, Henry, 5, Palsgrave Place.

Woolbright, William, Liverpool, Lancaster.

Worthington, Edward, Plymouth Grove, Co. Lancaster.

Yates, Charles Francis, 114, Upper Stamford Street.

Yelloly, Samuel Tyssen, Norwich.

Young, James Cumming, Town of Falmouth, Cornwall.

*To whom attitled.*

Thomas Barton, Chorley; assigned to Thomas Howard, Preston.

Thomas Henry Taunton, Oxford, deceased; assigned to Charles Leake, Oxford.

William Whitter, Worthing; assigned to George Mounsey Gray, Staple Inn.

John Michael Blagg, Cheadle, Stafford; assigned to William Wybergh How, Shrewsbury.

Michael Lane, Braintree, Essex.

Robert Carr Forster, 28, John Street.

Matthias Thomas Hodding, New Sarum, Wilts.

Thomas William Tottie, Leeds.

Richard Stevens Tripp, late of Gray's Inn.

Thomas Frederick Maples, 6, Frederick's Place, Old Jewry.

Samuel Frederick Miller, Old Jewry.

Thomas Rogers Jones, Swansea, deceased; assigned to David Rowland, 4, White Lion Court, Cornhill; now a pupil to John Hodson, 4, Lincoln's Inn, Barrister at Law.

Richard Roy, Liverpool Street.

William Pateshall, late of Hereford, deceased; assigned to William Euclid Ball, late of Hereford, also deceased.

John England, Kingston aforesaid.

John Dickinson, St. Michael's Alley, Cornhill; assigned to Charles Arnott, Essex Court; and by him assigned to David Morice Johnston, New Broad Street.

William Leake, Devonshire Street, Portland Place; assigned to Edward Leigh Pemberton, Salisbury Square.

John William Watson, same place.

Robert Henry Wilson, Manchester; assigned to Christopher Willis, Tokenhouse Yard.

George Ashby Pritt, late of Liverpool, deceased; assigned to Castel William Clay, Liverpool.

Thomas Clarke, Sadler's Hall; assigned to William Faulkner, same place.

George Gill, late of Queen Square, deceased; assigned to Alexander Dobie, 6, Palsgrave Place.

John Smith, Berkley, Gloucester, deceased; assigned to Daniel Croome, Berkley aforesaid.

Joseph Ablett Jesse, of Manchester.

Edward Frowd, 33, Essex Street, Strand.

John Blake, Norwich.

Andrew Young, same place.

## COMMON PLEAS.

*Clerks' Names.*

Atkinson, Charles, the Younger, 10, King's Bench Walk.

Chapman, Edward, Harwich.

*To whom attitled.*

Robert Copeman, Aylsham, Norfolk.

Benjamin Chapman, late of same place, deceased.

## RE-ADMISSIONS IN THE KING'S BENCH.

Archer, William, 9, Symond's Inn.

Eaton, Thomas Berney, Furnival's Inn.

Mawson, William, now of Manchester, County of Lancaster, last of Trinity Term.

Priest, Miles, formerly of Norwich, now of Reading, Berkshire.

Wright, Thomas Skeeles, formerly 6, Bucklersbury, now of 47, Salisbury Square.

## SUPERIOR COURTS.

## Rolls Court.

## WILL.—CONFIRMATION.—HEIR-AT-LAW.

*Circumstances in which an heir at law is held to have been estopped by his own deed from taking an issue to dispute the validity of a will.*

The testator in the cause, Mr. Thomas Bainbrigg, by his will dated the 18th July 1818, devised the bulk of his property to his natural grand daughter, with remainder to her issue, and in default of such issue, then to the issue of the testator's natural daughter, the mother of the plaintiff; and in further default, to his own right heirs. He appointed three of the defendants, Mr. Blair, Mr. Wood, and Mr. Hawthorn, executors and trustees of his will. The testator was a person of eccentric habits, and the only object of his affections was the child of one of his servants, of which he was the reputed father. This child herself had an illegitimate child; who is the present plaintiff. The executors proved the will. Shortly after the testator's death (the 20th July 1818) Mr. Joseph Bainbrigg, his brother and heir at law, expressed a wish to purchase the family mansion in the city of Derby, which was devised to the plaintiff by the will. This led to a correspondence, in which Mr. Blair, the acting trustee and executor, informed Mr. Bainbrigg, among other things, that if he intended to dispute his brother's will it would be dangerous to purchase the house in question; that it would be necessary for him to prove that his brother had been insane. At this time Mr. Joseph Bainbrigg claimed to be a creditor of his brother's estate to the amount of 1600*l.* which he desired to be allowed him out of the purchase money. The trustees wishing to act with caution, a case was prepared (as it was contended by Mr. Joseph Bainbrigg's solicitor) and submitted to counsel, for the purpose of ascertaining whether the statute of limitations acted as a bar to the claim in question. Counsel gave it as his opinion that the statute of limitations did not act as a bar; and after some further correspondence Mr. Joseph Bainbrigg agreed to execute a deed of confirmation of the will, and another deed for the purchase of the house at Derby. The deed of confirmation stated that Mr. Joseph Bainbrigg, the testator's heir at law, was satisfied with the validity of the will, and released and confirmed to the trustees all the estates upon the trusts of the will. These deeds were executed in 1820 and 1821. Mr. Thomas Parker Bainbrigg, Mr. Joseph Bainbrigg's eldest son, on the 6th Feb. 1824, obtained from his father an assignment of all his interest under the contract for purchase of the house. On the 26th of November 1829, Mr. Joseph Bainbrigg filed his bill in the Court of Exchequer, for the purpose of setting aside

the deed of confirmation, and his brother's will. This bill was subsequently dismissed for want of prosecution, and Mr. Blair, on behalf of the parties interested in the estates, filed his bill for carrying the trusts of the will into execution. In June 1831, Mr. Thomas Parker Bainbrigg, disputing the trustee's title to the property which he had purchased, filed his bill for a discovery, and for the purpose of having the trustees restrained from setting up his father's deed of confirmation as a defence to any action which he might bring. In July 1831, the plaintiff having previously come of age, and having married, filed her bill against the executors, trustees, and some of the legatees under the will, and also the heir at law. In July 1833, a decree was made in Mr. Thomas Parker Bainbrigg's suit, decreeing a specific performance of the contract for the house. The plaintiff's bill in this cause came before the late Master of the Rolls, who ordered it to stand over, and gave the plaintiff liberty to file a supplemental bill, which with the original one was now before the Court.

Mr. Tinney and Mr. Piggott, for the plaintiff. The heir at law could not dispute a deed which he had himself executed. The deed of confirmation stood, and the plaintiff was consequently entitled to the benefit of that deed, which was obtained fairly, and under circumstances which could make no case for setting it aside. The dealings of the parties subsequently to the execution of the deed, had been such as to put it out of the power, after this length of time, of the heir at law, to dispute a will which he had by his acts confirmed. Mr. Bickersteth, and Mr. Wright appeared for the defendant Mr. Blair, the acting executor and trustee of the will: Mr. Pemberton, Mr. Duckworth, and Mr. S. Russell, appeared for several of the legatees under the will.

Mr. Spence, for the defendant, the testator's heir-at-law submitted that the circumstances under which the deed in question was prepared and executed were such as to preclude a Court of Equity from enforcing it. The original bill, after simply stating the will, charged that the trustees had been guilty of gross neglect and breaches of trust—that shortly after the decease of the testator they contracted with Mr. Joseph Bainbrigg, for the sale of a dwelling house in Derby, devised to the plaintiff.—That Mr. Joseph Bainbrigg entered into possession, and that the trustees have never carried that contract into effect, or obtained any portion of the purchase money for the premises so sold. By these charges the plaintiff repudiated the two deeds which were executed in consideration of the claim of 1600*l.* being allowed the party. It was admitted that the heir-at-law was entitled to an issue in the original bill. The supplemental bill followed the course of the original bill, and now it is argued that the heir-at-law in the supplemental bill was not entitled to an issue. According to this reasoning the original bill ought to be considered as dismissed and a decree obtained, not on the original and supplemental bill, but on the supplemental bill alone. That was the first irregularity which

presented itself on these pleadings. Witnesses were examined in the original bill, and cross examined, which cross examination entirely removed the facts first sworn to, and shewed a clear case for an issue. No decree could be made in this suit against the heir-at law on the supplemental bill, and consequently the question reverted to, whether or not the heir at law was entitled to an issue on the original bill. Mr. Joseph Bainbrigge, from the relation in which he stood of creditor and client of Mr. Blair, was induced to execute the deed of release on the representations of that gentleman. It was not necessary to shew that such representations had been fraudulent; that there had been misrepresentations was sufficient to vitiate a deed executed on the basis of misrepresentation.

His Honor the Master of the Rolls. Several questions were raised in this case, some upon points of form, others upon the merits. The objections in point of form were, that whatever the case made by the plaintiff might be, she was not entitled to take any benefit under the release which had been executed, and that the Court could not look at such release, but was bound to direct an issue upon the will. The state of the pleadings was somewhat singular, but as they had been the subject of an order of the late Master of the Rolls, who gave the plaintiff leave to file a supplemental bill for the purpose of stating the deed of release, he should not now observe upon them. The supplemental bill had been filed, and he was bound to look at the pleadings in this case precisely as if the two bills had been incorporated in one. The case made by the bills was that the testator's heir at law had executed a deed to confirm the will. It was admitted that the will was well executed, and the heir-at-law tendered his assistance to give effect to its provisions; but it was now contended that in such a case the Court had no jurisdiction; and the argument in behalf of the heir-at-law was founded upon the supposition that a Court did not establish a deed, though it established a will. This argument assumed that the party had no title under the will, whereas the deed of confirmation was an instrument by which the heir at law released only—not conveyed—his title to the estates in question. It was further contended, that the heir at law was of right entitled to an issue, and he could not now waive that privilege. The ordinary rules of a Court of Equity gave this privilege to an heir-at-law; but what was the purport of the deed of confirmation? It was an instrument to estop the heir-at-law from obtaining the ordinary equity of the Court by way of an issue, by a deed which they contended was void in equity but not at law. If the instrument were void, it was still obvious that the heir-at-law could not make any defence for he had taken no steps to set it aside. It was then contended, that the agreement ought to be considered as an agreement to be performed; and that though there might not be sufficient evidence to induce the Court to set it aside, yet there was sufficient evidence to induce the Court to refuse a specific

performance of its provisions. It would now be necessary to consider how far the deed had been treated as an agreement, what the result of evidence was as to the conduct of the parties under the agreement, and lastly, the circumstances under which the agreement was not attempted to be impeached. The instrument was undoubtedly an absolute release. His Honor then went through the various dealings of the parties respecting the purchase of the house in Derby, part of the property devisable under the testator's will, for the purpose of shewing that the heir-at-law had confirmed such will by his dealings, and then referred to the various suits that had been instituted by the different parties; and under all the circumstances of the case he apprehended no doubt could be entertained that the heir at law had estopped himself from disputing the testator's will. The plaintiffs had a clear right to have the will established, as the heir-at-law had effectually relinquished that right which the rules of a Court of Equity gave him, viz. of trying the validity of the will by an issue.—*Bainbrigge v. Blair and others*, at the Rolls, Feb. 13, 14, and 17, 1835.

#### King's Bench Practice Court.

ATTACHMENT FOR NON-PAYMENT OF COSTS  
PURSUANT TO THE MASTER'S ALLOCATUR.  
—UNDERTAKING OF CLIENT ON TAXATION.

*It is indispensable that in an order to tax an attorney's bill, the undertaking to pay what should be found due should be introduced.*

A rule nisi for an attachment had been obtained in this case for the non-payment of costs, pursuant to the Master's allocatur.

On shewing cause, it was contended, that as the Judge's order which directed the taxation, contained no undertaking to pay that which the Master on taxation should find to be due, the supposed offending party had in fact been guilty of no negligence whatever in not paying that sum.

In support of the rule, it was submitted, that although that undertaking was not introduced in the order, such an undertaking was entered in the book at the Judge's chambers by the party who obtained it.

The Court was of opinion that the Judge's order ought to have contained such an undertaking, and upon that ground discharged the rule.

Rule discharged.—*Harrison v. Ward*, E. T. 1835. K. B. P. C.

JUDGMENT FOR WANT OF A REJOINDER.—  
JUDGMENT OF NON-PROS.—DEMAND OF  
REJOINDER.—SHORT NOTICE OF TRIAL.—  
REJOINING GRATIS.

*Being under terms to rejoin gratis, does not remove the necessity of a demand of rejoinder previous to signing judgment of non-pros.*

In this case, a rule nisi had been obtained for setting aside the judgment signed in this

case, for want of a rejoinder, upon the ground of no rejoinder having been demanded.

On shewing cause, it was contended, that the defendant being under terms to take short notice of trial, and rejoin *gratis*, the necessity of demanding a rejoinder was consequently waived.

The Court thought, that notwithstanding the terms under which the defendant was, the plaintiff should have demanded a rejoinder previous to his signing judgment. The present rule must therefore be made absolute, but without costs.

Rule absolute, without costs.—*Seaton v. Shey*, E. T. 1835. K. B. P. C.

NEW TRIAL.—VERDICT OF JURY.—QUESTION OF FACT.

*Where the question in a cause is properly one for the jury's consideration, the Court will not disturb their finding.*

This was an application for a new trial. It appeared that the cause had been tried before the sheriff, on a writ of trial obtained pursuant to a Judge's order, granted under the Law Amendment Act. The action was brought to recover a sum of 12l. 13s. 7d. for money alleged to have been lent and advanced by the plaintiff to the defendant. The defendant pleaded a set-off. On the part of the plaintiff, evidence was given of the money lent, as alleged in the declaration. The defendant then entered into his proof of the set-off pleaded. Several witnesses were called to show that board and lodging to a certain extent had been supplied by the defendant to the plaintiff. On cross-examination of the defendant's witnesses, however, it was elicited, that some work was done by the plaintiff for the defendant, during the period of the defendant's set-off having accrued. On the part of the plaintiff it was then contended before the jury, that the supposed set-off of the defendant had really no existence; the board and lodging furnished by the defendant being only in part remuneration for the work done, and services rendered by the plaintiff to the defendant.

The jury, after some consideration, returned a verdict in favour of the plaintiff; thus showing that they disbelieved the evidence in support of the set-off. Under these circumstances the application was made for a new trial.

*Williams*, J. thought, that the claim made by the defendant in his particular, was for the consideration of the jury. They were to say, whether the board and lodging enjoyed by the plaintiff were as a remuneration for his services, or as a matter for which he was to pay. The jury had found their verdict on the evidence, and by it they had declared that they were of opinion, that the defendant was entitled to the board and lodging supplied. Under these circumstances, the Court could not interfere with their verdict by directing a new trial. The rule now prayed could not therefore be granted. Rule refused.

*Frame v. Driver*, E. T. 1835. K. B. P. C.

JUDGMENT ON OLD WARRANT OF ATTORNEY.

—RELATION.—PLEADING RULES.

*The doctrine of relation of judgments to the commencement of the term, is now abolished; and therefore in signing judgments on old warrants of attorney, it is not now necessary to show the defendants have been alive within the term.*

This was an application to the Court for leave to sign judgment on an old warrant of attorney. An affidavit was produced, stating the defendant to be living on the 8th of April, the 15th being the first day of term. This, it was submitted, was sufficient, under the rules of H. T. 4 W. 4. The Court granted a rule.

Rule granted.—*Robinson v. Lester*, E. T. 1835. K. B. P. C.

SERVICE OF DECLARATION IN EJECTMENT.—HUSBAND AND WIFE.—SPECIAL SERVICE.

*Where explanation of the meaning of service of the declaration in ejectment may, under special circumstances, be dispensed with.*

Motion for judgment against the casual ejector. It appeared from the affidavit of the person endeavouring to serve the tenant, that on going into the premises in question, he saw the wife of the tenant in possession, to whom he delivered the declaration in ejectment. On receiving it she immediately left deponent. He was therefore unable to give her any explanation, or read over the notice.

The Court thought that a sufficient service, and therefore granted the rule.

Rule granted.—*Doe d. George v. Roe*, E. T. 1835. K. B. P. C.

RETURN OF WRIT.—SHERIFF.—ATTACHMENT.—JUDGE'S ORDER.

*In order to obtain an attachment against the sheriff for not returning a writ, a separate motion must be made for that purpose, besides that for making the Judge's order a rule of court.*

In this case it was sought to make a Judge's order, directing the return of a writ, a rule of court, and obtain an attachment for disobedience to it, on one motion. Several applications of this description, it was said, had been entertained in the Court of Exchequer.

*Littledale*, J. The practice has always been, in this Court, that two distinct motions should be made; and, as I find that no alteration has been made in it, such a course must in this case be adopted.

Rule accordingly.—*Frost v. Green*, E. T. 1835. K. B. P. C.

AWARD.—SUBMISSION.—RULE OF COURT.—ENLARGING TIME.

*Under certain circumstances the Court will enlarge the time for moving to set aside an award.*

This was an application, on the last day but one of the term, to set aside an award. It ap-

peared that the successful party had obtained possession of the submission, and refused to make it a rule of court, so that, as it was contended, one term might elapse after the award was made, and thereby bar the unsuccessful party's right to set it aside. It was submitted that, under these circumstances, the Court would enlarge the time for moving to set the award aside.

*Williams, J.*, directed this application to be made next term, and said that if a rule *nisi* was granted, it would be dated of this term.

Leave accordingly.—*Re Arbitration of Per-ring and Keymer, E. T. 1835. C. B. P. C.*

#### ATTACHMENT.—MASTER'S ALLOCATUR.—DEMAND OF COSTS.—PERSONAL DEMAND.

*Under certain circumstances a demand of the costs claimed under the master's allocatur may be dispensed with in obtaining an attachment.*

In this case a rule *nisi* had been obtained for an attachment for non-payment of costs pursuant to the master's *allocatur*. The facts of the case appeared to be these:—The defendant had himself attended the taxation, and a copy of the rule, with the *allocatur* endorsed, was afterwards sent to his house. An attempt was shortly afterwards made to serve him, when the original rule, and *allocatur* endorsed thereon, was shown him; but before it was possible for the party to make any demand, the defendant's conduct became very violent, and he knocked down the person endeavouring to serve him. It was therefore impossible for him to make a demand, he being obliged to make his escape, in order to save himself from further violence.

On showing cause against this rule, it was contended that the conduct of the defendant was such as to waive the necessity of making a demand of costs.

The Court was of opinion, that this was a case to which the rule of requiring a demand did not apply; and that, under the circumstances, a demand of costs might be dispensed with. The present rule must be discharged, with costs.

Rule discharged, with costs.—*Wenham v. Downes, E. T. 1835. K. B. P. C.*

#### Exchequer of Pleas.

#### ARBITRATION.—AWARD.—ATTACHMENT.—ACTION.—ORDER TO PAY MONEY.

*An award which will authorize the bringing of an action will not necessarily entitle the party in whose favour it is made to obtain an attachment for its non-performance.*

This was a cause which had been referred, with all matters in difference, to two arbitrators, who, after hearing the evidence on both sides, published their award, directing a verdict to be entered in favour of the defendant, for 17*l*. Their award contained no order on the plaintiff to pay that sum, but merely stated that that sum was due from the plaintiff to the defendant.

Application was now made for an attachment against the plaintiff, for his not paying money, pursuant to an award and the master's *allocatur*, upon the usual affidavit, stating the service, and a demand of the money to have been made.

Cause was shown in the first instance, when it was objected that the affidavit did not sufficiently show that the award had been served and left with the defendant, as was required, before a motion for an attachment could be entertained. It was, however, contended, that from the terms of the award, the plaintiff could not be compelled to pay either the amount of the damages or the costs; for it merely stated, that the arbitrators found 17*l*. to be due from the plaintiff to the defendant, but did not direct that sum to be paid by the former to the latter, and then went on to state that the arbitrators further ordered and adjudged, that the costs and charges of the reference, and incidental expenses thereto, shall be paid by the plaintiff at the time of the delivery of the award. It would be seen, therefore, that the award was worded in so ambiguous a manner, that it was quite uncertain to whom the money was to be paid. It was clear, therefore, that although an action would lie against the plaintiff on the award, no attachment can issue.

*Per Curiam.* We are of opinion, that although an action would lie against the plaintiff, we cannot make this rule absolute for an attachment, as the award contains no order to pay.

Rule discharged, without costs.—*Scott and another, assignees, &c. v. Williams, E. T. 1835. Excheq.*

#### COMMON LAW SITTINGS,

*In and after Trinity Term, 1835.*

#### KING'S BENCH.

*In Term.*

MIDDLESEX.		LONDON.	
Thursday	May 28	Tuesday	June 16
Monday	June 1		
Monday	15		

*After Term.*

Thursday	June 18	Friday	June 19
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The Court will sit at eleven o'clock in Term, in Middlesex; at twelve, in London; and in both at half-past nine after Term.

Causes untried on the Lists for the 28th of May, and the 1st of June, will be taken on the 29th and 30th of May, and the 2d and 3d of June.

None but undefended Causes will be tried on the 15th and 16th of June.

**COMMON PLEAS.**

*In Term.*

MIDDLESEX.	LONDON.
Tuesday June 9	Wednesday June 3
For undefended Causes only.	Wednesday . . . 10

*After Term.*

Thursday June 18	Friday June 19
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The Court will sit at ten o'clock in the forenoon on each of the days in Term, except Tuesday the 9th June, on which day it will sit at three o'clock in the afternoon, and at half-past nine precisely on each of the days after Term.

The Causes in the List for each of the above Sitting Days in Term in London, if not disposed of on those days, will be tried by adjournment on the days following each of such Sitting Days.

**EXCHEQUER OF PLEAS.**

*Trinity Term, 1835.*

*In Term.*

MIDDLESEX.	LONDON.
1st Sit. Frid. June 5th.	1st Sit. Sat. May 30th.
2d Sit. Wed. June 10th.	2d Sit. Sat. June 13th.
N.B. The Court will sit in Middlesex, by Adjournment, on Saturday, June 6th.	N.B. The Court will sit in London, by Adjournment, on Tuesday, June 16th.
Thursday, June 11th.	

*After Term.*

MIDDLESEX.	LONDON.
Thursday, June 18th.	Friday, June 19th.

New Causes entered for the Sittings in Trinity Term will be tried in Term.

Short Remanets may be taken in Term by consent.

The Court will sit at half-past nine o'clock.

**NOTES OF THE WEEK.**

**HOUSE OF LORDS.**

*Bills for second Reading.*

<i>Title of the Bill.</i>	<i>Proposer.</i>
Residence of Clergy.	Lord Brougham.
Pluralities Prevention.	Lord Brougham.
Ecclesiastical Jurisdiction.	Lord Brougham.
Illegal Securities.	

**HOUSE OF COMMONS.**

*Bills to be brought in.*

Law of Tenure.	Attorney General.
Law of Escheat.	Attorney General.
Prisoners' Defence.	Mr. Ewart.

County Coroners.	Mr. Cripps.
Poor Law Amendment.	Mr. Trevor.
Registration of Births, &c.	Mr. Wilks.
Tithes Commutation.	Sir R. Peel, Bart.

*Second Reading.*

Law of Libel.	Mr. O'Connell.
Bankruptcy Funds.	Master of the Rolls.
Ecclesiastical Courts.	Sir F. Pollock.
Clergy Discipline.	Sir F. Pollock.
Dissenters' Marriages.	Sir R. Peel, Bart.
Infants' Property (Ireland).	
Contempts in Equity (Ireland).	

*In Committee.*

Copyholds Enfranchisement.	Attorney General.
Highways.	Mr. Lefevre.
Registration of Voters.	Lord J. Russell.

*Consideration of Reports.*

Execution of Wills.	Attorney General.
Law of Executors, &c.	Attorney General.

*Re-committed.*

Abolishing Imprisonment for Debt, &c.	Attorney General.
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*Third Reading.*

Oaths Abolition.

**EQUITY SITTINGS.**

At the Rolls, Motions will be heard on the 27th; Pleas, Causes, &c. on the 28th; and Petitions in the General Paper on the 29th instant.

In the Exchequer, Petitions and Motions will be heard on the 28th, and Causes on the 29th inst.

**ANSWERS TO QUERIES.**

*Law of Property and Conspawning.*

COVENANT.—BUILDINGS. VOL. 9, P. 496.

It has been held that a general covenant to repair, extends to all buildings erected by the lessee during the term, as well as to the buildings demised; and, therefore, where a lessee in a lease of three messuages, covenanted to pull down the houses, and rebuild three other houses, and that he would repair the houses so agreed to be built; and also, that he would repair the demised premises, and leave the said premises in repair; and he pulled down the three, and built four in their place, it was held, that though he was obliged to build only three houses, yet he was bound to deliver up all in repair, the last covenant being general, and not confined, as the former, to the houses agreed to be built. *Dowse v. Cole*, 2 Ventr. 125; S. C. nom. *Dowse v. Earle*, 3 Lev. 264. See also *Brown v. Blundell*, Skinn. 121.

W. H. S.

## COVENANT.—BUILDINGS. VOL. 9, P. 496.

A covenant in a lease to repair the premises, from the time of making the lease to the determination of the term, will include after-erected buildings; for though they have no actual, they have a potential being at the time of the lease, *Brown v. Blundell*, Skinn. 121. *Dowse v. Cale*, 2 Vent. 126; and such a covenant will include buildings erected by the tenant for the purposes of trade, if fixed to the freehold; but not where they merely rest on blocks or pattens. *Naylor v. Collinge*, 1 Taunt. 19; *Administratrix of Perry v. Brown*, 2 Stark. N. P. C. 403. ASPIRO.

## TRUSTEE.—RECEIPT STAMP. VOL. 9, P. 304.

It appears to me that the demand of the revenue was satisfied at the time "A Trustee" received the dividends, and signed his name in the Company's book, on behalf of the person for whom he acted. The claim of Government is liquidated by the contract; and whether the party interested in the dividends receives them himself, or obtains them through the intervention of his trustee, is, in my opinion, immaterial; inasmuch as the stock itself is virtually the property of that party, and does not belong to the trustee. He is merely the channel through which the payment in question is transmitted, and can only be looked upon in the light of an authorized agent. A person acting under a bank power, in subscribing his name in the bank books, must add "Attorney for A. B.," and I do not see any difference between an instrument of this description, and a deed or settlement appointing a trustee, and establishing his several functions. In both cases, the revenue is amply satisfied by the stamps which are impressed on all such documents in the first instance. I am inclined to think, therefore, that this transaction can only be considered as one payment; and that, as between the trustee and his party, a letter acknowledging the remittance, is quite sufficient for every purpose of evidence, and is no fraud upon the revenue. ASPIRO.

## EXECUTORY DEVISE.—DESCENT. VOL. 9, P. 383, 480.

T. O. is evidently wrong. I understand the case thus: B. and C. both die without issue, and intestate, and claims are now made by collateral and distinct branches of their respective families. If B. had died prior to the late act, I allow that no question could have arisen as to E.'s right; because although entitled under the limitation as heir to C., he would also have been the heir at law of B.; for B. and C. were brothers, and whoever was heir to the one, must have been also heir to the other. But since that statute, there may be instances wherein the heir of the one may not be heir to the other, as in the present case; for though E. claims as heir to C., it appears that he cannot claim as heir to B., that being done by another, viz. D., who, I take for granted, is an entire stranger in blood to E. That the late

statute regulates the descent of executory interests, is evident from the definition given by sect. 1 to the word "Land;" and then the 9th sect. lets in the half blood. I think, therefore, that on the death of C. in 1800, the executory interest descended on his brother and heir at law B.; and that B.'s dying in 1835, confers on D. a right to the estate as heir at law of the half blood to B., under the 9th sect. of the act, in preference to C.'s heir of the whole blood, independent of the act.

A. W. W.

## QUERIES.

## Law of Property and Conveyancing.

## ASSIGNMENT.—MORTGAGE.

A. mortgages leaseholds to B. and C., who are trustees, and advance the money out of the trust fund: afterwards B. and C. transfer the leaseholds and mortgage money to the said C. and one D., who pay off the mortgage out of their own private property. Is such an assignment good? Or must B. and C. assign to a trustee, and the latter re-assign to C. and D.?  
Y.

## STOCK.—WIFE.—TENANT FOR LIFE.

A. the wife of B. takes a vested interest in bank stock payable to her, her executors or administrators, upon the decease of C. It was bequeathed to her previous to her marriage. A. dies intestate and without issue, leaving B. her husband surviving, who exercises no act of ownership over the interest, and also dies intestate, without having administered to A., and leaving C. the tenant for life living. Who is entitled to the stock at the decease of C.?

AMBLER.

## Common Law.

## WIFE'S EFFECTS.—SEPARATION.

A wife voluntarily separates from her husband, on account of his ill-usage; lives on her own income, derived from interest of bequests to her, with reversion of principal to her children after her decease, and out of such income furnishes her residence. Has the husband power over her furniture at her decease? Can she will it away? or by what act of her's during her life can she appropriate it to the use of her children at her decease?

W. J. T.

## THE EDITOR'S LETTER BOX.

The Second Part of the Quarterly Digest of all reported Cases for the present Year, is now published. Price 2s.

The letters of "Adviser," and J. C., will receive early attention.

The Queries and Answers of Y. Z.; "Lector;" an Anonymous Correspondent; and "Spec"; have been received.

We thank "A Barrister" for his communication on the appointment of the Lords Commissioners of the Great Seal, which we shall probably make use of next week.

The letter on the "Usages of the Profession," shall be inserted.

# The Legal Observer.

Vol. X.

SATURDAY, MAY 30, 1835.

No. CCLXXI.

— "Quod magis ad nos  
Pertinet, et nescire malum est, agitamus.

HORAT.

## ON THE SEPARATION OF THE JUDICIAL FROM THE POLITICAL FUNCTIONS OF THE LORD CHANCELLOR.

WE have already stated our opinion on the important subject of the separation of the judicial from the political functions of the Lord Chancellor, and we shall now notice two Pamphlets by the same author,\* in which the appointment of a permanent Judge in the Court of Chancery is strongly advocated. They are in the form of letters to Mr. Cooper, the Chancery Barrister; and we shall first notice, for the amusement of our readers, those parts of them which relate to that gentleman.

The first letter, which has no small portion of professional gossip, ascribes the merit of the greater part of recent Chancery Reforms to Mr. Cooper, insinuates that he was consulted with respect to the present arrangement of putting the Seals in Commission, which was ordered according to his advice; compliments him on his friendship with Lord Brougham, to whom, however, the author of the pamphlet much prefers him; and in short, treats him throughout, as one of the most important persons in the country.

By the second letter, Mr. Cooper would seem to have quarrelled with the station thus given to him.

"You have treated," says Causidicus, "what was meant to convey an honourable mark of distinction, as an affront; you have publicly declared that you considered my praise as ridicule, for which, I solemnly protest, it was never meant:

and, what is still more, you have thrown a doubt upon the accuracy of all those statements that concern yourself. You protest in Westminster Hall and elsewhere, as I am informed, that you never had any communication with Lord Melbourne, or any other Member of the Cabinet, respecting the placing of the Great Seal in Commission; you disclaim any participation in the legal reforms of the last five years, and intimate that you never enjoyed the friendship of Lord Brougham; and you have even been at the pains of addressing notes to some Members of the Bench and Bar, in order to prevent them from crediting allegations, which, for some reasons best known to yourself, you appear to deem as almost amounting to libel."

Perhaps Mr. Cooper considered that "praise undeserved was satire in disguise;" perhaps he shrunk back from notoriety; perhaps, knowing nothing of his anonymous idolater, he objected to a fame thus dealt him in the dark; perhaps he knows him too well, and is careless of compliments from such a source; perhaps, for we are weary of conjectures, the whole is to be treated as a piece of mystification, and Mr. Cooper and Causidicus are secretly hand and glove:—but be any of these notions right or wrong, the author of the Second Letter declares, that no "causes of private displeasure or pique," shall prevent him addressing it as the first was directed, "when the general good is in view." Leaving Mr. Cooper and his apparently alighted admirer to compose their alleged differences, and beseeching the former in pity to relent, we proceed to advert to the contents of the letters themselves, which are really worth reading.

The author points out the great evils to the suitor of the want of a permanent Chief Judge in Equity; the amount of property involved in Chancery; the increase of business of late years; the increase of the

\* A Letter to Charles Purton Cooper, Esq. of Lincoln's Inn, Barrister at Law, on the appointment of a permanent Judge in the Court of Chancery, &c. by Causidicus. 1835.

A Second Letter to Charles Purton Cooper, &c. &c. by Causidicus, 1835.  
NO. CCLXXI.



duties of the Lord Chancellor; the inconsistency of appointing a politician to that office; and lastly, the great expense to which the suitor is often put, in consequence of the changes which take place in the custody of the Great Seal, by reason of political events.

"Besides, it is no small hardship that the suitors should be put to the enormous expense attending the rehearing of their cases. Those (I fear they are but few in number) who have not been drawn within the circle of the Chancery, are not perhaps aware that counsel expect to receive fresh fees upon the re-argument of all matters confided to their professional skill; and in most cases before the Chancellor the fees are, from the length and bulk of the papers, of large amount: the solicitors are of course entitled also to fresh fees of attendance. These last are however of trifling amount;—not so the former. The fees of counsel upon an appeal often amount to several hundred guineas; and it ought—if it were for this reason alone—to be a point of honour with us to remedy the evil which I am complaining of.—(I am sorry to say—for it does not redound to our credit—that, with some exceptions, a disposition has been shown to effect reforms that bear rather upon the solicitors than ourselves.\*)"—In the case of Lady Hewley's Charity, the fees of the relators' counsel, on the first hearing before Lord Brougham, must have amounted to from three to five hundred guineas, and those of the defendants' counsel, who were more numerous, were probably as much. The matter, as every body knows, was undecided by his Lordship, by reason of the argument not having been completed, and it was set down to be heard before Lord Lyndhurst:—when not only was it necessary to pay fresh fees to all the counsel who had been before concerned, but it was necessary to give leading briefs to new counsel, who were appointed in the place of Sir Edward Sugden and Sir Charles Pepys. But this is not all—the

case has come on before Lord Lyndhurst, and it was partially argued when the recent changes were announced; and unless the parties shall agree to do now what they declined to do before—take Lord Lyndhurst's judgment after he has given up the Great Seal—there must be a third argument, and consequently a third payment of fees to counsel. To persevere in a system which produces such consequences as these, is to sin against common justice and common sense; and, if I mistake not, will not be much longer endured."

The remedy for these evils is, according to the writer, to appoint a third Judge in the Court of Chancery, who, like the other Judges, shall be irremovable, except for misconduct upon an address of both Houses of Parliament, and to confine the Lord Chancellor to the exercise of his political functions, with some trifling exceptions. He then by name points to Sir Edward Sugden as the proper person to be appointed to the office of Chief Judge, and considers that Sir John Campbell will do well enough for the political Chancellor.

In the Second Letter, the writer advocates the putting the Seal in commission, and thinks it may safely and properly be left there for the present year. He deprecates the appointment of a Common Lawyer to any Equity Judgeship. He then traces, with considerable learning, the practice of putting the Seals in commission; and for this history we shall hope to find room in our next number: and lastly, he urges the remodelling of the judicial functions of the House of Peers.

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## ON THE LAW OF ARREST.

*To the Editor of the Legal Observer.*

Sir,

I HAVE read attentively, and derived much interest, from the various remarks which have been made, and the several suggestions which have been advanced, regarding Sir John Campbell's proposed bill for the Abolition of the Law of Arrest. Many of those opinions have certainly been urged with a degree of force which operated upon my mind as a complete conviction of the necessity of the measure in question; others too have been so ably made in reprobation of its expediency, that after a most diligent weighing of all the arguments in favor and against the law, I am yet quite unable to declare the preponderance of the balance. I should have rested satisfied, however, with merely reading and reflecting on the opinions and arguments of others upon this

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\* "Make it a rule that counsel should receive no fresh fees on a re-argument occasioned by a change in the custody of the Great Seal, and you may depend upon it we should hear a great deal more about the inexpediency of the principal judge in Chancery being removable. I, for one, think that Lord Brougham went much too far in diminishing the fair emoluments of the other branch of the profession. If it be not worth the while of respectable men to follow it, the country will, I fear, be overrun with the race of pettifoggers and knaves, with which it was infested in the last century."

most momentous subject, which in my mind alike affects the moral and commercial world, without venturing an opinion of my own, if your correspondent "M. I. N." had not observed, in the course of his judicious remarks, that "the individual freedom which every person in every government ought to enjoy, is of more inestimable value than that of commercial prosperity—limited in its benefits, as it is, to a few members of the community."

In endeavouring to refute, or in some degree to mitigate, this very unseasonable observation of your correspondent, I shall confine myself to three distinct heads or propositions—namely, the nature of the present existing state of society—the means whereby it receives that existence, or upon which it depends—and the way in which the legislature ought to interfere to preserve and maintain the welfare of the community, and the prosperity of its subsistence.

The present state of society differs from that which existed during the middle ages, in this respect, that a *merchant*, in these days, revels in luxury and splendour, which was totally unknown to a *prince* at that period. The moral character of society has had certainly a meliorating effect, by the gradual elevation of the lower ranks, which unjust systems of polity had long depressed. The condition of slavery is indeed perfectly consistent with the observance of moral obligations; yet reason and experience will justify the remark of Homer—that he who loses his liberty, loses half his virtue. Those who have acquired, or may hope to acquire, property of their own, are most likely to respect that of others; those whom law protects as a parent, are most willing to yield her a filial obedience; those who have much to gain by the good will of their fellow-citizens, are most interested in the preservation of an honorable character.

To come immediately to the subject-matter in question, I would ask, whether extravagance, far beyond the means of *legitimate* indulgence, is not the characteristic feature of the present day—whether there is not the same, if not a greater desire in the poor man, to tread upon the heels of the rich, as formerly existed—in other words, to assume a character which does not belong to him, and which he is unable to maintain? Surely no one will answer me in the negative: and what is the effect of this assumed character and conduct? Why, nothing more nor less than profligacy, debt, and a total disregard of all moral and social obligations.

In making these remarks, Sir, I beg to be understood as not casting the slightest reflection upon any one who has already arrived at or who may now be struggling to attain, an honorable position in society, from its humble ranks, by the exercise of his own individual talents; inasmuch as laudable ambition must at all times be recognized by the community, and will always, I am sure, meet with its due reward. The example, too, which such conduct evinces must neither be lost sight of nor disregarded.

I now come to the "means whereby society receives its existence, or upon which it depends, and the way in which the legislature ought to interfere to maintain its welfare." The wealth of this country lies exclusively in its commerce: to use the language of Adam Smith—"the annual labour of every nation is the fund which originally supplies it with all the necessaries and conveniences of life which it annually consumes, and which consist either in the immediate produce of that labour, or in what is purchased with that produce from other nations." As then labour—or what is tantamount to it, its product, commerce—forms the lungs or vital parts of the community, whatever and whenever circumstances arise which have a tendency to depress their free circulation, it is the bounden duty of the legislature to interpose such salutary expedients for the purpose of counteracting the effect of those circumstances, in order to give fresh vigour to the "original fund," as in its wisdom shall seem meet.

The freedom of the subject is in my opinion so intimately connected with his means of subsistence, that the one cannot be maintained without a due regard to the welfare of the other; and Liberty—a word of the most comprehensive sense—is as "mere sounding brass and a tinkling cymbal," if in contemplating the beauty of the superstructure, by a nice discernment in its architectural proportions and magnificence of its external appearance, the builder overlooks the stability of the foundation upon which he erects it.

Viewing this subject, then, in the light I do, and in all its bearings, I am very much disposed to think that the abolition of the Law of Arrest will be detrimental to, and that the introduction of the proposed scheme will in its operation rather injure, than improve, our commercial relations.

What our ancestors did by their Restriction Acts, the present Law of Arrest effects, by holding itself in *terrorem* over the heads of those who would otherwise plunge into the depths of extravagance past all redemption. A man of the most dissolute habits is anxious not to appear so to his fellow-men; and by removing this law you remove at the same time every check which either prudence or fear may dictate. The principle of Sir John Campbell's measure appears to me to be grounded on the presumption that every individual of the community possesses goods sufficient to satisfy the just claims of his creditors: if such was the case, it might then with much reason be said that goods are better sureties than the debtor's person.

As a concluding observation: we hear much of the hard heartedness of creditors; but the fact of the rascality of debtors is studiously suppressed by its advocates.

ASPIRO.

## REVIEW.

*A Popular and Practical Introduction to Law Studies.* By Samuel Warren, of the Inner Temple, Esq., F. R. S. London: Maxwell. 1835. pp. 552.

THIS is unquestionably the best and most comprehensive book now extant for the guidance of the legal student, in his arduous and difficult career, and more especially in reference to the Common Law. We cannot, indeed, say that we concur in all the opinions of Mr. Warren, or that we entirely approve of his method of treating every part of the subject; but on the whole, we are satisfied that he has produced a work, comprising not only all that is to be found in preceding publications, but abounding with original and striking observations, which cannot fail to make a lively impression on the student.

The following is a brief analysis of the scope of the volume:

1. On the choice of the legal profession.
2. Students—their characters, objects, pretensions, and prospects.
- 3, 4, and 5. On formation of a legal character: general conduct; general knowledge; mental discipline.
6. On the study of English history.
7. Different departments of the profession: Equity, Conveyancing, and Common Law.
8. How the Common Law pupil should commence his studies.
9. Special pleading: its history, character, and excellence examined and illustrated.
10. Course of reading, with reference to pleading, practice, evidence, real property, and commercial law.
11. Method and objects of law reading, with reference to apprehension, memory, judgment.
12. Practical suggestions for facilitating law studies.
13. Hints on the education of attorneys and solicitors.
14. Hints to young attorneys and solicitors for laying in a law library.
15. Mode of entering an Inn of Court, and keeping terms.

This ample outline is ably filled up by Mr. Warren, in all its various particulars. The composition displays great legal research, classical learning, and literary talent. It may be questionable, however, whether it is not occasionally, at least, somewhat too rich and attractive for the digestion of those who are confined to a mental diet, necessarily of a very solid and homely description. We must candidly add to the sincere expression of our admiration of his merits, that the author, (by the comprehensive nature of the plan of his work,) has been led into the discussion of several topics, which relate rather to a system of education in

general, than to the law in particular;—that many of the details of mental cultivation, which he has investigated, belong to other students, as well as those of the law; and that he has trodden the ground over which the student must have already passed, if his preliminary education has been of a liberal nature. These, however, if faults, are on the safe side, and the importance of the topics to which we refer, may well bear setting forth in various points of view. Too much, indeed, can hardly be said in the way of inciting the student to the acquisition of general knowledge, or pointing out clearly and minutely the course he should pursue. In all these respects Mr. Warren is full to overflowing, and often forcible and eloquent.

Practically considered, (by which test it is our duty to view every thing,) the question is, whether the law student, after being animated by the author's splendid descriptions of the importance and dignity of the Law, and incited by the embellishments of imagination, and the classical allusions with which the volume is replete, will sit down calmly and perseveringly to his ordinary pursuits? We doubt not, however, that Mr. Warren's book will render service to those who would be disgusted with the profession, unless it were associated with some of those pleasing and noble views which are presented to the reader, in almost every part of the volume. In other words, this is a book peculiarly adapted to the ingenious and aspiring student; it will delightfully harmonize with all that he wishes; and if to his genius, he add great and persevering industry, Mr. Warren's stirring descriptions may lead the aspirant to the highest distinctions in the law.

We shall take another opportunity of entering into the consideration of such of the principal subjects of the volume, as we deem of especial importance to the younger part of our readers; and for the present, we must be content to offer, as a specimen of the merits of the work, the following remarks on the Mental Qualifications of the Practical Lawyer:

“*A practical lawyer!* A character contemned by some and despaired of by others: the former being those ‘genteel vagabonds’ who, swallowed up in idleness, conceit, and dissipation, nevertheless affect to be law-students!—the latter, those who, diligent and persevering, yet destitute of judicious tuition, egregiously over-estimate the difficulties to be overcome. Need a word be uttered to assert the usefulness and dignity of legal studies? Against whom are they to be vindicated? What

number of men are they who presume to speak contemptuously of them! Who but those poor foxes that leer at grapes far out of their own reach—men frequently destitute both of talent and powers of application! We are not, however, wasting a word on the boobies that abuse what they have not first attempted to understand; but thinking, rather, of those who, lively and clever enough for lighter matters, do not carry weight of metal sufficient to make any serious impression on the study of the law. Healthy and bracing as is its pursuit, the intellect that engages in it must be one manly and vigorous. A frivolous and volatile mind is knocked up in a moment; and then, probably, creeps off to abuse the law as a 'low and debasing pursuit—cramping—paralysing to all the powers of the mind!' *Eheu!* As well might a child, with its little wooden axe, attempt to clear a North-American forest, in competition with the sturdy settler, felling away from day to day, from month to month, with stout arm and keen axe—as a mind, weak in constitution, or frail of purpose, undertake to wrestle with the stubborn difficulties of law. It is, indeed, a science well worthy of Lord Bacon's eulogium on mathematics:—  
 "Pure mathematics do remedy and cure many defects in the wit and faculties intellectual; for if the wit be dull, they sharpen it; if too wandering, they fix it; if too inherent in the sense, they abstract it."

"A mind habituated to legal investigation, is, necessarily, an eminently acute and logical one: for its faculties are constantly exercised, and sharpened by the severest exercise. It has, indeed, been said, that the tendency of legal studies is to warp, contract, and impoverish the mind: never was there advanced a charge so thoughtless and unwarrantable. 'Mr. Grenville,' said Burke, 'was bred to the law, which is, in my opinion, one of the first and noblest of human sciences; a science which does more to quicken and invigorate the understanding than all the other kinds of learning put together; but it is not apt, except in those who are happily born, to open and liberalise the mind, *exactly in the same proportion.*' It is this latter cautious and measured expression that has been hastily made the foundation of many vague but violent accusations against our profession. If, to be sure, legal pursuits alone engross a man's attention throughout life, he will become, of course,—however great,—a mere lawyer: and what say you of a mere metaphysician?—a mere mathematician?—a mere linguist?—a mere physician?—a mere politician?—a mere parson?—in short, a mere anything?—A mere lawyer! But if, also, a good—a great lawyer, is he not, at worst, as practically useful to his fellow-creatures, as the follower of any calling known among men? Does he not patiently and resolutely devote his best energies to their assistance in the most momentous, perplexing, and harassing concerns of life?

Trust us, however, if this 'mere' lawyer moves all his days like a horse in a mill, his round is a pretty extensive one; 'For my

part,' says Mr. Raithby, 'I protest I do not know any pursuit in life that requires such various powers: taste, imagination, eloquence.' Consider, for a moment, what a lawyer must know, and what he has to do, if supposed to be in but moderate practice. He must be, more or less, acquainted with the leading details of the mechanical arts and sciences, of trade, commerce, and manufactures; of the sister professions; even of the amusements and accomplishments of society—for in all of these, questions are incessantly arising which require the decision of a court of justice, for which purpose their most secret concerns must be laid bare before the eyes of counsel, who is expected to be quite *au fait* at them!—A thorough knowledge of constitutional history, also, and the many important topics subsidiary to it, can hardly be dispensed with. If he practises at the Bar, he superadds to all these, a keen insight into character, the power of extracting truth, detecting falsehood, and unravelling the most intricate tissues of sophistry. His mind is in a high state of health and discipline; he is capable of profound abstraction, of long and patient application, and, in short, has such perfect controul over his well-tempered faculties, that he can concentrate them upon any subject he chooses, passing rapidly from one to another of the most opposite character. Take a sample of his every-day employment. His 'opinion' is sought upon a case, which discloses numerous commercial, or other, relations, deranged by the sudden death, marriage, bankruptcy, or separation of one of the parties concerned. Mark the apparently inextricable confusion into which extensive interests, rights, and liabilities are precipitated—wheels within wheels—all parties at fault—all stating their case in different ways—cross accounts of many years to be mastered—probably large sums of money at stake. Is it nothing, now, to answer such a case as this, with rapidity and skill—to adjust these conflicting claims with a precision that often satisfies the most clamorous contendants, preventing, perhaps, a long and expensive course of litigation? See the comprehensive grasp of thought—the accurate analysis—the rapid generalisation—the perfect mastery over details—the almost simultaneous contemplation and balancing of numerous particulars—the extensive research—the decision—exhibited on such occasions by the well-trained legal intellect! This is no highly-wrought picture. All the qualities and accomplishments above mentioned will be found displayed, more or less, in the daily business of a well-employed chamber or court practitioner. What, again, is to be said of the large emoluments he derives from his honorable and responsible toils—the station he occupies, the influence he exerts, in society—the rank he attains both in the senate, and on the Bench?"

## THE LORDS COMMISSIONERS OF THE GREAT SEAL.

Sir,

It is with some degree of diffidence that I address the following lines to you, on the subject of the recent appointment of "the Lords Commissioners of the Great Seal;" but in the present day even a junior member of the legal profession is not, I trust, precluded from mootng a point which appears to him to be of great constitutional importance to the nation at large, and which relates to the *legality* of the present commission itself. I do not for one moment call in question the right of the Crown to appoint whomever it in its wisdom may see fit; but I do contend that if persons already holding high judicial situations, are appointed by the Crown as Lords Commissioners of the Great Seal, it is of vital importance to consider what the consequence of such an act will be. Let us then make an inquiry, first, into the circumstance of the Master of the Rolls being appointed one of such commissioners; he though holding his office of Master or Keeper of the Rolls by letters patent for life from the Crown, must nevertheless be obedient to the enactment contained in the statute 3 Geo. 2, c. 30, which says, that "no orders or decrees of his making shall be inrolled till signed by the Lord Chancellor, Lord Keeper, or Lords Commissioners of the Great Seal." Thus we see that he as Master of the Rolls, is inferior in power to the Lord Chancellor or Keeper; but the statute 1 Will. & Mary, c. 21, enacts "that the Lords Commissioners of the Great Seal of England for the time being, may use and exercise all and every the same and like offices, authority, &c. which the Lord Chancellor or Keeper ought to have, use, or execute;" in fact giving them concurrent and equivalent jurisdiction with the Chancellor or Keeper, (which latter person is rendered equipowerful with the Lord Chancellor by the stat. 5 Eliz. cap. 18, declaring the common law to be, and ever had been, that "the Keeper of the Great Seal of England for the time being, hath always had, used, and executed the same and like place, authority, &c., as if he were Lord Chancellor of England.") Thus he as commissioner, must sign his own orders and decrees, and becomes, though not superior, yet equal to the Lord Chancellor. Next let us look to the Vice Chancellor as commissioner; he is a judge of much more recent date than the Master of the Rolls; though appointed by letters patent under the *Great Seal of the United Kingdom*, the Vice Chancellor owes his origin to the stat. 53 G. 3, c. 24, (1813), but little more than twenty years ago, and his office is "to be an additional judge assistant to the Lord High Chancellor, Lord Keeper, or Lords Commissioners for the custody of the *Great Seal of the United Kingdom* for the time being," &c. "to hold such office during his good behaviour." Then we find it enacted, that "he shall have full power to hear and determine all causes, matters, and things, as the Lord Chancellor;

Lord Keeper, or Lords Commissioners for the custody of the Great Seal shall from time to time direct." Then follows a restriction similar to that relating to orders and decrees made by the Master of the Rolls, that such shall not be valid until signed by the Lord Chancellor, Keeper, or Commissioners. Thus the Vice Chancellor, the inferior judge as Commissioner, is made equal to the Lord Chancellor, and actually delegates to himself *his own* power as Vice Chancellor; for unless he is authorized by the Lords Commissioners to sit as Vice Chancellor, he sits illegally in such character, and all his acts as such are voidable. But, sir, by the 3rd section of the last-mentioned act, he is empowered to sit as *deputy* for the Chancellor, Keeper, or Commissioners, "whenever they shall respectively require him so to do," and I apprehend is by this clause invested with *all* the powers of *all* the commissioners, and is made equal to the Chancellor himself; what need then of having two commissioners sitting, or of impeding the business in the Court of the Master of the Rolls, when the Vice Chancellor *alone* can sit for *all*, even five hundred commissioners, were so many appointed? With respect to the Common Law Judge appointed Joint Commissioner with the Master of the Rolls and Vice Chancellor, we will not here allude to any inconvenience that may result from his appointment, but will proceed to bring before your readers the act 6 G. 4, c. 93, which affords us a view of the manner in which, and the persons who were appointed commissioners during the reign of George III., and since that period. From this list it appears, that "certain of the Justices of his Majesty's Courts of King's Bench and Common Pleas, and of the Barons of his Majesty's Court of Exchequer, and others associated with them, had been assigned, and power given to a certain number of them, in the absence of the Lord Chancellor or Lord Keeper for the time being, of *Great Britain*, to hear and examine all matters depending in the King's Chancery, and the same finally to determine."—"And whereas such commissions were founded upon ancient and continued usage," and that certain doubts had arisen whether such commissioners had power to decide causes at the Rolls, and that the Chief Baron had, after his ceasing to be a puisne judge, still acted as commissioner, &c., proceeds to enact, that all such decisions at the Rolls by the said commissioners, in the absence of the Master of the Rolls, shall be as valid as if made by the Master of the Rolls.

Now, Sir, allow me to express my amazement at the style, as affixed in the Registrar's Office of the Lords Commissioners; they have actually assumed that they have power over *Ireland*, for they call themselves "Lords Commissioners for the Custody of the Great Seal of the United Kingdom of Great Britain and Ireland,"—I venture to assert, a *most unheard-of* proceeding; for I have explored

<sup>a</sup> As to this, see *Rex v. Bullock*, 1 Taunt. 71; and 3 L. O. 115. Ed.

the winding and devious tracks of numberless acts of parliament on this subject; and I believe from the time of *Magna Charta* to the present, never before was such assumption made, nor ever at any time warranted by circumstances; for the first mention that I can find in the statutes, of the Great Seal, is in 17 Ed. 1, c. 6, where we find the words, "*nos Seals d'Engleterre,*" and c. 7, "*nostre grant seal d'Iraund.*" The 25 Ed. 1, c. 1, mentions "*nostre seal,*" but does not add "*grant.*" The 28 Ed. 1, c. 1, has the words, "*le seal le Roi, les lettres le Roi, ovetes de soon grant seal;*" and in the 25 Ed. 3, c. 2, "*les grant ou prive sealt le Roi.*" In the 4 Hen. 7, c. 14, the words "*Broad Seal of Chancery*" occur, which seal is no doubt synonymous with the Great Seal; but not to trouble you or your readers at greater length, I will proceed to the 27 Hen. 8, c. 11, (which I believe is in full force at the present day), whereby the duties of the Clerks of the Signet are defined; and mention is there made of the *Great Seals of England, Ireland, Duchy of Lancaster, Counties Palatine, Principality of Wales.* In 1 W. & M., c. 21, s. 3, the words "*Broad Seal*" are used in the same paragraph as the *Great Seal.* In the 57th year of Geo. 3, acts were passed regulating the Exchequer in England, abolishing and regulating offices in Ireland, and also in Scotland, wherein we find mention made of the Privy Seal of Ireland, Keeper of the Great Seal of Scotland, Privy Seal for Scotland, and such like terms. The point to be considered seems then to me to be, how do the Acts of Union with Scotland and Ireland respectively, affect the question? The 5 Ann, c. 8, article 22, mentions "*Great Seal of the United Kingdom,*" "*Great Seal of Great Britain,*" and the article 24, expressly directs a "*Great Seal for the United Kingdom of Great Britain,*" different from either then in use in England or Scotland; a Great Seal of Scotland for grants within that kingdom, the Privy Seal of Scotland to remain as then used there. The 6 Ann, c. 7. s. 9, provides for the uses of the *Great Seal of Great Britain*, notwithstanding the demise of any king or queen; the 39-40 G. 3, c. 67, provides for a Great Seal of the United Kingdom of Great Britain and Ireland, but it sanctions also the use of the Great Seal of Great Britain, and the retention of the Great Seal of Ireland; though certainly the words, "*the Chancellor, the Keeper, or Commissioners of the Great Seal of the United Kingdom for the time being—shall direct a writ to be issued under the Great Seal of the United Kingdom to the Chancellor, the Keeper, or Commissioners of the Great Seal of Ireland for the time being,*" Sec. 2, which incorporates into this act an Irish act passed for the Union of the two Kingdoms of Great Britain and Ireland,—this clause may perhaps justify the Commissioners in using the style they have directed, though I doubt it. That there is a distinct *Great Seal of Ireland* for Chancery purposes, is quite clear; and that a Lord Keeper or Commissioner may be appointed there is equally so; see 4 & 5

W. 4, c. 78, s. 18, (1834). That there is also a Great Seal of *Great Britain*, the 3 & 4 W. 4, cc. 84 and 94, ss. 1 and 30, render equally clear: and the former act seems to bear out my statement, that the style assumed by the Commissioners is improper; for I find these words occur: "*The Lord Chancellor or the Lord Keeper, or Lords Commissioners for the Custody of the Great Seal of Great Britain.*"

As the Vice Chancellor prepared the style for the Commissioners, I apprehend the mistake arose from his referring to the 53 Geo. 3, c. 24, under which he holds his office, where I admit the words, "*Great Seal of the United Kingdom,*" are inserted, but in my humble opinion, most improperly; and abundant instances of recent acts can be brought forward to prove the *general* use of the words, "*Great Seal of Great Britain,*" and which, I contend, are the proper ones to be used by the present Commissioners. To select one from many, see 11 G. 4, and 1 W. 4, c. 60, (Sir Edward Sugden's Act), s. 28,—"*Commissioners of the Great Seal of Great Britain,*" "*Commissioners of the Great Seal of Ireland.*" In conclusion, allow me add, that by the 2 & 3 W. 4, c. 111, providing for the retirement of the Chancellor, no provision whatever is made for the Lords Commissioners, though there is for the "*Lord Keeper of the Great Seal of Great Britain.*" The inference clearly is, that they are only temporarily appointed. The Equity Draftsman, last edition, 1828, p. 2, also supports the doctrine, that "*and Ireland,*" used in the present style, is erroneous.

S. T. B., A BARRISTER.

## PROFESSIONAL GRIEVANCES.

### CHANCERY OFFICE COPIES.

Sir,

Induced by your kindness in occasionally devoting a part of your valuable journal to the exposure and reprehension of professional grievances, and feeling confident that the pages of the Legal Observer are the most likely channels by which they may be called to the attention of the profession at large, and may, I hope, be ultimately redressed, I again trouble you to ask, why, where a solicitor has filed a bill of several hundred folios in length, against certain defendants, some of whom being friends of the plaintiffs, are merely formal parties, but who, under the advice of the equity draftsman who drew the pleadings, and who settles and signs the answer, are made defendants, is not permitted by the officer of the Six Clerks' Office to put such their answer, consisting of six folios, on the file, until he has taken, at the expence of several pounds, an office copy of his own bill, which to him must of course be perfectly useless, except as waste paper.

Cases of this nature, and amicable suits, where one solicitor is concerned for all parties, are daily occurring; and I believe the custom of forcing office copies of his own pleadings on the solicitor is never departed

from, however much he may complain of the unnecessary expense thus thrown on his client, and the utter uselessness of the copies to him. I hope I shall not be accused of wishing to deprive any person of his just and proper fees and remuneration; but the letters of "a Sufferer," and many others of your correspondents, plainly indicate the feeling of the profession on many of the customs and rules of the Six Clerks' Office, and loudly call for their abolition.

I hope the day is not far distant when the law of the Six Clerks' Office on the points adverted to in my letter inserted in the Legal Observer of the 4th of April last, by your correspondent, "A Sufferer," in the Legal Observer of the 18th of that month, and on the grievance (for such I must consider it,) with which I now trouble you, will be brought to the attention of some competent authority, and the soundness or invalidity ascertained and settled for the guidance and indemnity of solicitors, now exposed to hearing the complaints of their clients on the above subjects, without being able to offer any reason why such practices are tolerated.

I cannot conclude without expressing my doubts, after much inquiry among my professional brethren, whether on any of the before-mentioned points, any other authority but that of the self-constituted legislators of the Six Clerks' Office, and the indifference of the profession, exists, for the continuance of the practices complained of. ADVISER.

## SUGGESTIONS FOR IMPROVING THE LAW. No. VII.

### FINE AND RECOVERY ACT.

Sir,

In the Legal Observer for the 25th of April last, vol. 9, p. 502, your correspondent M. M. points out what he conceives to be a defect in the late Act for the Abolition of Fines and Recoveries; namely, that it contains no provision enabling the owner of a contingent remainder to convey such remainder.

Alluding to the practice under the old law, of having recourse to a fine, with a view to effect this object, he observes, that "as the act has abolished the assurance by fine, and has not substituted an assurance in lieu of it, (except in particular instances,) there is now no mode of making a title to a purchaser of a contingent remainder." It seems however to have escaped him, that although the levying of a fine was a mode frequently adopted, it was not the only mode, even under the old law, of passing a contingent interest. In the case of *Bensley v. Burdon*, reported 2 Sim. and Stu. p. 519, it was expressly decided, that a conveyance by lease and release will operate as an estoppel; and the Vice Chancellor, in giving judgment, remarks, that "estoppel runs with the land, binding not only the party, but all who claim under him." He also expresses his confident opinion, that "estoppel is as well worked by an indenture of release as by any

other indenture, and this in respect of the solemnity of the instrument."

A similar view of the subject is taken by Mr. Hayes, in his Introduction to Conveyancing, p. 105, second edition, where he observes, (speaking of the Act in question),—"The mention of an indenture suggests the observation, that fines were sometimes resorted to for the purpose of binding and even passing contingent interest by way of estoppel;<sup>a</sup> but as an indenture (which if intended to operate by estoppel, should not<sup>b</sup> by recital or otherwise disclose the actual state of the title, and which, in the case of a married woman, must be attended with the solemnities prescribed by this Act), is equally conclusive,<sup>c</sup> it was not necessary to make any special provision with reference to such interests." It may be added, that the doctrine here laid down is understood to be in unison with the opinion of the learned framers of the Act, and will in all probability be adhered to by the Courts.

Another point of a kindred nature, and which admits perhaps of some doubt, has arisen upon the construction of the same act, namely, whether a *contingent estate tail* comes within its provisions, and may be effectually barred by a deed enrolled.

In reference to this point, the following passage occurs in the work just quoted, p. 124. "The owner of such an estate, or rather right, was deemed incompetent to suffer a common recovery with effect. The Act, however, seems to embrace every species of estate tail, by enabling 'every actual tenant in tail, whether in possession, reversion, contingency, or otherwise,' to dispose, as against all claimants under the estate tail or any ulterior estate; and by defining an actual tenant in tail, to 'mean exclusively the tenant of an estate tail which shall not have been barred, and such tenant to be deemed an actual tenant in tail, although the estate tail may have been divested and turned to a right.' But this position is advanced with the diffidence created by the dissentient opinion of a very high authority upon points of this nature, who in the case of a contingent remainder in tail limited to a married woman, advised thus:—"The owner of a contingent remainder cannot bar the remainders over, even though the contingency should arise; and I do not think the new act has given more power of alienation than existed before the act. The act has not distinctly contemplated this case," &c. &c."

It is somewhat remarkable, that the case in question has been expressly provided for in the Act for the Abolition of Fines and Recoveries in Ireland. See p. 132 of the same work. And it would perhaps have been as well if a few words had been thrown into the English act, to exclude all possibility of questions upon these points. B. B.

<sup>a</sup> *Doe v. Martyn*, 8 Barn. & C. 497; 2 Man. & R. 485; *Doe v. Oliver*, 10 Barn. & C. 181.

<sup>b</sup> *Wright v. Bucknell*, 2 Barn. & Adol. 278, &c. *ib. cit.*

<sup>c</sup> *Bensley v. Burdon*, *sup. cit.*

## COMPENSATION TO FOREIGN WITNESSES.

Admitting that the captain, in the case of *White v. Brasier*, Excheq. E. T. 1835; ante, p. 12, was a foreigner, (which does not appear from the report,) I do not see why, merely as a foreigner, a party should have any better claim to compensation than another party. In the above case, no mention is made of the witness being sent for from abroad; and therefore he does not come within the exception hereafter named. With respect to compensation for loss of time, the general rule is, that it ought not to be allowed. Some exceptions to this rule have been admitted by the Courts, to exist in favour of medical men and attorneys; but in all the cases, the direct question as to whether they were strictly so entitled, was not before the Court. In *Moor v. Adam*, 5 M. & S. 156, which was an application on the behalf of two merchants, Lord Ellenborough said, "he believed the practice had been to make allowance to medical men and attorneys, but not to others." So in *Severn v. Olive*, 3 B. & B. 72, which was an application by some scientific men, the Court refused it, unless they were medical men or surgeons; and in *Willis v. Peckham*, 1 B. & B. 516, Park, J. lays it down, (this being an application by a carpenter): "Compensation for loss of time in attendance as witness, is only allowed to medical men and attorneys," referring to the above cases. Thus have we three cases in which the exception is admitted, without the slightest reason being given why it should exist.

Tindal, C. J., seems to have been the first to dissent from this rule; for in 7 Bing. 731, after stating "the general rule has been, that where witnesses attend under a subpoena, none receive any allowance for loss of time, except medical men and attorneys;" he adds, "If that rule were to undergo revision, I cannot say it would stand the test of examination. There is no reason for assuming, that the time of medical men and attorneys is more valuable than of others, whose livelihood depends on their own exertions;" and accordingly, in the same year, (1831,) we find Lord Tenterden, in the case of *Collins v. Godefroy*, 7 B. & Ad. 950, (which was assumed by an attorney for loss of time as a witness,) laying down the law thus: "Assuming that the offer to pay the six guineas without costs, was evidence of an express promise by the defendant to pay that sum to the plaintiff as a compensation to him for his loss of time; still, if the defendant was not bound by law to pay that sum, the offer to do so not having been accepted, will not avail the plaintiff. If it be a duty imposed by law, upon a party regularly subpoenaed, to attend from time to time to give evidence, then a promise to give him any remuneration for loss of time incurred in such attendance, is a promise without consideration. We are aware of the practice which has prevailed in certain cases of allowing, as costs between party and party, so much per day for the attendance of professional men; but that practice cannot alter the law. What the effect of our decision may be, is not for our consi-

deration. We think, in principle, that an action does not lie for a compensation to a witness for loss of time in attendance under a subpoena." Here, then, we find the rule, on being inquired into, falling to the ground. If we look with the same strictness into the rule respecting a foreign witness, it will be found that the mere circumstance of a party being a foreigner, has nothing to do with the compensation. If such had been the case, there was sufficient grounds for acting in the case above mentioned, from 5 M. & S., as there the merchants mentioned were foreigners brought over from Spain, and compensation disallowed. After stating the general rule as to compensation, Tindal, C. J., p. 731, continues, "But that rule is not applicable to the case of a foreign witness, who may refuse to attend, if the terms he proposes are not acceded to. If he asks only what is reasonable, I cannot see why it should not be allowed, and be charged to the unsuccessful party;" and again, "We are not called upon to lay down a general rule, that in all cases where a party is obliged to have recourse to a foreign witness, he may, if he succeed, call on the opposite party to pay for the witness's loss of time: still less are we called upon to say, that in any such case, the losing party is bound to pay the full amount paid by the successful party. It must be ascertained what is reasonable the losing party should pay. If there had been any general rule contrary to this, I would not have departed from it; but from what Lord Ellenborough said in *Moor v. Adam*, it seems there is no such general rule. As the question is, whether a foreign captain, having refused to come, unless compensated for loss of time,—the expense falls on the defendant. I am of opinion it does;" and per Park, J., "as the witness refused to appear, except on terms, the party had no alternative but to accede." In the above case, the witness was an American, and residing out of England, and therefore out of reach of a subpoena, and refusing to come over without his own terms, they were allowed him. In the case of *Moor v. Adam*, it did not appear that the parties had made any such stipulation, and therefore it is distinguishable; and again in the case of *White v. Brasier*, the captain (whether he was a foreigner or not, does not seem to matter) was here within reach of a subpoena; and therefore even a promise to pay him anything would have been unavailing. The rule seems, therefore, to be independently of whether a party be an Englishman or a foreigner. If the witness be living beyond reach of a subpoena, it then becomes a matter of agreement with the party who wants his evidence; and what he promises, he will be bound to pay; but as regards what he may charge to the losing party, is a matter to be considered, viz., whether he has agreed on reasonable terms with the witness; as of course it would be hard to charge the losing party with ten guineas, when five would have answered the same end; and this seems reasonable, as it often happens to be of more importance to a party bringing over a witness, to pay him a little more, sooner than lose his cause entirely by his absence. T. O. B.



## SUPERIOR COURTS.

## Lord Chancellor's Court.

## PRACTICE.—ATTACHMENT.

*An attachment issued against a party after abatement of the suit and before revivor, is irregular.*

*Semble, that a party may have a rehearing of an interlocutory order, without paying the deposit of 20*l.* which is required by the 42d of the New Orders.*

This was a motion to discharge the defendant, Mary Nees, out of the custody of the gaoler of the city of York, on the ground that the attachment issued against her was irregular. An application was made some time before, to permit the defendant to present a petition of rehearing of the cause without the usual deposit of 20*l.*, such application being made on the ground that the defendant, although poor, was not poor enough to sue *in forma pauperis*. His Lordship doubted whether the 42d order of the Court permitted him to allow this, but he gave leave to try a motion, with notice to the other side, to get rid of the attachment.

Mr. *Bonnes* and Mr. *Tamlyn* now appeared in support of the motion; by which, in addition to the superseding of the attachment, they asked the discharge of an order to revive the suit, on the ground that that order was irregularly obtained. In support of the first part of the motion, the learned counsel read an affidavit that the defendant was taken on an attachment for the payment of the 477*l.* after the abatement of the suit by the death of one of the parties; and with respect to the second part, they contended that the suit had been improperly revived, because it had been revived by the administrators of persons who had not themselves administered to those under whom they claimed.

Mr. *Daniel*, *contra*, argued that it was contrary to the practice of the Court to permit an order obtained on petition to be discharged by motion. With respect to the objection taken against the irregularity of the revivor, he also argued that the Court had no power to give relief under the present form of proceeding, because the parties had eight days notice to put in a plea or demurrer to that bill of revivor, and as they had neglected to take advantage of those eight days, they must wait for a subsequent stage of the cause to make their objection. That opportunity would arrive when a motion would be made to pay the money out of Court to the parties entitled to it. At present it was the defendant's duty, under the order of the Court, to pay that money and so release herself from confinement.

The Lord Chancellor, without expressing any opinion on the second point, said, (after consulting the Registrar) he understood that a party, before the issuing of the late Orders, was never required to find a deposit on the

presentation of a petition to set aside an interlocutory order, and therefore he thought the defendant might have had leave to present a petition without that deposit, because the order<sup>a</sup> referred to the rehearing of causes. The parties had, however, waived that, and as the matter was now to be decided on motion as if it had been a petition, he was of opinion that the attachment issued irregularly from there being an abatement by the death of parties, and that, therefore, the defendant must be discharged from the commitment.

*Wilson v. Ness*.—At Lincoln's Inn. March 14, 1835.

## King's Bench.

[Before the Four Judges.]

PLEA OF PENDENCY OF ANOTHER ACTION.—  
NON PROS.—ABANDONING JUDGMENT.

*Where a defendant, who is sued in one Court, signs judgment of non pros. against the plaintiff, and then abandons it, the Court will not give effect to a subsequent proceeding in another Court, where its validity depends on that abandonment.*

In this case the defendant and another person had been sued by the plaintiff, but the plaintiff not proceeding in proper time, he was non pros'd. Subsequently the plaintiff proceeded for the same cause in this Court, in an action against the defendant alone. The latter then pleaded the pendency of the former action in the Court of Common Pleas. The plaintiff having ruled him to bring in the roll, a rule for further time for that purpose was obtained.

On shewing cause against that rule, it was shewn by the plaintiff's affidavits, that the defendant in the cause in the Common Pleas had signed judgment of *non pros.* against him.

That rule was accordingly discharged, it being thus shewn that no cause was then pending in the Common Pleas.

A subsequent rule was obtained by the defendant before the four Judges of the Court, for the purpose of rescinding the above rule, which was disposed of before Mr Justice *Williams* in the Bail Court, on the ground that the defendant had abandoned his judgment of *non pros.*, and therefore, that the fact of the *non pros.* did not preclude the defendant from availing himself by plea in abatement, of the pendency of the suit in the Court of Common Pleas.

Cause was subsequently shewn against this rule, when—

The Court was of opinion, that the defendant was not at liberty to abandon his judgment

<sup>a</sup> 42d Order—That the deposit upon every petition of appeal or rehearing, be increased to 20*l.* to be paid to the adverse party when the decree or order appealed from is not varied in any material point, together with the further taxed costs occasioned by the appeal or rehearing, unless the Court shall otherwise order.

of *non pros.* for the purpose to which he wished to apply such abandonment, and therefore discharged the rule with costs.

Rule discharged, with costs.—*Pepper v. Whalley*, E. T. 1835. K. B. F. J.

### King's Bench Practice Court.

ATTORNEY AND CLIENT.—CHANGE OF ATTORNEY.—PARTNERSHIP.—SUMMONS.—WAIVER.

*Where an order for changing an attorney is waived, if even such order were necessary under particular circumstances.*

In this case a rule *nisi* had been obtained for discharging another rule *nisi* for judgment as in case of a nonsuit, upon the ground that the latter rule had been obtained by a different attorney from the one by whom the defendant had pleaded, without any order directing a change of attorney. It appeared that originally the defendant's attorneys were Messrs. Pasmore and Taylor. The action was carried on in the name of their firm as was usual. Pasmore's name was used as the attorney who pleaded. Shortly afterwards a dissolution took place between Messrs. Pasmore and Taylor, and the subsequent proceedings were carried on in the name of Taylor. Taylor upon one occasion took out a summons on the part of the defendant, which was attended by the plaintiff's attorneys at chambers. The plaintiff having neglected to proceed to trial pursuant to notice, the rule for judgment as in case of a nonsuit was obtained by Mr. Taylor as attorney for the defendant.

On shewing cause against this rule, it was contended, that the rule of Court did not apply to cases like the present, for Mr. Taylor must be considered to be as much the attorney for the defendant as Mr. Pasmore. Mr. Pasmore's name was merely used for the convenience of the firm, as the name of either might have been used indifferently.

The Court was of opinion, that this case was not within the rule, and that Mr. Taylor was the attorney for the defendant, and had been so all through the proceedings; and that after recognising the new attorney by attending the summons taken out by him, the plaintiff could not now be allowed to object to the omission of the order to change. This rule must therefore be discharged, with costs.

Rule discharged with costs.—*Farley v. Hebbes*, E. T. 1835. K. B. P. C.

ATTACHMENT FOR CONTEMPT OF COURT'S PROCESS.

*What conduct does not amount to a contempt of the process which is served, although violence of conduct takes place on the part of the person so served.*

A rule *nisi* for an attachment against the defendant, for a contempt of the process of the Court, had in this case been obtained. It ap-

peared from the affidavit on which the application was founded, that a writ of summons had been sued out against the defendant, and that when the deponent endeavoured to serve him, he snatched the original writ out of his hand and put it in his pocket. When asked by deponent for the writ, he for some time refused to return it, but ultimately did.

Cause was shewn against this rule, when it was contended that this could not amount to a contempt.

The Court thought there was no contempt of the process of the Court contemplated, and therefore discharged the rule with costs.

Rule discharged with costs.—*Weekes v. Whitely*, E. T. 1835. K. B. P. C.

SECURITY FOR COSTS.—PLAINTIFF'S ABSENCE ABROAD.—TEMPORARY OR PERMANENT ABSENCE ABROAD.—WAIVER.

*If a defendant applies for security for costs from a plaintiff on the ground of his residing out of the jurisdiction, it must be shewn by the latter that he is resident within it; and the claim to such security is not forfeited or waived by obtaining an order for time to plead.*

In this case a rule *nisi* had been obtained for compelling the defendant to give security for costs, on the ground of his being resident abroad. The affidavits on which the motion was founded, disclosed the following facts:—At the time the action commenced, which was in the beginning of January, the plaintiff was in this country. Early in February the defendant applied for and obtained an order for further time to plead. In the following Easter term the present rule was obtained.

Cause was now shewn, when it was contended, that the defendant was no longer entitled to security for costs, if even the plaintiff were permanently resident abroad, he having waived that privilege by taking a step in the cause after the fact of the plaintiff's absence from this country had come to his knowledge. It was however clearly shewn by the plaintiff's affidavits, that the residence abroad was but temporary, and that he had had a town residence in St. James's Square, when he commenced this action.

In support of the rule, it was submitted, that as the plaintiff's affidavit did not state any residence in this country, it was but reasonable to suppose that he had none; he was therefore clearly liable to be called on to give security for costs. Besides, he having had occasion to come to this country a short time since as a witness, he was arrested, and in order to obtain his discharge on the ground of his privilege from arrest while attending here as a witness, he swore in his affidavit in support of an application for that purpose, that he was resident abroad. As to the objection that the defendant had waived his right to security for costs, by obtaining further time to plead, it had been decided some time since that a de-

defendant might apply for security for costs at any time before plea pleaded.

*Williams, J.*, said, that the plaintiff's affidavit in support of his application to be discharged when arrested, clearly shewed him to be resident abroad. As to the objection that the defendant was too late in his application, he was of a different opinion; he thought he was sufficiently early. Under these circumstances therefore, the present rule must be made absolute.

Rule absolute.—*Gurney v. Key*, E. T. 1835. K. B. P. C.

#### GRANTING DISTINGUAS.—EFFORTS TO SERVE COPY OF WRIT OF SUMMONS.—ABSENCE OF DEFENDANT FROM THIS COUNTRY.

*Where the Court will not allow a writ of distinguas to issue for the purpose of compelling an appearance by the defendant, although he has a residence in this country, and he is in another.*

This was an application to the Court for a *distinguas*. The affidavit on which the motion was founded stated, that several attempts had been made to serve the defendant with the writ of summons at his town residence, but without success. He was now at Louth in Ireland. It did not however state that he was gone there to avoid his creditors, nor that there was any reason for thinking the defendant did not intend returning to this country.

The Court thought that the facts disclosed in the affidavit, were not sufficient to entitle the plaintiff to a *distinguas*.

Rule refused.—*Evans v. Fry*, E. T. 1836. K. B. P. C.

#### CHARGING IN EXECUTION.—TAKING IN EXECUTION.—PRISONER.—CARRYING IN ROLL.—HABEAS CORPUS.

*If a defendant is taken in execution on a ca. sa., it is unnecessary to charge him in execution, although he is afterwards removed at his own instance into the Marshalsea of the King's Bench.*

This was an action of trespass for an assault and battery, tried at the last summer assizes for the county of Essex, when a verdict was found for the plaintiff. On the 28th of November judgment was signed, and on the 5th of December the defendant was taken on a *ca. sa.* Shortly afterwards he removed himself by a *habeas corpus* to the Marshalsea of the King's Bench. A rule *nisi* was now obtained for discharging the defendant out of custody, on the ground of irregularity. The first irregularity complained of was, that the plaintiff had not carried in the roll previous to issuing execution; and secondly, that he had not charged the defendant in execution as directed by the Rule of Easter Term 41 G. 8.

Cause was shewn against this rule, when it was contended, that from the terms of 1 Reg. Gen. H. T. 2 W. 4, it was not necessary to carry in the roll. As to the second objection,

the present case did not come within the rule alluded to, which only applied to cases where the defendant was in custody at the time the judgment was signed.

The Court thought that the rule did not apply to cases where the defendant had been already taken in execution on the process which had been sued out, and therefore directed the rule to be discharged with costs.

Rule discharged, with costs.—*Deemer v. Brooker*, E. T. 1835. K. B. P. C.

#### ATTACHMENT.—ATTORNEY AND CLIENT.—TAXATION OF COSTS.—RULE NISI OR ABSOLUTE.

*Where a rule for an attachment is only nisi in the first instance, although it is for non-payment of costs.*

In this case an application was made to the Court, for a rule for an attachment for non-payment of costs pursuant to the Master's *allocatur*. The only doubt about the case was, whether the rule ought to be *nisi* or absolute in the first instance, it being between attorney and client.

The Court said, that under these circumstances it must be *nisi* in the first instance.

Rule *nisi* granted.—*Green v. Light*, E. T. 1835. K. B. P. C.

#### SERVICE OF DECLARATION IN EJECTMENT.—TENANT KEEPING OUT OF THE WAY.—SERVICE ON AGENT.

*A strictly personal service of a declaration in ejectment, is not on all occasions necessary, if the tenant keeps out of the way and the agent is served on the premises.*

Motion for judgment against the casual ejector. It appeared from the affidavit on which this application was founded, that the premises were a public house, and the tenant in possession a female. It was evident that the tenant kept out of the way to avoid being served, for deponent had repeatedly called without being able to effect a personal service. The business was carried on by her shopman, who on being questioned respecting his mistress, told deponent, that if he had properly tried he might serve her. Deponent had given a copy of the declaration with the usual explanation to the shopman.

The Court granted a rule *nisi* and directed the service to be on the shopman.

Rule *nisi* granted.—*Doe d. Morpeth v. Roe*, E. T. 1835. K. B. P. C.

#### SERVICE IN EJECTMENT.—NOTICE TO APPEAR IN DECLARATION.—INTERMEDIATE TERM.—JUDGMENT AGAINST THE CASUAL EJECTOR.

*If a regular service in ejectment has been effected, a motion for judgment against the casual ejector may be made in the term next*

*following the day in which the notice requires the appearance to be made.*

Motion for judgment against the casual ejector. The only doubt about the case was, that a term had elapsed between the service of the declaration and the motion for judgment. The tenant was regularly served before last Hilary term, and the notice at the foot of the declaration required him to appear in Hilary term.

The Court granted the rule.

Rule granted.—*Doe d. Thompson v. Roe*, E. T. 1835. K. B. P. C.

AGENT.—SERVICE ON TENANT'S SON ON PREMISES.—DECLARATION IN EJECTMENT.

*The service of a declaration in ejectment on the son of the tenant, will be sufficient if the latter keeps out of the way for the purpose of avoiding service.*

Motion for judgment against the casual ejector. An affidavit was produced, which stated that the tenant was evidently keeping out of the way to avoid being served. Deponent had left a copy of the declaration in ejectment with the tenant's son, and gave the necessary explanation.

The Court granted a rule nisi, and directed the service to be on the tenant's son on the premises.

Rule nisi granted.—*Doe d. Luff v. Roe*, E. T. 1835. K. B. P. C.

AFFIDAVIT TO HOLD TO BAIL.—INTEREST.—BILL OF EXCHANGE.—AFFIDAVIT BAD AS TO PART, BAD AS TO THE WHOLE.

*What is a sufficient statement, in an affidavit of debt, of the plaintiff's claim to interest.*

In this case a rule nisi had been obtained, for the purpose of cancelling the bail-bond, on the ground of a defect in the affidavit to hold to bail. The first part of the affidavit, was on a bill of exchange; and it also contained a separate clause, for the amount of three pounds six shillings, for interest due upon, and for the forbearance of certain monies lent by the plaintiff to the defendant. The alleged defect in the affidavit was, that it was not sufficiently positive as to the amount of the plaintiff's claim to interest.

Cause was shewn against this rule.

In support of the rule, it was submitted that the interest alluded to in the affidavit of debt, must be understood as relating to the bill of exchange; and therefore some date, by which the Court might be enabled to calculate whether or not the interest claimed by the plaintiff was legal, ought to have been stated in the affidavit. In the event even of this part of the affidavit not applying to the bill of exchange, it must still be considered defective, so far as the interest was concerned; and it being bad as to part, it must be considered bad as to the whole. Under these circumstances, it was hoped the present rule might be made absolute.

*Williams J.* thought that the only question in the case for his consideration was, whether the plaintiff's claim for interest was sufficiently stated in his affidavit of debt. A defendant might be held to bail for interest due on a contract for interest; and that being the case, he could not see how it could be more clearly set forth than in the plaintiff's affidavit on the present occasion. The present rule must therefore be discharged.

Rule discharged.—*White v. Sowerby*, E. T. 1835. K. B. P. C.

### Exchequer at Pleas.

ATTORNEY AND AGENT.—ATTACHMENT.—JUDGE'S ORDER.—DELIVERY OF DOCUMENTS.—CONTENT.

*What is insufficient to entitle a party to an attachment, for non-delivery of documents.*

This was an application for an attachment for disobedience to a Judge's order, which had been made a rule of Court. The Judge's order directed, that upon payment or tender of 1000*l.*, the debt for which this action was brought, on or before the 26th March, with 7*8**l.* 12*s.* interest, up to the said 26th of March, and costs to be taxed by the master to the plaintiff, their attorney or agent, all further proceedings in this suit were to be stayed, and that on obedience to this order, the plaintiffs were to deliver up to the defendant's attorney, all securities held by them for the payment of this debt and costs. Costs had been accordingly taxed, and the master's *allocatur* was for 14*l.* 5*s.*; and on the 26th instant, the tender was made to the agent for the plaintiff's attorney, and a demand made of the documents, but which were not delivered to him. The money was then placed in the hands of a banker, notice of which was sent to the agent.

The Court thought the defendant was not yet entitled to an attachment. He must give notice to the plaintiff, that a tender has been made to the agent, and then make a personal demand of the deeds of him.

Rule refused.—*Evans and Wife v. Millard*, E. T. 1835. Excheq.

AFFIDAVIT OF MERITS.—ESTABLISHED FORM OF WORDS.—POSITIVE ALLEGATION.—AMENDMENT OF AFFIDAVIT.

*The affidavit of merits to set aside proceedings, must adopt the established form, and no other.*

A rule nisi had, in this case, been obtained for setting aside the interlocutory judgment signed, for irregularity.

Cause was shewn against this rule, when it was contended that the affidavit on which the rule had been obtained, and which ran thus: "and this deponent saith, that he hath merits, and a good cause of defence to this action," was not sufficiently positive.

*Per Curiam*.—The affidavit is not sufficiently certain. It must state, that the defendant has a good defence on the merits. The defendant,

however, may take time to get a proper affidavit, upon terms.

Time allowed accordingly.—*Lane v. Isaacs*, E. T. 1835. Excheq.

#### EXAMINATION OF WITNESSES ON INTERROGATORIES IN SCOTLAND.—MANDAMUS.—COMMISSION.

*If a witness is in Scotland, he must be examined on interrogatories, and not under the authority of a mandamus.*

Upon a motion for a *mandamus*, under the 1 W. 4, c. 22, s. 1, to examine witnesses in Scotland—

The *Court* said, that as Scotland could not be considered as "foreign parts," the case was not within sec. 1; but the proper course was for the party to proceed by commission, under sec. 4 of the act.

*Mandamus* refused.—*Wainwright v. Bland*, E. T. 1835. Excheq.

#### AFFIDAVIT TO HOLD TO BAIL.—BILL OF EXCHANGE.—INTEREST.—ARREST.

*If it is sought to hold a defendant to bail, for money due on a bill of exchange and interest, the amount of the bill must be stated in the affidavit of debt.*

A rule *nisi* had been obtained for cancelling the bail bond, on the ground of a defect in the affidavit to hold to bail, which was for 30*l.* and upwards, payable at a day past, but which contained neither the amount, nor date of the bill.

Cause was shewn, when—

The *Court* said that the affidavit was clearly insufficient. It ought to have stated the amount of the bill, or how could it be seen what part of the 30*l.* consisted of interest. The present rule must be absolute, with costs.

Rule absolute, with costs.—*Molyneux v. Doreman*, E. T. 1835. Excheq.

### NOTES OF THE WEEK.

#### HOUSE OF LORDS.

##### *Bills for second Reading.*

<i>Title of the Bill.</i>	<i>Proposer.</i>
Residence of Clergy.	Lord Brougham.
Pluralities Prevention.	Lord Brougham.
Ecclesiastical Jurisdic- tions.	Lord Brougham.
Illegal Securities.	

#### HOUSE OF COMMONS.

##### *Bills to be brought in.*

Law of Tenure.	Attorney General.
Law of Escheat.	Attorney General.
Poor Law Amendment.	Mr. Trevor.
Registration of Births, &c.	Mr. Wilks.
Tithes Commutation.	Sir R. Peel, Bart.
Municipal Corporations.	Lord J. Russell.

##### *Second Reading.*

Law of Libel.	Mr. O'Connell.
Bankruptcy Funds.	Master of the Rolls.
Ecclesiastical Courts.	Sir F. Pollock.
Clergy Discipline.	Sir F. Pollock.
Infants' Property (Ireland).	
Contempts in Equity (Ireland).	
County Coroners.	Mr. Cripps.
Prisoners' Defence.	Mr. Ewart.
Capital Punishments.	
Durham Court of Pleas.	
Parish Vestries.	

##### *In Committee.*

Copyholds Enfranchisement.	Attorney General.
Registration of Voters.	Lord J. Russell.
Dissenters' Marriages.	Sir R. Peel, Bart.

##### *Consideration of Reports.*

Highways.	Mr. Lefevre.
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##### *Re-committed.*

Abolishing Imprisonment for Debt, &c.	Attorney General.
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##### *Third Reading.*

Execution of Wills.	Attorney General.
Law of Executors, &c.	Attorney General.

##### *Passed.*

##### Oaths Abolition.

The Bills which were prepared by Sir R. Peel and Sir F. Pollock, whilst in office, are included in the List; but it is probable that those measures, if proceeded with, will be altered by the present administration.

#### SELECT COMMITTEE ON THE REGISTRATION OF VOTERS' BILL.

The Registration of Voters Bill is referred to a Select Committee. The names are: Lord John Russell, Mr. Goulburn; Lord G. Somerset, Lord Lowther, the Attorney and Solicitor General, Sir F. Pollock, Sir W. Follett, Sir R. Donkin, Sir J. Graham, Sir M. W. Ridley, Sir O. Mosley, Col. Evans, Mr. Serjt. Wilde, Messrs. Hume, C. Buller, Blackburne, Tooke, R. Clive, Hawes, G. Vernon, Pendarves, Ellice, G. Berkeley, Ward, B. Carter, H. Elphinstone, W. Miles, Nicholl, Praed, Ross.

## COURT OF BANKRUPTCY.

A Select Committee has been appointed to inquire into the present system of management in the Court of Bankruptcy, so far as relates to the Office of the Accountant General, and to objects which appertain to the department of Accounts; also into the sources and amount of income provided to defray the expenses of the Court of Bankruptcy, and the compensations charged on these funds, and to report their opinion thereon.

The Committee consists of Mr. Crawford, the Master of the Rolls, the Attorney and Solicitor-General, Sir F. Pollock, Sir W. Follett, Mr. Pemberton, Mr. Horace Twiss, Mr. Lynch, Mr. Pryme, Sir G. Grey, Mr. Freshfield, Mr. B. Carter, Mr. Tooke, Mr. A. Baring, Mr. Hume, Mr. Warburton, Mr. Roberts, Mr. Abel Smith, Mr. Alderman Thompson, Sir R. Inglis, Mr. Patteson, Mr. P. Stewart, Sir M. W. Ridley, Mr. Strutt, with power to send for Persons, Papers, and Records.

## JUDGES' CHAMBERS.

We observe that Mr. Tooke has given notice of a petition from the attorneys and solicitors of the metropolis, for better accommodation for the Judges of the superior Courts of Common Law sitting in Chambers. We understand the motion will be made on Wednesday next, and trust it will be supported by every member of the profession in the House.

## GENERAL RECORD OFFICE, JUDGES' CHAMBERS, &amp;c.

Mr. C. Purton Cooper, the secretary of the Record Commission, has recently collected and printed the documents drawn up at different times, under the sanction of the board, together with every thing to be found in the minutes of its proceedings connected with the project of building a General Record Office upon the site of the Rolls estate. The collection, it appears, was made with a view to the annual meeting of the board.

We trust this is a sign of some steps being about to be taken to carry some part at least of the plan into effect. We observe that the valuable records of the Courts at Westminster, lately deposited in the King's Mews, have been removed to a riding-house near Pall Mall. This state of things is surely very discreditable, and ought to be terminated.

We shall take an early opportunity of

noticing some interesting particulars which are stated in this collection, and which have occurred subsequently to Mr. Cooper's former work on the subject, to which we have had occasion frequently to refer.

## AMENDING PLEADINGS FOR THE ASSIZES.

We understand that it is intended by the Judge who will sit at Chambers during the vacation, not to grant any orders to amend the pleadings in causes to be tried at the Summer Assizes, unless the application be made *six days before the Commission day*. If the application be made subsequently to that time, the question will be left to the Judge of Assize.

This appears to be a proper regulation; and we announce it thus early, in order that practitioners in the country, as well as in town, may not delay the consideration of any necessary amendments until it be too late. It is hardly fair towards the opposite party, who may be diligently preparing himself at an early period, to find that much of his labour is thrown away, and for which he is not sufficiently compensated.

## ANSWERS TO QUERIES.

## Law of Attorneys.

## ARTICLED CLERK.—INSTRUCTION. P. 15.

Although *C. S.* says that all precedents for articles of clerkship are nearly alike, yet he appears to me not to have recollected the following stipulation: "That he will readily and cheerfully obey and execute his master's lawful and reasonable commands." When he applies to be admitted an attorney, can he conscientiously swear that he has faithfully served his articles, if he has refused to pass through the regular routine of the office? Could *C. S.* establish the wished for precedent, then might attorneys look in vain for industry and order in their offices.

## COMMON SENSE.

## Law of Property and Conveyancing.

## TITLE.—OVERSEERS. VOL. 9, P. 432.

The overseers have power, under the 5 Geo. 1, c. 8, to seize and sell the goods and chattels of *B.*; and under those words, I think, they may sell his share in the vessel. Care must be taken to pursue the directions contained in the statute.

J. C. G.

## AD VALOREM STAMPS. VOL. 9, P. 432.

The conveyance does not require *two ad valorem* stamps; for the money expressed to be paid by the purchaser of the house, (although apportioned between *B.* and *C.*) is deemed the purchase money: the general Stamp Act, (folio edition, page 1570,) under the head "Conveyance," has provided expressly for the case:

*B.* is a necessary party to the conveyance.

J. C. G.

## AD VALOREM STAMPS. VOL. 9, P. 432.

Let the sub-purchaser take a conveyance directly from *C.* the original vendor, *B.* joining therein. The deed may recite the contract between *C.* and *B.*, and that *C.* agreed to convey to *B.*, or whom he might direct, treating the purchase money to *C.* as having been paid, but no conveyance taken—then state the contract between *B.* and the sub-purchaser; and that *B.* had requested *C.* to convey to the sub-purchaser. *C.*, in consideration of the premises, and for a nominal money consideration, and *B.* in consideration of his purchase money, must then convey to the sub-purchaser, and both *C.* and *B.* may severally covenant for the title. If the deed be prepared after this manner, only one *ad valorem* stamp will be necessary, and that must be a stamp appropriate to the purchase money payable by the sub-purchaser. See the 5th and 6th clauses of the note appended to the schedule of the 55 Geo. 3, c. 134, title "Conveyance." G. Bz.

## Practice.

## ACTION.—BANKRUPT. VOL. 9, P. 496.

In an action at law, if the plaintiff becomes a bankrupt, the action does not abate, but the assignees must proceed in the name of the bankrupt. *Hewitt v. Manbell*, 2 Wils. 372. The assignees may then revive the judgment, but they are not obliged to do so; and it is no irregularity, if the bankrupt proceeds to sue out execution in his own name. *Wagh v. Austen*, 3 T. R. 437. ASPIRO.

## ACTION.—BANKRUPT. VOL. 9, P. 496.

If the action be continued in *A.* the bankrupt's name, the defendant *B.* may plead the bankruptcy in bar. *Kinross v. Tarrant*, 15 East, 622. LECTOR.

## FIAT.—BANKRUPT'S NAME. VOL. 9, P. 496.

I think the omission of the one christian name, is fatal to the fiat, unless the bankrupt has himself adopted it as an abbreviation or otherwise. See *Ex parte Smith*, in the matter of *Robert Martin Jackson*, 2 Rose, 26. ASPIRO.

## NON-PROS. VOL. 8, P. 495.

In turning over the pages of your work for October last, p. 495, title "Non-pros," I perceive a question put by "A Subscriber," of some apparent novelty and difficulty, which does not appear to have been answered by any of your numerous readers. I am not aware of any decision upon the point; but I am inclined to think that a Judge has the power, and would order, that unless *A.*, within a reasonable time, proceeded in the action, either by compelling an appearance on the part of *C.*, or by proceeding forthwith against him, an exoneretur should be entered on the bail-piece filed by *B.*, and that in default, *A.* shall be deemed out of

Court as against *B.* As the above point involves a question of some importance in the present state of the practice, I should like to see it discussed by some abler hand than B. B.

## Common Law.

## LODGINGS.—TRESPASS. VOL. 9, P. 432.

The refusal of *B.* to deliver up the piano to *C.*, is equivalent to a distress; *Wood v. Nunn*, 5 Bing. 10, and *C.* had no right to take the piano, without satisfying the rent: he will, therefore, have no defence to an action at the suit of *B.* The cases cited in the query, do not apply to this case. J. C. G.

## QUERIES.

Estate of Property and Conveyancing.  
GAVELKIND-HEIR.

*H. Y.* conveyed his estate to the use of himself for life,—remainder to his wife for life,—remainder to their children in tail,—remainder to the right heirs of *S. D.* *H. Y.*, and his wife died without issue. Are the heirs of *S. D.* in gavelkind, or his heir at common law, entitled?

A. H. D.

## ASSIGNMENT OF LEASE.—RENT.

A house is leased by *A.* to *B.* The lease is afterwards assigned by *B.* to *C.*, and by *C.* to *D.* *D.* becoming insolvent, *B.* is called upon by *A.* to pay him six months rent of the premises, which he accordingly pays. Can *B.* maintain an action against *C.* upon the usual covenant for payment of rent contained in the assignment from *B.* to *C.* for the rent so paid by him to *A.*; *C.* having parted with all his interest in the house; and if not, has *B.* any other, and what remedy? A reference to authorities is requested. B. Y. Z.

## Estate of Landlord and Tenant.

## NOTICE TO QUIT.

By agreement in writing, dated 23d June 1834, *A.* lets a house to *B.*, at a rent of 45*l.* per annum, and the agreement states that the rent is "payable quarterly, to commence from the 24th day of June, 1834, and the first payment to be made on the 29th day of September next, and so on every quarter-day till due notice is given to quit by either party according to law." On the 24th December last *B.* (the tenant) gives notice to *A.* that he shall quit and deliver up possession of the house "on or before midsummer-day next." Is this a good notice, or should not the notice have been given a day earlier, viz. on the 23d day of December?—as, from the 24th of December, to the 24th of June, unless both days are inclusive, there are only 182 days,—consequently not half a year.

A SUBSCRIBER.

# The Legal Observer.

Vol. X.

**SUPPLEMENT  
FOR MAY, 1835.**

No. CCLXXII.

— "Quod magis ad nos  
Pertinet, et nescire malum est, agitamus."  
HORAT.

## LEGAL BIOGRAPHY.

### No. VIII.

SIR MATTHEW HALE.

IN the Supplement of the last month (vol. 9, p. 513), we stated concisely the leading incidents of the life of Sir Matthew Hale, abridged from his Memoirs by Dr. Williams. We proceed now, from the same authority, to notice the habits and character of this distinguished Judge. Example is more forcible than precept, and we deem it a pleasing discharge of our duty to the rising members of the profession to set before them such bright and splendid instances of moral excellence and legal eminence as are afforded in the annals of the profession.

Sir Matthew was remarkable for *diligence* in all his pursuits; and to this in a great degree, combined with his early rising, abstemiousness, and systematic arrangements, may be ascribed the eminent results which his life displayed.

"Upon 'time' he placed the highest possible value, and he redeemed it with great care. He allowed only a short season for taking his food; he rarely discoursed concerning news; he entered into no correspondence, except about necessary business, or matters of learning; he studiously avoided all unnecessary familiarity with great persons; he shunned the diversions and vanities of the world; he abstained from public feasts; and, confining his own entertainments almost exclusively, as we shall see presently, to the poor, much time, usually wasted, was so redeemed.

"Besides his tract on the *redemption* of the fleeting treasure; and, besides the evidence afforded by his doings, there are various and very touching passages in his printed works, relating to the same matter. One of them, by the allusion it makes, though in few words, to his early days; 'to long feastings, seeing of

interludes, and impertinent studies;' and to the impressions produced upon him by 'concernments of everlasting importance,'—presents in strong colours those mingled emotions which haunt, not unfrequently, the awakened mind—regret for past negligence, and anxiety for future improvement.

"An attentive reader will notice that the first letter 'to his children' was penned 'while he lay at an inn;' and that in others of his writings hints occur of a similar description; all shewing the hate he bore to idleness, and how incessant his efforts were to employ his hours, especially his '*Horæ Sacrae*,' *well*. Many of his 'Contemplations' were written during journeys, which, by reason of company, were ill adapted to the exercise."

Of his *prudence* and discretion many illustrations are given by Dr. Williams. We extract the following:

"Private discourse of public affairs he avoided, and, although when at the Bar, he was free in solving the doubts of young and inquiring lawyers, he grew, in that respect, after his elevation to the Bench, more reserved. It was not possible to obtain his opinion until he was obliged to declare it in open court, and *there* it was delivered with caution. We have before seen how the feeling was inspired by a sense of liability to mistake; and how his vigilance against error, consequent upon that perception, was exercised; both have been illustrated in his rules for judicial conduct; and as an instance of the full exemplification, whether of scrupulosity, or a nicely adjusted love of rectitude, the legal reader may be referred to the case of *Goff v. Lloyd*. Lord Hale there, upon a question, whether a smith's forge was within the Acts relating to hearth-money, observed, that it was a matter of fact into which he had not inquired; and that he should be loath to deliver an opinion without much inquiry. *Ventr.* 192.

"In cases of importance, such was his studied silence, in court, as to render it impossible to guess at the inclination of his mind; he acted



so, because he thought it the duty of every individual with whom he was associated, to pronounce judgment strictly according to his own conscience, and convictions. Sometimes, and it shews the deference paid to his opinion, the other judges, after expressing their sentiments with entire unanimity, felt so strongly the reasons he assigned in favour of a different decision, as, actually, to retract what had been said, and concur with him."

He resembled many eminent men in the *unassuming* nature of his habits and demeanor.

"Like Erasmus, he took more care to avoid the legitimate honours and preferments of his profession, than others do to secure them; and when *constrained* to accept them, which was literally the case, he has shewn, by his general demeanour, as well as in his 'Works,' how wisely, and devoutly they were used.

"To others, his conduct was fair, kind, and obliging. Instead, in the progress of a cause, of taking triumphant advantages where the arguments of a junior, on the opposite side, betrayed either inexperience, or imbecility, he would often give strength to weakness, supply what was defective, and, in noticing the objections themselves, *commend*, if possible, the gentleman who had pressed them; and few things operated so favourably upon a young practitioner as his good word."

He was eminently distinguished for his *fidelity*, fulfilling abundantly the confidence which was reposed in him.

"A spirit of litigation, therefore, he opposed; recommending, when a case appeared doubtful or weak, an amicable adjustment rather than a suit. To such an extent did his virtuous integrity in such cases go, as that, for a time, if the matter so much as *seemed* unjust, he declined further interference. Ultimately, he became less scrupulous about appearances; for he found, in unison with the experience of all lawyers, how much depends upon *ex parte* statements, and how easily, and not uncommonly, the truth suffers from the narrator's perverseness, ignorance, or stupidity.

"Of him, as of his patron, the attorney-general Noy, it may be said, that he never pleaded a cause in which his tongue was *opposed* to the dictates of his conscience; he associated dishonour with saying or doing for hire, otherwise than as he thought; and ascribed a contrary habit to that 'love of money,' which is condemned alike by Scripture and reason. But the reader will do well to refer to his own remarks in the 'Good Steward,' upon the 'gift of elocution:' his practice, and the considerations which influenced it, are there fully described.

"In pleading, Sir Matthew, as a matter of course, disliked, and consequently avoided, the mis-reciting of evidence, the making of false quotations, and such confident assertions as were calculated to mislead. Nor was he more favourable to inordinate sallies of wit and elo-

quence, than to some other forensic artifices; he contended, that if the judge or jury had a right understanding, it signified nothing; it was a waste of time, and a loss of words; and that, if the parties addressed were easily wrought upon, the course pursued, by bribing the fancy, and biasing the affections, was only a more decent way of corrupting them. He marvelled, and attributed it to affectation, that the French lawyers, who enjoyed the privileges of a monarchy, should, in their pleadings, imitate the Roman orators, whose style was occasioned by the popular nature of their government; by the consequent factions of the city; and a special training in the schools of the Rhetors, adapted to such a state of affairs. That the orations of Cicero were contaminated by the corrupt fountain alluded to, can hardly be questioned; and the attempt to make them acceptable to the auditory, rather than satisfactory to himself, has rendered them less cogent, and less beautiful than his other writings. They are more to be regarded as essays of wit and sophistry, than as *pleadings*, at all calculated to succeed with such a judge as Hale."

Many pleasing instances are related by his present biographer of his benevolent disposition.

"He took pains to be informed of proper objects for his bounty, but when they were ascertained, or when he discharged necessitous prisoners (to which object many of his perquisites of office were applied,) he concealed from them their benefactor. On his promotion to the Chief Justiceship of the King's Bench, he stipulated for the marshal's accustomed new year's gift to be presented in money instead of plate, that it might be so disposed of: and he would not have accepted the donation at all, had not the other judges urged it as a thing pertaining to his appointment, and his refusal as a prejudice to his successors.

"He invited his poorest neighbours to dinner, making them, as did Bishop Bedell, sit at his own table; and to those whom sickness prevented attending, he sent a supply. Nor was this kindness restricted to his own parish; it embraced, as occasion required, the surrounding districts. The poor, as such, were *considered*; and, ever remembering that they were of the same nature with himself, and reduced to no other necessities than those to which he was exposed, they were treated with the utmost familiarity, and tenderness. Such common beggars as could work, he paid liberally to gather stones, and then used his own carts to carry them for reparation of the highways. His 'Discourse touching provision for the poor,' is well known. It unfolds his many excellent qualities, and represents 'populousness' as a blessing.

"Some complained of his alms to street beggars, alleging that he thereby encouraged idleness, and that most of those he so assisted were cheats. He admitted it might be so; nay, that he believed most of them *were* such; but he contended, that some among them were great objects of charity; and said, that he had

rather give relief to twenty who might, perhaps, be rogues, than that one of the other sort should perish, for want of the small assistance he bestowed."

"The pity of this good man reached to his beasts. When his horses became aged and infirm, instead of selling them, they were, in the spirit of Virgil's advice, turned loose upon his grounds; seldom used, and then at easy work, such as going to market, and the like. His dogs, also, were treated with similar care. Information having reached him that his shepherd was about to kill, or lose a dog of his own, because blind, he sent for the animal, and, while life lasted, had it fed. Never was his anger seen to glow so hot, as towards one of his servants, who had negligently starved a bird to death for want of food."

His patience and vigilance as a Judge were peculiarly conspicuous.

"When trying prisoners his vigilance was taxed to the utmost, in order that no circumstance might be neglected which could, in any way, elucidate the facts. His whole conduct displayed a disinterested regard to truth, and was marked by the most instructive gravity, and compassion; not, however, that false compassion (as the Honourable Daines Barrington has accurately noticed) which some judges have thought it right to manifest; he never discovered an anxiety to find out such niceties as would enable criminals improperly to escape: a temptation, and source of perplexity, too, in a great measure now, happily, removed by law.

"His whole demeanour towards witnesses was that of patience, and gentleness. They were borne with, though tedious; and protected against those rude buffetings which, commonly, instead of eliciting truth, suspend the memory, produce confusion, and pervert justice. He 'summed up' with studied fairness; and when it devolved upon him to pass sentence of death, such was his attention to decency, both of speech and manner; such his entire freedom from affectation; and such the instructions he imparted, as to occasion many to declare, they heard few such sermons. Roger North admits, that he 'became the cushion exceedingly well: his manner of hearing was patient, his discretions pertinent, his discourses copious, and although he hesitated often, fluent. His stop, for a word, by the produce, always paid for the delay; and on some occasions, he would utter sentences heroic.'

"He never aimed at that 'dispatch' which Lord Bacon reprobated; he bore with the meanest, and gave to every man full scope. Lest, when addressing a jury, any thing material should, through inadvertence or forgetfulness, escape him, he constantly required the Bar, without regard to the temporary delay, to interrupt, and remind him of it.

"The whole demeanour of Lord Hale was grave and dignified, and calculated to inspire respect. He was, at the same time, far from any thing gloomy, or repulsive; the very so-

lemnity of his magisterial character was relieved, by occasional effusions of innocent humour. His pleasure in rising merit he manifested by the most encouraging acknowledgments; by those good-natured graces, and delicate compliments which, while they so eminently adorn talent, excite laudable ambition, and bind the recipient, in ties of deep, and grateful obligation."

Of his method of studying and writing we have the following instructive description:

"When studying a subject, Lord Hale first prepared a plan, to which he strictly adhered; he took nothing for granted; and he pursued his inquiries with equal caution, and ardour. Having drawn the scheme, or as much of it as he then intended to consider; sometimes upon a loose piece of paper, at others upon the corner, or margin, of that upon which he wrote; he, to borrow his own phrase, 'tapped his thoughts, and let them run:' they, usually, flowed as fast as his hand, ready as it was, could secure them. Often he wrote two sheets at a time; seldom less than between one and two; and the gentleman, from whom this testimony is borrowed, states,—that, when reading in the same room with him, he has known him to continue writing in that proportion for hours together.

"So extreme was his love of method, as to lead him to endeavour the reduction of every thing with which he meddled, to scientific principles: and once hearing it remarked, how incapable the common law, by reason of its undigestedness, and the multiplicity of cases, was of being systematised, he not only expressed a different opinion, but speedily prepared that wonderful outline of it which formed, at a subsequent period, the basis of Blackstone's Commentaries; and the use of which, even that immortal work has failed to supersede."

His temper was admirably equal; he was cheerful rather than merry; his habits were strictly domestic, and he shunned fashionable and formal visiting.

We close our extracts with the following distinguished testimonials of the worth and eminence of Lord Hale.

"Lord Chancellor Northington, then Lord Keeper Henley, pronounced Sir Matthew 'one of the ablest, and most learned judges that ever adorned the profession.' Mr. Justice Grose declared he was 'one of the most able lawyers that ever sat in Westminster Hall:' 'as correct, as learned, and as humane a judge as ever graced a bench of justice.' Lord Kenyon said, that the operations of 'his vast mind always called for the greatest attention to any work that bears his name.' In *Herries v. Jamieson*, alluding to a case cited from Ventris in argument, the same great judge observed, 'that it ought not to be treated lightly, or overturned without great consideration, because it had the sanction of Lord Hale's name:' and in the King against *Suddis*, he mentioned him as one of the great-

est and best man who ever sat in judgment.' Lord Erskine, in addition to his other frequent testimonies, mentioned him as 'the never-to-be-forgotten Sir Matthew Hale; whose faith in Christianity is an exalted commentary upon its truth and reason, and whose life was a glorious example of its fruits; whose justice, drawn from the pure fountain of the Christian Dispensation, will be, in all ages, the subject of the highest reverence, and admiration.'

"A late Attorney General, Sir Samuel Shepherd, mentioned him as 'the most learned man that ever adorned the bench; the most even man that ever blessed domestic life; the most eminent man that ever advanced the progress of science; and, also, one of the best, and most purely religious men that ever lived.' Lord Ellenborough spoke of him as 'one of the greatest judges that ever sat in Westminster Hall:' as 'venerable, as well for the sanctity of his character, as for the profundity of his learning.'"

## LAW OF ATTORNEYS.

### STRIKING OFF THE ROLL.—*In re PALMER.*

We have obtained authentic copies of the report of the Master of the Court of King's Bench, and the judgment of the Court in this case. They are as follows:

The report states that this was an application against John Palmer, an attorney of this Court, calling upon him to shew cause why he should not be struck off the rolls for allowing his name to be used by one Edmonds, contrary to the 22 Geo. 2, cap. 46, sec. 11, which enacts, that "if any attorney shall permit or suffer his name to be in any ways made use of upon the account, or for the profit of any unqualified person, or send any process to any such unqualified person, &c., and complaint shall be made thereof to the Court from whence such process did issue, &c., he shall be struck off the rolls," &c.

The Court referred the matter for me to report upon, and in the last term, I reported that in the year 1829, Palmer was residing at Coleshill, and also occupying, occasionally, part of a house in Birmingham, in which Edmonds and his family lived, Edmonds paying the rent and taxes—Edmonds being at the time articulated to Palmer, and the name of Edmonds being on the door, as also the name of Palmer. That Edmonds was in the habit of attending the Court of Requests in Birmingham, and before the magistrates at the public office in Birmingham, and at the petty sessions in Warwick—transacting business as the clerk of Palmer nominally, with his knowledge, but drawing a profit to himself therefrom.

It appeared also, that an appeal had been tried in the Court of Quarter Sessions for the county, in the name of Palmer, in which the client had consulted Edmonds, supposing him to be an attorney; and where Palmer had permitted Edmonds to conduct the proceedings, and had permitted part of the law bill to be

paid by the client, (who was a tailor,) making a suit of clothes for Edmonds.

The above circumstances arise in the inferior Courts, or Courts of Quarter Sessions; and I have now to add, and submit to the decision of the Court, two instances, arising in the Court of King's Bench. These are first—that in or about 1832, several writs were placed in the hands of an officer to be executed, having Palmer's name upon them, for part of which Palmer afterwards paid him, but referred him to Edmonds for the remainder, saying the rest was Edmonds's business, and not his. And second, that in 1829, 1830, an action (*Davies v. Ashford*) was carried on in the name of Palmer, with the knowledge and concurrence of Palmer, in the course of which Edmonds appeared, and acted as the attorney; and after verdict obtained, claimed to have the costs paid to himself, and objected to have them paid to Palmer.

The matter having come before the Court on this report, the following judgment was delivered.

**Lord Denman.**—The affidavits on the former occasion, certainly stated a great intimacy between these two parties, and something very much like a partnership. The question was, whether there was any part of the business which Palmer permitted Edmonds to carry on in his name, was business issuing out of this Court, as doubt was entertained on that subject, with reference to putting in force the powers of the 22 Geo. 2.

Now, the object of sending it to the Master was, as I have stated simply, to see whether that act of parliament should be put in force; and certainly we should not resort to the general power on the occasion, at least under the present circumstances, after having confined the inquiry to the facts, which would bring it within that act of parliament. At the same time, we cannot shut our eyes to the general circumstances of the case to which I first alluded, because when we find that there are two persons living in one house, and going on in a great variety of minor particulars together, as these persons have done, undoubtedly that goes a great way to convince one, that in any business in which they at all appear jointly concerned, that was done in this Court, the same course would have been pursued between them.

There are two particular examples to which the Master calls our attention; and on looking at the mode in which they are stated, I am afraid they leave no doubt as to what the Court ought to do, acting on these principles, which are so clearly and so justly laid down by Lord Tenterden, and which must be the guide of any Court, which has to decide on matters of fact.

Now, there are two instances arising in the Court of K.B. The first is this: in or about 1832, several writs were placed in the hands of an officer to be executed, with Palmer's name on them, for part of which Palmer afterwards paid him, but referred him to Edmonds for the remainder, saying that the rest were Edmonds's business, and not his.

Now, that being so, it is impossible not to infer that Palmer has stated, that of the various writs that were placed in the hands of the officer, all bearing his name; some related to business of which he was the Master, and of which he was to have the profit; and some related to business, for which he was not bound to pay, because this said Edmonds was to have the profits.

The second case is in 1829, or 1830. An action is carried on in the name of Palmer, with the knowledge and concurrence of Palmer, in the course of which Edmonds appeared, and acted as the attorney; and after verdict obtained, claimed to have the costs paid to himself, and objects to have them paid to Palmer.

It is not, indeed, stated what became of those costs: it is stated that the action was carried on in the name of Palmer, with Palmer's knowledge and concurrence; and in the course of it, at some periods at least in the course of it, Edmonds appeared and acted as the attorney in that case.

Edmonds, therefore, was acting in a case in which Palmer's name was employed, and with his knowledge and concurrence his name was employed. It does not appear he acted in it at all; and it does appear that Edmonds appeared and acted as the attorney.

Now, considering the particular object of making these inquiries, which was not to set forth precisely the facts which were to prove the partnership, if I may so express it, the partnership between these two persons; but to point the inquiry to the question, whether the business in which this joint act had been done, was business issuing out of this Court—giving it that explanation, it seems to me it is impossible not to come to the conclusion that Edmonds has been employed in business issuing out of this Court, using the name of Palmer, and using it with the concurrence of Palmer. It appears to me, therefore, the case is distinctly brought within the 11th sect. of that act of parliament, 22nd of Geo. the 2nd; and that with respect to Palmer, the party now before the Court, (I believe Edmonds is not,) with respect to Palmer, we have no option as to the exercise of the authority we possess, namely, that of striking him off the rolls.

Mr. Justice *Littledale*.—The two instances which are given in this cause, are not quite so explicit as the affidavits would allow the Master to make them; there may be some objection taken to the language of one and the other—with regard to the first, it says "the writs were placed in the hands of the officer," it does not say whether by the hand of Palmer, or by Edmonds; but when the officer was to be paid, Palmer says, "some are mine, and some belong to Edmonds;" there is an admission on his part, that Edmonds had the benefit of some of these writs. At the same time, it is not at all stated that Edmonds did put any into the hands of the officer; nor is it stated, whether it is by one or the other; but I think the instance that is put, is a good deal helped out by the circumstance of Palmer and Edmonds residing in the same house; and at that time

Edmonds was an articulated clerk of Palmer; and if he was, it is to be intended that he transacted some business connected with Palmer, as he was his articulated clerk; and if he was his articulated clerk, and the writs were put in his hand, and he said some belong to Edmonds, it does seem to follow, although, perhaps, not necessarily so, but in the whole we must take it, it does appear to follow, that Edmonds had the benefit of that proceeding, with the full assent and concurrence of Palmer.

With regard to the other, it is in that action, the second instance mentioned, which was brought in the name of Palmer, with his concurrence; but that Edmonds appeared, and acted as the attorney, and then when the action was at an end by the verdict, that then Edmonds applied for the costs.

Now, it appears therefore, whatever was that action, it was conducted in the name of Palmer, with his concurrence. Well, then, what was done on that occasion? It does not appear Palmer, even afterwards, took any part in it whatever—on the contrary, that Edmonds appeared, and acted as the attorney, and afterwards claimed the costs. I think it must be taken he claimed the costs. On the whole, I am of the same opinion as my lord, that he must be struck off the rolls.

Mr. Justice *Coleridge*.—One's mind is naturally very slow to come to the conclusion, the consequence of which is so highly penal to the party. I am bound, although I struggled against it for some time, to say, I concur entirely in the view of the facts which my lord has taken in this cause. I must apply to those facts, the principles which are laid down in the judgment which has been cited of my Lord *Tenterden*. I feel myself compelled to come to the same conclusion with the other members of the Court, that this party must be struck off the rolls.

*King's Bench, 30th Jan. 1835.*

## LECTURES AT THE INCORPORATED LAW SOCIETY.

THE following report of the remarks made at the conclusion of the Common Law Lectures, at this Society, on Friday the 22d instant, may be useful to the younger part of our readers.

There are divers opinions on the utility of keeping a Note or Common-place Book; but much of the dispute has arisen from the want of a proper and well-considered plan of proceeding. It has been said that the hand has no closer correspondence with the memory than the eye; and that what is twice read, is commonly better remembered than what is transcribed. This is hardly correct in itself, as a general position, and if it were entirely so, it leaves the real use-

fulness of a proper Common-place Book wholly untouched. The act of writing compels us to attend with some degree of care to the words transcribed, and to bestow some attention, in order to produce a faithful copy; and therefore the impression when we write, as well as read, must be stronger than even two readings, because the quantity of attention bestowed must necessarily be more vivid.

It is evident, however, that the objection applies only to *whole extracts* from books, and not to such notes as a student ought to make in the course of his reading, (forming a test of the degree of his attention,) and which should not be mere extracts, but either concise statements of the result of his researches or abridgments of important matter. It has also been objected, that the student reads, not to recollect, but to find matter for his Common-place Book; and thus the hand ingrosses the business of the head. Now it is obvious, that even with this purpose only in view, the student must read with *attention*. In order to make a proper selection, he must judge between what is important, and the contrary; and even if there were no use in after reference to his Common-place Book, the mental labour which the student undergoes, the active exercise of the faculties employed in the process of compilation or abstract, must be healthful and invigorating to the mind, and the result highly beneficial in forming habits of reflection.

The great object, in truth, which all the various methods of study are designed to accomplish, is to arouse the latent powers, to awaken the slumbering faculties, and stimulate them to the utmost extent of which they are capable. Now, we much fear, that unless the student be accustomed to ponder on the matter before him, to analyse it, and note down, however concisely, the substance or result of his reading, though the book be placed before the eye, and its characters mechanically traced, but little of its solid contents will be transferred to the memory or the understanding.

Therefore, we think, a Common-place Book is an essential appurtenant of the student: of what its contents should consist, there may be different opinions. The following, it is hoped, may furnish some hint, and be capable of improvement:

Nothing should be literally extracted, except a short sentence, which cannot be abridged, or the importance of which turns on the precise words used. In all other cases, the passage should be either abridged,

or referred to, and not transcribed. It is manifestly of the greatest use to know readily *where* to find what we require, instead of recommencing the search for it. The principal rule will be to condense as much as possible. For this purpose, the attention will be especially aroused. It may be agreed, that merely to copy is somewhat of a mechanical operation, and the mind may, from time to time, wander far away from the subject; but in order to form an abstract of an important doctrine or decision, or point of practice, the student must necessarily make himself master of it, and this is the very object which is sought to be attained.

So much for the Common-place Book of the Law Student. We now proceed to the remaining topic — the *utility of Law Lectures*.

Dr. Johnson said, "I cannot see that lectures can do so much good as reading the books from which the lectures are taken. I know nothing that can be best taught by lectures, except where experiments are to be shewn. You may teach chemistry by lectures; you might teach making of shoes by lectures." Dr. Johnson, as you know, in the conversations reported by Mr. Boswell, was remarkable for putting his points pretty strongly; seldom leaving an opinion half expressed, but rather carrying it to an extreme; and you will probably not quite agree in the latter part of his dictum. And if the first part be right—if it be better to search for knowledge in the books which already exist, than to listen to the result of the study and investigation of learned men—if the lecturer be useless, what shall be said of the preacher? It is evident, therefore, that something more than chemistry and shoemaking can be taught by public discourses; and if religion and morality are so taught, let us see how the plan operates with reference to the law.

Without entering on the relative importance of the three principal branches of Conveyancing, Equity, and Common Law, into which the lectures are here divided, for all are equally essential to the general practitioner—it may be worth remarking, that such an arrangement seems well calculated to facilitate the acquisition of knowledge. By the method thus adopted, you *divide* and *conquer* the difficulty. It is to be feared, that there are some present who have not read with great attention, and in a regular and steady course of application, the whole of Blackstone's Commentaries. Even that celebrated work, unrivalled for its style and

composition as a legal work, occasionally wearies the reader, and fails in keeping up his constant attention. Now, it may be asked, whether the fatigue and listlessness which is felt in solitary study, would not be overcome if the student could hear the lectures personally delivered? Even supposing the Commentaries to be read with as much attention as usually attends private study, would not the matter produce a much greater effect on the mind, when impressively delivered by the lecturer?

"There is, (says Mr. Ritso in his Introduction to the Science of the Law,) a monotony attending retired study, by which the attention is apt to be fatigued, and the spirits exhausted; while, on the contrary, the effect of oral communication is to keep the mind on the alert, and to render the understanding more active." And Dr. Arnott observes, in his Elements of Philosophy, that "what is seen, and felt, and heard, leaves on the memory much stronger and more correct impressions than where the conceptions are produced by merely verbal description."

Let the value of law lectures be ranked as moderately as you may, it is clear at all events, that they constitute *one* of the means by which legal knowledge may be communicated; and it will be universally agreed, that with "all appliances and means to boot," there are not too many facilities for making good lawyers. There may be a difference of opinion on the exact degree of the utility of lectures, but surely none that they confer very considerable benefit. Out of the eight or nine thousand hours in a year, the small proportion of thirty-six—not the two hundredth part of the time—passed in this hall, can scarcely be considered too great a sacrifice, or unprofitably applied.

It is true, that unless the student take copious notes of the lectures, he will derive comparatively little advantage; but even that limited advantage will be greater than the dull uninteresting perusal of a book in his own chamber—his eye tracing the printed characters before him, but his attention often divided with other objects, or slumbering at its post. Unless the student who is present at a lecture be actually fast asleep, (a state of being though extraordinary, not altogether impossible, at a law lecture) he must learn something; and though his faculties may be only in the perceptive, and not the remembering state—though he hears, but cannot repeat the lecture—yet when a case occurs, bearing

in its facts and circumstances on the doctrine expounded, it is probable that he will then find material assistance from the comparatively unnoticed information he had previously heard in the lecture-room.

This, however, is placing the usefulness of lectures at the very lowest point. The next degree may be exemplified by supposing that some of you are accustomed to make a note of the general subject of the lecture,—as, for instance, the subject of this evening—that of the contract of coach proprietors—and taking down all the authorities referred to. It is clear, that whenever a case of that kind occurred in actual practice, such a list of decisions would be very useful; and if to this, the student or practitioner added in his notebook any cases which were subsequently decided, he would never regret the employment of the few hours which he had devoted in this place.

A further stage in the process might be the following:—Let the student note down the leading doctrines which are stated; and if he cannot always succeed in following the lecturer, let him consult the authorities referred to, and thus fill up the outline; and even if he be satisfied that he has taken accurate notes, it will still be beneficial to compare them with the books. He will thus not only make the points certain, but impress them indelibly on his mind. These leading principles will assist him also in cases far beyond the immediate scope of the subject of the particular lecture; for as there is a general consistency in legal principles, he will be able by analogy to reason from the known and certain to the doubtful or the unknown.

One more degree may be stated, to complete our notion of the benefits which might result from a diligent attendance on these lectures.

In addition to noting the general rules and principles, let the *exceptions* and *details* be set down, and as soon as practicable after the lecture, let them be investigated. This would be to take the whole pith and substance of the lecture, and go over all the cases and authorities, and thus become complete master of the law comprised in the subject treated of. Such a course, perhaps, would require more time than can generally be spared; and therefore the leading cases only might be consulted. It should be recollected, however, that the lectures continue only for six weeks in succession, and that there are considerable intervals between each section, as well as the whole of the long vacation.

It should ever be borne in mind by those who are desirous to excel, that the attainment even of a moderate degree of proficiency in all or any of the several branches of the law, is no child's play. You must summon up a spirit of unconquerable resolution, or you will be lost in the throng. You must determine to shun the ordinary allurements of pleasure, and depend on that which is the highest and the noblest—the gratification of exercising and improving the intellectual faculties, and accomplishing the still higher purpose of well and faithfully discharging the duties of your office; and certainly no art or science, nor the practice of any other profession, can more usefully or honourably occupy the best powers, both of head and heart, than a profession in which you are called upon diligently to study the principles of law,—to become acquainted with all its varied modes of practical application,—to weigh and consider the rights and interests of your fellow-beings,—to apply the best and speediest remedy adapted to the exigency of each particular case,—and in fine, to assist in the vigilant and faithful administration of the laws of your country.

In preparing yourselves for the discharge of these important duties, you will consider no amount of labour too burthensome—no sacrifice of temporary gratification too great. You will “overcome obstinate resistance by obstinate attack”—you will relax no efforts until the field has been fairly won. You will recollect that there are few things really worth possessing that can be achieved without great labour and perseverance; and that in proportion to the *difficulty*, will be the *honour*, of success. It is encouraging also to know, that each step forward which you make, shortens the remainder of the road—that each day your well-directed exertions will enable you with increasing strength to proceed on your course with greater facility; until at last that which was commenced as an irksome task, will become a delightful occupation, and be pursued for its own sake, even if it were not the means of attaining an important end.

## INNS OF CHANCERY.

### ATTORNEY'S RIGHT OF ADMISSION.

*Ex parte W. Gresham, Gent. one, &c.*  
*In re Barnard's Inn.*

This was an application made on behalf of Mr. Gresham, an attorney of this court, for a

mandamus to compel Mr. John Baines, of the Six Clerks Office and the Principal of Barnard's Inn, to admit Mr. Gresham, a member of that society.

Mr. Kennedy, of counsel for the applicant, stated that Sir John Fortescue, in his well known treatise *De Laudibus Legum Angliæ*, asserts as follows. “There belong to these larger Inns (of Court) ten lesser Inns called Inns of Chancery, in each of which there are a hundred students at the least, and in some of them a far greater number. After they have made some progress and are more advanced in years, they are admitted into the Inns of Court; of these there are four.” The learned counsel then quoted several orders made by the Privy Council and by all the judges in the reigns of Elizabeth, James I, and Charles I, and particularly one on the 15th of April, in the 6th year of Charles I, that the Inns of Chancery shall hold their government subordinate to the benchers of the Inns of Court, unto which they belong; and in case any attorney, clerk, or officer shall withstand the direction given by the benchers, upon complaint thereof to the judges of the court in which he shall serve, he shall be severely punished, either by prejudging from the court, or otherwise, as the case shall deserve.”

“That by a rule made by the judges (*tempore reipublicæ*) 1654, it is ordered “that all attorneys of this court be admitted of some Inn of Court or Chancery by the beginning of Hilary term next, or in the same term wherein they shall be admitted attorneys, under pain of being put out of the roll of attorneys.”

That by rule 3 Anne 1704, reciting that “divers complaints have been made to us that many attorneys and clerks of the several courts at Westminster, are not admitted in any of the Inns of Court or Chancery according to ancient course and usage, by which they might be resorted to, and business of law better managed, to the greater ease of the Queen's subjects, the neglect whereof is to the great detriment and decay of the societies of the law, and divers inconveniences do thereupon daily happen; for prevention whereof, and to establish a remedy for the same, it is ordered, &c. (by all the Judges) that all attorneys and clerks of the said Courts not already admitted into one of the said Inns of Court or Chancery shall procure themselves to be admitted into one of the Inns of Court (if these honorable societies will admit them), or into one of the Inns of Chancery, before the end of Trinity term next; and that for the future no person shall be sworn or admitted an attorney of any of the said Courts unless first admitted of one of the Inns aforesaid, and no attorney already admitted, or who shall be hereafter admitted, entered or sealed, and who is or shall be admitted, shall put himself out of the society whereof he is or shall be admitted until admitted of some other society, except such person shall totally leave off the practice of the law; and in case any attorney or clerk shall offend against this rule, or any part thereof, such attorney shall be put out of the roll of

attorneys until he or they shall give obedience to this order; and it is further ordered, that the respective treasurers and principals of the Inns of Chancery shall procure and get a list of the names of such attorneys and clerks of the respective Courts who are not admitted, and deliver the same yearly to the Lord Chief Justice, and Chief Baron, for the time being."

The learned counsel then stated that pursuant to the foregoing orders and rules, Mr. Gresham, had three times applied to the principal and ancients to be admitted a member, and had delivered testimonials signed by two serjeants, and nine barristers. To the first application, in 1832, he received an answer that they declined complying with his request; to the second, that they had no further answer to give; and to the third, that the society was full. The society at that time consisted only of eighteen persons, almost all relatives and several of one family; and the son of Mr. Baines, the principal, a youth of seventeen or eighteen years of age, was admitted immediately after the last refusal of admittance to Mr. Gresham.

Their Lordships seemed much surprised at these facts, and at the statement of the foregoing rules; but upon searching the manuscript rules of the Court, such a regulation was found.

The learned counsel then contended, that though he did not mean to argue at this day that it was compulsory on attorneys to be members, still they had the option of becoming so and he submitted that the Court would enforce the orders now existing, and procure Mr. Gresham admittance. Here was a very wealthy Inn, with a rental of between 1000*l.* and 2000*l.* per annum, a valuable library, and many other advantages, which ought not to be enjoyed by one family. He further stated that Mr. Gresham, since the third application for admittance, had applied to the benchers of Gray's Inn as visitors, who had cited the principal and ancients of Barnard's Inn before them. They did not appear, and the benchers of Gray's Inn after having heard Mr. Gresham, declined interfering, conceiving that their jurisdiction extended only to the internal government and management of the society of Barnard's Inn and its members *inter se*, and did not enable them to make orders for the admission of members there.

The Court directed the matter to be again mentioned on the following day; and on its being accordingly mentioned, they took the affidavits to read, and promised their judgment on the first day of next term.

## USAGES OF THE PROFESSION.

### CONVEYANCE TO DEVISEES.

Messrs. *H.* and *B.* are professionally concerned on behalf of the trustees and executors of the will of *A. B.*, by which an estate is de-

vised to the trustees upon trust for several devisees, in undivided proportions; and in discharge of the trust devolving upon the trustees under the will, it becomes requisite that they should convey the trust estate to the several devisees beneficially entitled. There are five devisees, for two of whom Mr. *L.* is professionally concerned; for other two Mr. *M.* is concerned, and for the other Mr. *T.* is concerned, and they each require separate conveyances. Messrs. *H.* and *B.*, as concerned for the trustees, contend, that all conveyances ought to be uniform, and that it is their duty, and that they are entitled to prepare them, and submit them for the perusal and approbation of the other parties. The solicitors for the beneficial devisees, however, dispute this, and contend that they are respectively entitled to prepare the conveyances to their own clients.

Are Messrs. *H.* and *B.* entitled to prepare the conveyances?

## INNS OF COURT.

### *Regulations relative to Attorneys and Solicitors.*

A new regulation having been made at Gray's Inn, relating to the admission of attorneys as members of that Inn of Court, by which the practice there is assimilated to that of Lincoln's Inn, we subjoin the rules in this respect, as they at present stand in all the Inns of Court.

*At Lincoln's Inn*, no person can be admitted a member whose name stands on the roll of attorneys or solicitors; and no person can be called to the Bar until he has kept twelve terms, and been a member of the society for five years.

In the *Inner Temple*, attorneys or solicitors may be admitted as members, but cannot enter into commons; and they must have ceased for three years to be on the roll of attorneys before they can be called to the bar. Persons who are twenty-three years of age may be called to the Bar after being members of the society for three years, and having kept twelve terms.

In the *Middle Temple*, attorneys and solicitors cannot be admitted as members; but all persons of twenty-three years of age, who have been members of the society for three years, and having kept twelve terms, may be called to the Bar.

*At Gray's Inn*, attorneys and solicitors may be admitted as members for the purpose of holding chambers, but cannot enter into commons, nor can any one be called to the Bar



until he has kept twelve terms, and been a member of the society for five years.

At Gray's Inn, until recently, attorneys and solicitors might become members of that society, but before being called to the Bar, must have ceased for *two* years to practise as attorneys. As the matter now stands, they must cease practising for *five* years, before they can be called at Lincoln's Inn or Gray's Inn, and *three* years at the Inner and Middle Temple. We understand that it is under consideration at Gray's Inn, whether that society should not reduce the period to three years, in conformity to the Temple.

## ON THE STUDY OF SPECIAL PLEADING.

To the Editor of the Legal Observer.

Sir,

I have, as almost every law student has, in attending a special pleader's office, experienced great difficulty in comprehending the principles of Special Pleading. Perhaps this arises from the inability of most of the special pleaders satisfactorily to put their pupils in possession of the principles upon which all pleadings must depend—or perhaps also because there is no work on special pleading sufficiently elementary to explain the difficulties, which surround the art of special pleading, to the student. In the hope that your valuable and instructive periodical may be able to furnish the law student with the means of mastering the difficulties that beset his way in learning special pleading, I have taken the liberty of addressing you on the subject. The little I have learned of special pleading, has taught me to classify all actions under two great heads, viz. those arising from,

I. *Ex contractu.*

II. *Ex delicto.*

I. Under the former, are those of

1. Assumpsit.

2. Debt.

3. Covenant.

II. Under the latter,

1. Trespass on the case.

2. Trespass *vi et armis*.

3. Trover.

4. Replevin.

5. Ejectment.

In looking over the precedents which Mr. Chitty gives for drawing declarations, in one or other of these actions, he does not reduce the precedent into its parts, which the declaration must comprise before it can apply to any case that is brought under it; so that the student,

who is sent by his master to draw a declaration on the case that is given to him, is quite bewildered. And in nearly every action, though it may be again and again under the same head, as, for instance, under assumpsit, he has the same difficulty to go over. Whereas, were he first told that a declaration on assumpsit, or trover, must comprise so many parts to render it a perfect declaration, he would soon be able to draw any declaration, whenever a case was presented to him. In short, if a perfect analytic outline of its contents were laid before him, he would soon find no difficulty in drawing the declaration.

An instance of what I mean, of giving the parts of every declaration to the student, before he draws it, is the following, under an action of assumpsit.

*A Case to draw a Declaration on Assumpsit.*

Suppose *A.*, a manufacturer, has sold a quantity of woollen goods to *B.*, for which *B.* was to pay 50*l.* in money, and four pipes of wine. The money has been paid by *B.*, but no wine has been delivered. *A.* brings an action against *B.* in assumpsit.

The declaration of *A.* will contain the following heads, or parts, or outline, which being given to the student, he can readily, with Mr. Chitty's precedents on assumpsit, draw the declaration for *A.* against *B.*

1. To draw a declaration on promises against *B.*
2. A bargain is stated to have been made between *A.* and *B.* to buy and sell goods.
3. Promise by *B.* to *A.* to pay money 50*l.* and four pipes of wine.
4. Delivery of the goods by *A.* to *B.*
5. Acceptance of them by *B.*
6. Payment of money, 50*l.* by *B.*
7. Reasonable time for payment of residue given by *A.* to *B.*—Time has elapsed.
8. Request of *A.* to *B.* to pay the wine.
9. Breach of the contract by *B.*
10. Damages sustained in consequence by *A.*

Such are the parts, or heads, in the outline of the declaration, which the student must have in his mind before he can draw the declaration on assumpsit in such a case as the one adduced.

Were you, sir, to give the student a case or two, such as the attorney sends to the special pleader to draw a declaration upon, under the different actions arising *ex contractu*, as also *ex delicto*, and lay out the parts that each declaration must comprise, and then give the declaration itself, pointing out at its side or margin, these different parts or divisions like the plan I have just imperfectly attempted to explain in the case I have given, you would confer an immense benefit to the student of Pleading. He would then, in a short time, become familiarly acquainted with the parts of every declaration, and would find little or no difficulty, whenever a case was given him, to draw a declaration upon it. At present, as I have already explained, he cannot obtain this knowledge of the elementary principles of

pleading from either special pleader, or from works on pleading.

You might give, every week, one of these forms of declaration, under the different heads of *ex contractu* and of *ex delicto*, analytically divided into the parts it ought to contain; and any other hint to facilitate the progress of the student in acquiring a perfect knowledge of special pleading.

It would increase much the value of the papers I have ventured to suggest, if there were added shortly the principal heads of evidence, upon which the plaintiff must support his declaration. It would also be very useful to give pleas, whether general or special, according to the new rules on pleading, drawn up in the same analytic outline, and also such evidence as may be necessary to support the action or defence.

A LAW STUDENT.

[We question whether our limits will enable us to do all that our correspondent suggests, even in the briefest manner; and we think he has not done justice to the works of Mr. Tidd and Mr. Chitty, in assuming that the student is at present without the means of instruction on the points suggested, and we refer him also to the work of Mr. Warren, reviewed in the present number. Being desirous of rendering all the service in our power to the younger members of the profession, we shall look into the details of the subject, and in the mean time shall be glad to receive any further communication bearing upon it.—Ed.]

## SELECTIONS FROM CORRESPONDENCE.

No. C.

### ATTORNEYS' CERTIFICATE DUTY.

Sir,

I am glad to find, from the Legal Observer published the 25th of April, that the attorneys and solicitors are about to petition the legislature to take off the annual certificate duty; so much has already been said on this subject, that it is unnecessary to offer any further argument as to the hardship on many, especially young practitioners, of this very unequal duty. The object of the annual certificate is, to check the admission of needy and objectionable men to practise in the courts of law; but it should be remembered, that this has already been attended to, by the heavy duty paid on the articles of clerkship. No other set of men, whatever their profession or station may be, are subjected to so heavy an impost; it becomes therefore doubly oppres-

sive upon solicitors and attorneys, after having incurred so great an expence to enable them to commence their career in life, being called upon to pay this annual certificate duty.

As a subscriber to your very useful journal, I take the liberty of offering you these hasty observations, and to add, that the profession will feel greatly indebted to you by publishing in an early number the form of a petition as one that may be generally adopted.

VERITAS.

[We are in possession of the form of a petition on this subject, but are not quite satisfied with it, and shall be glad to receive any other that may have been prepared.—Ed.]

### PRESUMED SURRENDER OF TERMS.

In equity, where a term has *never been assigned* to attend the inheritance, the Court will, in a proper case, presume a surrender. *Emery v. Trowcock*, 6 Madd. 54; and *ex parte Holman* 1 Sug. V. & P. 509; but there is no case in equity in which a term *once assigned* to attend has been presumed to be surrendered; and the cases *at law* are, I contend, overruled by the decision of *Doe d. Blacknell v. Ploverman*, hereafter noticed. The doctrine propounded in *Doe d. Burdett v. Wright*, and *Doe d. Putland, v. Hilder*, 2 B. & Ad. 710 and 782, was called in question in *Doe v. Putland*, 1 Sug. V. & P. 502, by Richards, C. B. and Graham, B.; and in *Deardon v. Lord Byron*, *ibid.* 506, by Richards, C. B.; by Lord Eldon, in 1820, in *Townsend v. Bishop of Norwich*, *ibid.* 504, and in *Hayes v. Bailey*, *ibid.* 506; and in *Cholmondeley v. Clinton*, *ibid.* 506, Lord Eldon again expressed a strong opinion against the doctrine of the presuming the surrender of a term to attend the inheritance. And in *Aspinall v. Kempson*, *ibid.* 508, the same learned person, speaking of the case of *Doe v. Hilder*, said, "I have no hesitation in declaring, that I would not have directed a jury to presume a surrender of a term in that case; and for the safety of the titles to the landed estates in this country, I think it right to declare, that I do not concur in the doctrine laid down in that case." *Ibid.* 502. In *Evans v. Bicknell*, 6 Ves. 184, Lord Eldon held the presuming a term to be surrendered, any thing but just, and extremely unsafe, as it would shake titles to property in many instances; and in *Maundrell v. Maundrell*, 10 Ves. 246, the Lord Chancellor said, "it was not necessary always to have a term assigned on a new purchase," 10 Ves. 259. In *Doe d. Blacknell v. Ploverman*, 2 B. & Ad. 573, Lord Tenterden said, "that the doctrine laid down in *Doe v. Hilder*, and *Doe v. Wright*, had been questioned." The case was as follows:—In 1772 a term of 1000 years was created by deed, for the purpose of securing 5000*l.*; and in 1787, the principal and interest having been paid, the residue of the term was assigned in trust for the devisees of the person who created the term. In 1789 the premises were conveyed to a purchaser by

deed, and the residue of the term was assigned in trust for the purchaser, her heirs and assigns, or as she should appoint, and in the mean time to attend the inheritance. The purchaser entered into possession of the premises, and continued so possessed till her death. In 1808 she executed a marriage settlement, reserving to herself a power of appointment, by deed or will; and after the marriage she, in 1813, devised all her real estate. Neither in the settlement nor in the will was any mention made of the term of 1000 years. She and her husband having both died, it was held, on ejectment brought by the heir at law, that there were no premises from which a surrender of the term could be presumed. Also in *Dny v Williams*, 2 Crompt. & Jer. 460, (which has been overlooked by Sir Edward Sugden, in his treatise on V. & P.) Bayley, B. said, "he had frequently talked with Lord Tenterden on the subject, and they had agreed in thinking, that the rule as to presuming surrenders had gone far enough, and that it ought not to be extended." The doctrine established in *Doe v. Hilder* and *Doe v. Wright*, recognising the presumed surrender of terms, must be considered entirely overruled, and these cases are consequently now of no weight. The importance of obtaining all outstanding terms cannot be too strongly impressed on purchasers.

J.

## SURNAME.

As to the change of name, a man may at any time assume any surname at his pleasure, not being for any fraudulent purpose, for such surname is only a patronymic, or name of reputation. A marriage by an assumed name, being the reputed name of the party, would be good. An act of parliament giving a new name, does not take away the former name; and as to the king's license, it merely permits the party to take, but does not give, 15 Ves. 100. The king's license is of itself nothing; the license is merely a more respectable sanction for changing the same, and prevents any disreputable inference. The license is merely permissive; and a name, without fraud, may as well be assumed without license as with it. If lands are limited to a party in fee, with the following injunction, "he taking and using the surname of B. within three years," A., by using the surname, without a license or act of parliament, is sufficiently complying with the injunction to entitle the party to the estates. If the testator declares that the name shall be effectually changed, an act of parliament would be perhaps necessary, as the effectual mode of changing the surname; for this is compulsory, the king's license is only permissive. If a man obliges himself by a false surname, he shall be estopped to avoid it, because he may have divers names; it is sufficient if it appear by evidence that he was the same person who sealed and delivered the obligation. Vin. Abr. Obligation (B.) *Reeves v. Slater*, 7 Bar. & C. 486. No party shall be allowed to defeat any

instrument sealed and delivered by him as his deed, by insisting on a variation between the name in the deed and his real or usual name: he *pro hac vice* may be said to adopt the name written; and it appears that a man may assume surnames at his pleasure, for he may have "divers at divers times." Co. & Litt. 3 a. 2 Bos. & P. 338. 7 Barn. & C. 486. Yet a person can only have one Christian name; if he be called John Job, yet it is but one name, and should be written John—Job. Co. & Litt. 3 a. 3 Mau. & S. 263. It is stated by Lord Coke, that the Christian name given at baptism may be changed at confirmation, and then the baptismal name is gone, and should not be used again; and Lord Thurlow speaks to the same effect, in *Delmar v. Robello*, 1 Ves. jun. 416.

J.

## PARLIAMENTARY RETURNS.

## BAILABLE WRITS.

Return of the number of bailable writs issued out of the Courts of King's Bench, Common Pleas, and Exchequer, from 1st Jan. 1830, to 31st Dec. 1834.

## Court of King's Bench.

Number of writs issued out of the Court of King's Bench, from 1st Jan. 1830, to 31st Dec. 1834, 63,793.

WADHAM WYNDHAM.

King's Bench Office, Temple, 4th April, 1835.

## Court of Common Pleas.

The number of bailable writs issued out of the Court of Common Pleas, from the 1st day of Jan. 1830, to the 31st day of Dec. 1834, were, in the totals, 22,794.

N. C. TINDAL.

Bedford Square, 7th April, 1835.

## Court of Exchequer of Pleas.

Bailable writs 1830—1,690.  
1831—6,308.  
1832—9,234.  
1833—8,670.  
1834—8,769.

We have not included alias or pluries writs in bailable actions, where the first writ was not executed, presuming the return intended was of the number of actions during that period, in which bailable process had been issued.

KENRICK COLLETT,  
EDMUND WALKER,  
Two of the Masters, &c.

Exchequer Office, Lincoln's Inn, }  
23d March, 1835.

MISCELLANEA.

**ANECDOTE OF BARON HULLOCK.**—In a cause which he led, he was particularly instructed not to produce a certain deed unless it should be absolutely necessary. Notwithstanding this injunction, he produced it before it was necessary, with the view of deciding the business at once. On examination, it proved to have been forged by his client's attorney, who was seated behind him at the time, and who had warmly remonstrated against the course which he had pursued. Mr. Justice Bayley, who was trying the cause, ordered the deed to be impounded, that it might be made the subject of a prosecution. Before this could be done, however, Mr. Hullock requested leave to inspect it, and on its being handed to him, immediately returned it to his bag. The Judge remonstrated; but in vain. No power on earth, Mr. Hullock replied, should induce him to surrender it: he had incautiously put the life of a fellow creature in peril; and though he had acted to the best of his discretion, he should never be happy again were a fatal result to ensue. Mr. Justice Bayley, not sorry perhaps to have an excuse for assisting the design, continued to insist on the delivery of the deed, but declined taking decisive measures until he had consulted with the associate Judge. The consultation came too late; for the deed was destroyed without delay, and the attorney escaped.—*Ann. Biog.* 1830.

ROLLS SITTINGS,  
*In and after Trinity Term, 1835.*  
At Westminster.

Wednesday	May 27	Motions.
Thursday	28	Pleas, Demurrers, Causes, Further Directions, and Exceptions.
Friday	29	Petitions in the General Paper.
Saturday	30	Pleas, Demurrers, Causes, Further Directions, and Exceptions.
Monday	June 1	
Tuesday	2	
Wednesday	3	
Thursday	4	Motions.
Friday	5	Pleas, Demurrers, Causes, Further Directions, and Exceptions.
Saturday	6	
Monday	8	
Tuesday	9	
Wednesday	10	
Thursday	11	Motions.
Friday	12	Pleas, Demurrers, Causes, Further Directions, and Exceptions.
Saturday	13	
Monday	15	
Tuesday	16	
Wednesday	17	Motions.

*At the Rolls.*

Thursday	18	Petitions in the General Paper, and to swear in Solicitors.
Friday	19	Short Causes.

Causes, Further Directions, and Petitions by Consent, every Friday, at the Sitting of the Court.

EXCHEQUER.

*Trinity Term, 1835.*

	Wednesday	May 27	Term begins.
	Thursday	28	Equity, Petitions and Motions, Lord <i>Abinger</i> .
	Friday	29	Ditto, Causes, Mr. Baron <i>Alderson</i> .
London, <i>Nisi Prius</i> .	Saturday	30	Petitions and Motions, Lord <i>Abinger</i> .
	Monday	June 1	Special Paper.
	Tuesday	2	Equity, Further Directions, &c. Lord <i>Abinger</i> .
	Wednesday	3	Special Paper and Error.
	Thursday	4	Equity, Petitions and Motions, Lord <i>Abinger</i> .
Middlesex, <i>Nisi Prius</i> .	Friday	5	
	Saturday	6	
	Monday	8	Special Paper and Equity Causes, Baron <i>Alderson</i> .
	Tuesday	9	Error.
Middlesex, <i>Nisi Prius</i> .	Wednesday	10	Special Paper.
	Thursday	11	
	Friday	12	Equity, Petitions and Motions, Lord <i>Abinger</i> .
London, <i>Nisi Prius</i> .	Saturday	13	Ditto, Further Directions, &c.
	Monday	15	Ditto Causes, Mr. Baron <i>Alderson</i> .
London, <i>Nisi Prius</i> .	Tuesday	16	Ditto Petitions and Motions, Lord <i>Abinger</i> .
	Wednesday	17	Term ends.

**BARRISTERS CALLED.***Easter Term, 1835.***LINCOLNS INN.**

John Bayley, Esq.  
 John Dekawer Frampton, Esq.  
 Robert James Tennent, Esq.  
 Richard Wood, Esq.  
 Joseph Slater, Esq.  
 Benson Blundell, Esq.  
 William John Campbell Allen, Esq.  
 William Scurfield Grey, Esq.  
 Samuel Gale, Esq.  
 Edward Robert Simmons, Esq.  
 William Rawson Havens, Esq.  
 Alfred Morgan, Esq.  
 Fitzowen Skinner, Esq.  
 John Shaw Drinkald, Esq.  
 George Burdett, Esq.  
 William Maurice Herbert, Esq.

**INNER TEMPLE.**

Edward Cooke, Esq.  
 Joseph St. John Yates, Esq.  
 Thomas Henry Benjamin Bund, Esq.  
 William Frederick Beadon, Esq.  
 Thomas Keogh, Esq.  
 Alfred Caswall, Esq.  
 Edward Ings, Esq.  
 John Leigh, Esq.

**MIDDLE TEMPLE.**

William Augustus Gordon Hake, Esq.  
 Richard Burroughs, Esq.  
 Charles Valentine Worsley, Esq.  
 Francis Burgess, Esq.  
 William Powis, Esq.  
 Joshua Wigley Bateman, Esq.  
 John Young Kemp, Esq.  
 John Watts Ebdon, Esq.

**MASTERS EXTRAORDINARY IN  
CHANCERY.**

*From April 21, to May 19, 1835, both inclusive,  
with dates when Gazetted.*

Craddock, George William, Nuneaton, Warwick. May 19.  
 Gregson, William, Rochford, Essex. May 1.  
 Payne Richard Ecroyd, Leeds, York. May 19.

**PERPETUAL COMMISSIONERS UNDER  
THE FINE AND RECOVERY ACT.****LANCASHIRE.**

John Postlethwaite Myers, } Broughton in  
 William Blendall, } Furness.  
 Robert Field, Cartmel.

**LINCOLNSHIRE.**

George Kewney, Grantham.

**DISSOLUTIONS OF PROFESSIONAL  
PARTNERSHIPS.**

*From April 21, to May 19, 1835, both inclusive,  
with dates when Gazetted.*

\* \* *The names printed in Italics are the  
Partners who receive and pay debts.*

Applehy, Samuel, and Richard Charnock,  
 Raymond Buildings, Gray's Inn, Attorneys  
 at Law and Solicitors. April 29.

Goodman, Timothy, and Thomas Herbert  
 Griffith, Warminster, Wilts, Attorneys and  
 Solicitors. May 12.

Rowley, *Alexander Butler*, and James Stain-  
 bank, Manchester, Solicitors. May 5.

Umney, Alfred, and Elijah Litchfield, Chan-  
 cery Lane, Attorneys at Law, and Solicitors.  
 May 15.

**INCORPORATED LAW SOCIETY.****MEMBERS ADMITTED.**

*May, 1835.*

Morland, George Bowes, Abingdon.  
 Townsend, Jackson, 10, Gray's Inn Square.  
 Latter, Robert Booth, Bromley, Kent.  
 Pycroft, Edmund, 1, South Square, Gray's Inn.  
 Keyser, Henry, 36, Lincoln's Inn Fields.  
 Wilcocks, James, Lombard Street.  
 King, Wm. Charles, Serjeants' Inn, Fleet St.  
 27th May, 1835.

## LIST OF NEW PUBLICATIONS.

A Digest of the new Statutes and Rules, with Cases commencing with 11 G. 4, alphabetically arranged, with an Appendix of Statutes. By R. C. Sewell, Esq. Price 14s. boards.

Cases of Controverted Elections in the Twelfth Parliament of the United Kingdom. By H. J. Perry, and J. W. Knapp, Esqrs. Vol. II. Part I. Price 6s.

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Reports of Cases in the Courts of Exchequer. By C. Crompton, R. Meeson, and H. Roscoe, Esqrs. Hilary Term, 5 W. 4. Vol. I. Part IV. Price 7s.

## BANKRUPTCIES SUPERSEDED.

From April 21, to May 19, 1835, both inclusive, with Dates when gazetted.

Ball, Wm., Worcester, Skin Merchant and Leather Dresser, and Glove Factor. May 15.  
Haynes, Geo., Trinity Street, Southwark, Victualler. May 15.  
Layfield, Thomas, and William Layfield, Silver Street, St. James's, Taylors. May 1.  
Race, Jones, Waxed-next-the-Sea, Norfolk, Grocer and Draper. May 12.  
Ward, William, Coventry, Ribbon Manufacturer. May 12.

## BANKRUPTS.

From April 21, to May 19, 1835, both inclusive, with Dates when gazetted.

Archbald, William Augustus, Phoenix Sugar Refinery, Ratcliffe Cross, and Back Lane, St. George's in the East, Middlesex, Sugar Refiner. *Adlington & Co., Bedford Row.* *Graham, Off. Ass.* May 6.  
Adams, John, Bridge Foot, Vauxhall, Surrey, Corn Dealer. *Fritchard & Co., New Bridge Street.* *Goldsmid, Off. Ass.* May 5.  
Browett, Thomas, Northampton, Tin-plate-worker and Brazier. *King, Tokenhouse Yard.* *Messrs. Markham, Northampton.* Apr. 24.  
Backhouse, Thomas, Wakefield, York, Plumber & Glazier. *Preston, Tokenhouse Yard.* *Waltham, Wakefield.* Apr. 24.  
Bell, Christopher Robinson, Leeds, York, Cloth Merchant. *Strangways & Co., Barnard's Inn.* *Blackburn, Leeds.* Apr. 28.  
Bodin, Wm., Cheetham Street, Cheetham, Manchester, Agent and Hair Dresser. *Rowley, Manchester.* *Cuselle & Co., Southampton Buildings, Chancery Lane.* Apr. 28.  
Browne, John, and Edmund Browne, Bath, Stationers. *Jones, Crosby Square, Bishopsgate.* *Hellings, Bath.* May 1.  
Bannister, Wm. Powell, Harley Mews, St. Mary-le-bone, Middlesex, Hackneyman. *Green, Off. Ass.* *Dale, Barnard's Inn.* May 8.  
Bishton, John, Edward Kempson, William John Jellicoise, and William Callum, Capponfield Iron Works, near Wolverhampton, Stafford, Ironmasters. *Capes, Raymond Buildings, Gray's Inn.* *Holyoke & Co., Wolverhampton.* May 8.

Badenach, George, and Thomas Jenkinson, Liverpool, Brokers. *Chester, Staple Inn.* *Dunport, Liverpool.* May 8.  
Boast, David, County Terrace, New Kent Road, Surrey, Surgeon and Apothecary, Chemist and Druggist. *Abdoo, Off. Ass.* *Messrs. Harrison, Bond Court, Walbrook.* May 18.  
Bass, Charles, Kingston-upon-Hull, Inn-keeper. *Belcher, Off. Ass.* *Miller, Ely Place.* May 19.  
Bazani, Anthony, High Holborn, Wax and Composition Doll Manufacturer. *Smith, King's Arms Yard, Coleman Street.* *Goldsmid, Off. Ass.* May 19.  
Brown, William, Gloucester, Victualler. *Messrs. Halls Gloucester.* *Galsworthy & Co., Cook's Court, Lincoln's Inn.* May 19.  
Crosby, Thomas, Nottingham, Dyer. *Sharpe & Co., Old Jewry.* *Graham, Off. Ass.* Apr. 28.  
Chapman, George Frederick, Littleham and Exmouth, Devon, Hotel and Lodging-house Keeper. *Clowes & Co., Temple.* *Laidman, Exeter.* Apr. 28.  
Cheetham, Wm., Austin Friars, Old Broad Street, Gunpowder Merchant. *Kerwas & Co., Cannon Street.* *Lockington, Off. Ass.* May 1.  
Caldwell, James, New Crane, Shadwell, Middlesex, Licensed Victualler, Coal Merchant, & Machinist. *Gole, Lime Street, Lendenhall Street.* *Terquand, Off. Ass.* May 1.  
Church, Wm., Aston, near Birmingham, Civil Engineer. *Adlington & Co., Bedford Row.* *Wills, Birmingham.* May 5.  
Cooper, Wm. Joseph, and James Beattie, North Shields, Northumberland, Drapers. *Williamson & Co., Verulam Buildings, Gray's Inn.* *Ingledeu, Newcastle-upon-Tyne.* *Thosley, North Shields.* May 12.  
Daniell, Thomas, Michael-church Court, Hereford, Copper Smelter. *Simmons & Co., Truro.* *Newton & Co., South Square, Gray's Inn.* Apr. 28.  
Dunn, Maurice, Preston, Lancaster, Wine Merchant. *Chester, Staple Inn.* *Haydock, Preston.* Apr. 28.  
De Carle, Eli, Norwich, Grocer. *Clarke & Co., Lincoln's Inn Fields.* *Beckwith & Co., Norwich.* May 5.  
Downs, Joseph, West Retford, Nottingham, Grocer. *Bell, Bedford Row.* *Carterwright, Bawtry.* May 5.  
Dymock, Ralph, Oxford, Saddler. *Robinson & Co., Charterhouse Square.* *Dudley, Oxford.* May 12.  
Evans, John, Bridge Street, Lambeth, Surrey, Grocer. *Bromley, South Square, Gray's Inn.* *Whitmore, Off. Ass.* May 8.  
Elliott, Richard, Princes' Street, Coventry Street, Westminster, Victualler. *Green, Off. Ass.* *Silver, Clement's Inn.* May 8.  
Ford, John, Fieldgate Street, Whitechapel, Iron Founder. *Belcher, Off. Ass.* *Pearce & Co., St. Swithin's Lane.* May 5.  
Glas, Joseph, White Hart Street, Drury Lane, Victualler. *Scargill & Co., Hatton Court, Threadneedle Street.* *Cannan, Off. Ass.* May 19.  
Griffiths, William, jun., Wellington Street, Strand, Bookseller and Publisher. *Lester, New Inn.* *Lockington, Off. Ass.* May 12.  
Gunning, William Broadbent, Egham, Surrey, Bricklayer. *Bull, Ely Place.* *Cannan, Off. Ass.* May 12.  
Goldsmid, Lionel Frager, Quadrant, Regent Street, Bill Broker. *Peterson & Co., Old Broad Street.* *Clark, Off. Ass.* May 19.  
Harris, Wm., Farcham, Southampton, Cattle or Sheepsaleman. *Bishop, Serjeant's Inn, Chancery Lane.* *Messrs. Hannes, Shaftesbury.* Apr. 21.  
Hogarth, William, Newcastle-upon-Tyne, Builder. *Gibson, Newcastle-upon-Tyne.* *Swaine & Co., Frederick's Place, Old Jewry.* Apr. 24.  
Hennell, Frederick, Air Street, St. James's, Tailor. *Groom, Off. Ass.* *Bell, Vine Street, Regent Street.* May 1.  
Hickson, Wilson, Lincoln, Grocer. *Scott, Lincoln's Inn Fields.* *Moore, Lincoln.* May 8.  
Houlder, William, Paignton and Brixham, Devon, Tea Dealer and Dealer in Toys. *Davison, Broad Street, Chapside.* *Jokson, Off. Ass.* May 12.  
Hall, John, Edgworth, Lancaster, and Jasper Wager, of Widdow's Day, Calico Printers. *Key & Co., Manchester.* May 19.  
Hancock, Simon Cole, Newbury, Berks, Cheese and Bacon Factor. *Pimiger, Newbury.* *Parker, St. Paul's Churchyard.* May 19.  
Haynes, William, Coln, St. Aldwyn's, Gloucester, Miller. *Trinder, Lincoln's Inn Fields.* *Mullings, Cirencester.* May 19.  
Hall, Robert, Newcastle-upon-Tyne, Hatter. *Green, Off. Ass.* *Scott & Co., St. Mildred's Court, Poultry.* May 12.  
Hackett, John, Leicester, Printer and Engraver. *Holms & Co., New Inn.* *Bond, Leicester.* May 18.  
Jarnan, Charles, West Smithfield, Woollen Draper, Tailor and Trader. *Brougham & Co., Falcon Square.* *Cannan, Off. Ass.* May 1.  
James, Thomas, Llangamarch, Brecon, Flannel Manufacturer. *Vaughan & Co., Brecon.* *Bicknell & Co., Lincoln's Inn.* May 1.  
Johnson, Wm., Gracechurch Street, Auctioneer, and Crosby, Surrey, Pawnbroker. *Wills & Co., Tokenhouse Yard.* *Graham, Off. Ass.* May 19.  
Kirkby, Thomas, sen., Harbour Flat, Westmoreland, and Thomas Kirkby, jun., Smelt-house Mills, Ripon, York, Flax Dressers and Spinners. *Johnson & Co., Temple.* *Taylor, Knaresborough.* May 1.

Kirkland, Matthew, and George Robinson, Manchester, and Blackburn, Lancaster, Muslin Manufacturers. *Hickcock, Manchester: Johnson & Co., Temple.* May 15.  
 Lawrence, Thomas, Farnham, Surrey, Fellmonger. *Prickett, Odham, Hants: Bridger, Finsbury Circus.* May 15.  
 Lock, Samuel, and Henry Binney, Berners Street, Oxford Street, Dyers. *Nind & Co., Thromorton Street: Johnson, Off. Ass.* May 1.  
 Mason, Wm., Watford, Hertford, Timber Dealer. *Gibson, Off. Ass.: Smith, Southampton Buildings.* May 12.  
 Morris, Martin, Junr., South Shields, Durham, Ship Owner & Merchant. *Hodgson, Broad Street Buildings: Wilson, South Shields.* May 12.  
 Mayston, Edward, North Elmham, Norfolk, General Shopkeeper. *Lythgoe, Essex Street, Strand: Winter, Norwich.* May 12.  
 Mortimore, Joseph Polyblank, Devonport, Devon, Upholsterer, Cabinet Maker and Undertaker. *Brooking & Co., Lombard Street: Elworthy, Devonport.* May 8.  
 Mawhood, Henry, High Holborn, Dealer in Lace. *Gibson, Off. Ass.: Martindale, Cecil Street, Strand.* May 19.  
 Murgatord, Charles, Shelf, Halifax, York, Stuff Merchant. *Bower, Chancery Lane: Mitchell, Halifax.* May 19.  
 Ord, Ralph, Bishopthorpe, York, Dealer. *Capes, Raymond Buildings, Gray's Inn: Campton, Goodramgate, York.* April 21.  
 Penrice, Joseph, and Matthew Andrew, Old Change, London, Warehouseman. *Bell & Co., Bowchurch-yard: Turgand, Off. Ass.* May 1.  
 Proctor, Benj., Prospect Place, Radford, Nottingham, Lace Maker. *Capes, Grays Inn: Wadsworth, Nottingham.* Apr. 28.  
 Pash, Joseph, Bury St. Edmunds, Suffolk, Leather Cutter & Cordwainer. *Wayman & Co., Bury St. Edmunds: Walter & Co., Symonds Inn, Chancery Lane.* May 15.  
 Rodbard, Frederick, and Charles Massina, Turnham Green and Hammermith, Middlesex, Schoolmasters. *Crocker & Co., Basinghall Street: Common, Off. Ass.* Apr. 21.  
 Richardson, Thomas, Norwich, Coal Merchant. *Staff, Norwich: White & Co., Frederick's Place, Old Jewry.* Apr. 28.  
 Ramas, Isaac, Brighton, Sussex, Clothes Dealer. *Edwards, Off. Ass.: Abraham & Co., Clifford's Inn.* May 1.  
 Rowley, Jonas, sen., Watney Street, Commercial Road, Baker. *Foster, at Mr. Stevens's Office, Gray's Inn Square: Goldsmid, Off. Ass.* May 8.  
 Rayner, Thomas, Manchester, Victualler. *Booth, Manchester: Johnson & Co., Temple.* Apr. 21.  
 Rix, Geo., Albany Wharf, Camberwell, Surrey, Potter. *Groom, Off. Ass.: Chell, Clement's Inn.* May 12.  
 Sayers, William, Horsham, Sussex, Baker. *Dandy & Co., Bream's Buildings, Chancery Lane: Johnson, Off. Ass.* Apr. 21.  
 Smallwood, Thomas, Birmingham, Warwick, Grocer. *Gem & Co., Carey Street, Lincoln's Inn: Lloyd, Birmingham.* Apr. 21.  
 Savage, Robert Watson, Great Ryder Street, St. James's Westminster, Dealer. *Groom, Off. Ass.: Parker, Fish Street Hill.* Apr. 24.  
 Stroud, Wm. Dickins, Woolhamton, Berks, Linen and Woollen Draper and Haberdasher. *Worne, Leadenhall Street: Johnson, Off. Ass.* May 5.  
 Seaman, Thomas, Manchester, Common Brewer. *Sweis & Co., London: Harding, Manchester.* May 5.  
 Scott, John, Wakefield, York, Grocer. *Preston, Tokenhouse Yard: Whiskam, Wakefield.* May 8.  
 Sherry, James, Southampton, Innkeeper. *Smith, Chancery Lane.* May 8.  
 Spencer, Frederick Charles, Halifax, York, Wine & Spirit Merchant. *Wesell, Halifax: Adlington & Co., Bedford Row.* May 2.  
 Taylor, William, Hitchin, Herts, Cow Dealer. *Edwards, Off. Ass.: Smith, Southampton Buildings, Chancery Lane.* May 19.  
 Thompson, Wm., Brassington, Derby, Cattle Jobber. *Habberny, Wirksworth: Adlington & Co., Bedford Row.* May 19.  
 Terry, Thomas Leighton, Cornhill, Vintner and Coffeehouse Keeper. *Gould, Great St. Helens, Bishopgate: Goldsmid, Off. Ass.* Apr. 24.  
 Tye, Daniel, Weybridge, Surrey, Cattle and Sheep Salesman. *Green, Off. Ass.: Smith & Co., Southampton Street, Bloomsbury.* Apr. 24.  
 Turner, Wm., and Henry Davey, Bermondsey, Paper Manufacturers. *Clift & Co., Ely Place, Holborn: Clark, Off. Ass.* May 5.  
 Thornton, Edward, Oxford Street, Ironmonger. *Abbott, Off. Ass.: Dawson, Ampton Street, Gray's Inn Road.* May 5.  
 Todd, Robert, Cheltenham, Gloucester, Builder. *Wilson, King's Bench Walk, Temple: Hyatt & Co., New-castle-under-Lyme.* May 5.  
 Troutbeck, James Sudell, Darcy Lever, Lancaster, Manufacturing Chemist. *Blackstock & Co., Temple: Deane & Co., Liverpool.* May 5.  
 Thomson, Wm., Cross Lane, Tower Street, Wine Merchant. *Edwards, Off. Ass.: Paterson & Co., Old Broad Street.* May 8.

Tonks, Joseph, Birmingham, Wire Worker. *Harrison, Birmingham: Newton, South Square, Gray's Inn: Benson & Co., Birmingham.* May 15.  
 Ullithorpe, Charles More, Red Lion Square, Broker. *Richardson & Co., Golden Square: Clark, Off. Ass.* May 15.  
 Vaughan, Richard, Freeman's Court, Cheapside, Coffeehouse Keeper. *Gale, Basinghall Street: Whitmore, Off. Ass.* May 5.  
 Woodward, Tho., Piccadilly, Tea Dealer & Grocer. *Edwards, Off. Ass.: Hadden, Philpot Lane.* May 15.  
 Watts, Wm., Lutterworth, Leicester, Cattle Dealer & Coach Proprietor. *Holme & Co., New Inn: Mash, Lutterworth.* May 15.  
 Williams, Wm., Pontymvile, Panteague, Monmouth, Shopkeeper. *Williams, Verulam Buildings, Gray's Inn: Davis, Abchurch-lane.* Apr. 21.  
 Webster, Alexander, St. Michael's Alley, Cornhill, Victualler and Tavern Keeper. *Green, Off. Ass.: Watson, Lincoln's Inn Fields.* Apr. 28.  
 Willis, John, Poplar, Middlesex, Victualler. *Gibson, Off. Ass.: Henderson & Co., Leman Street, Goodman's Fields.* Apr. 28.  
 Westley, Tho., Colehill Street, Eaton Square, Middlesex, Baker and Dealer. *Gibson, Off. Ass.: Kearns, Staple Inn.* Apr. 5.

## THE EDITOR'S LETTER-BOX.

The Reports under the Real Property, Common Law, Criminal Law, Municipal Corporation, and Ecclesiastical Commissions, may be obtained either separately or collectively, of the Publishers of this work. Of some of the Reports a small number of copies only remain.

The "Disputed Decision" of Lord Brougham, which has been sent us, shall be considered.

The Queries and Answers of L; "Mentor;" A; "Minor;" W.Y.C.; Carolus; and W.W.B.; have been received. These Communications are generally taken in the order in which they arrive. We cannot always accommodate those who request an immediate insertion.

We assure Z. we have no intention to give a preference to any one in the admission of the contributions sent to us. The delay has been accidental or unavoidable.

The complaint against the recent holidays at the Accountant General's Office, shall be attended to.

The letter of "Veritas," on the Taxation of Costs in actions under 20*l.* entered for trial at *Nisi Prius*, shall be inserted.

We thank a Correspondent for his communication, and the loan of the papers in the case of the King's Somerset Herald.

The Digest of Cases, of which the Second Quarterly Part is just published, (price 2*s.*) forms with the "Commentaries on the Statutes," effecting alterations in the Law each Session, an annual Volume, which appears more and more to meet the approval of the profession.

# The Legal Observer.

Vol. X.

SATURDAY, JUNE 6, 1835. No. CCLXXIII.

— "Quod magis ad nos  
Pertinet, et nescire malum est, agitamus.

HORAT.

## ON THE FORCE OF FOREIGN JUDGMENTS.

IN the recent case of *Aliven v. Furnival*,<sup>a</sup>—familiar to many of our readers, as an act<sup>n</sup> of considerable importance on a foreign judgment,—Mr. Baron *Parke*, in the course of the argument, referred to *Martin v. Nicholls*,<sup>b</sup> where the Vice-Chancellor, greatly to the surprise of the profession, decided that a foreign judgment was not examinable. Thus referred to, it might seem that that decision was adopted by the learned Baron, in which case we should distrust our dissent from it; but we rather believe the learned Baron only wished to bring the case under discussion; a supposition which is strengthened by the absence of all allusion to the case, when the learned Baron delivered judgment; to which we may add the fact, that in *Aliven v. Furnival*, the learned Baron did most elaborately examine the foreign judgment. Indeed to us it seems that no Court of Law has yet given its sanction to the decision; and as we consider it opposed to the main current of the previous authorities, we propose to consider how far the grounds on which alone the Vice-Chancellor has rested it, are tenable: the importance of the question, we are sure, will justify our freedom.

The question came before the Vice-Chancellor, upon a general demurrer to a bill, which stated that the defendants, as the personal representatives of P. Nicholls deceased, had obtained against the plaintiff a judgment in the Common Pleas of Antigua for 2,700*l.*, being the amount paid by Nicholls to the plaintiff for the purchase of an estate which parties claiming under a title adverse to that of the plaintiff had subsequently recovered from him; and this recovery of the estate was the ground of the judgment against the defendants. The bill then

stated, that the defendants had lately commenced an action on this judgment in the Common Pleas here; and after charging that there was no foundation for the demand, according to the laws of Antigua, or otherwise, it prayed for a discovery from the defendants, and for a commission to examine witnesses in Antigua, and an injunction in the meanwhile. In support of the demurrer, it was argued, that the Bill could not be supported, unless it could be shewn that the judgment might be questioned in this country; and it was further argued, that taking the judgment to be wrong, the plaintiff's only remedy was an appeal to the Privy Council. On the other side, it was said, that the judgment was only *prima facie* evidence of a debt, and might be questioned.

The Vice-Chancellor allowed the demurrer; and perhaps properly, if it had been considered that this was the case of a judgment from a Colonial Court, which has this peculiarity to distinguish it from the judgment of a Foreign Court, namely, that an appeal lay from it to the King in Council; for where a party having the right of appeal, does not appeal, it seems reasonable not to allow him to contest the judgment; but no case at law has gone even to this extent, nor was this the ground of the Vice-Chancellor's judgment: for with the exception of this single passage—"If the judgment below is wrong, it ought to be set right by an appeal to the King in Council;" the whole of the argument was on the general ground of the conclusiveness of a foreign judgment—in which point of view also it was, that Mr. Baron *Parke* referred to it.<sup>c</sup> The Vice-Chancellor thus

<sup>c</sup> The case before the Court of Exchequer was a French judgment, and the reference to *Martin v. Nicholls* would have been irrelevant, had Mr. Baron *Parke* understood this case to have been decided on the distinction of its being a Colonial judgment.

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<sup>a</sup> 1 Cr. Meeson & Roscoe, 277; 4 Tyr. 751; 9 L. O. 159.

<sup>b</sup> 3 Simons, 458.  
no. CCLXXIII.



states the question: "The question is whether, where a judgment has been recovered in a *Foreign Court*, and an action is brought upon that judgment in one of the Courts of this country, this Court will entertain a bill for a discovery, and a commission to examine witnesses abroad, in order that their evidence may be used in the action on the foreign judgment." The Vice-Chancellor then proceeds to review the authorities: first, what fell from Lord *Mansfield* in *Walker v. Witter* is quoted. "The judgments of Courts of Record in England cannot be controverted. Foreign Courts, and Courts in England, not of Record, have not that privilege: foreign judgments are a ground of action every where, but they are examinable." Against this is set off the opinion of Lord *Kenyon*, who said, "I cannot help entertaining very serious doubts concerning the doctrine laid down in *Walker v. Witter*, that foreign judgments are not binding on the parties here." Lord *Ellenborough's* phrase was next quoted: "I thought that I did not sit at Nisi Prius to try a writ of error upon the proceedings in the Court abroad;" and Lord *Nottingham* was placed on the same side, on the faith of a note of Mr. Swanston to the case of *Kennedy v. Cassilis*. The opinion of Mr. Justice *Buller* is cited as agreeing with Lord *Mansfield's*: the case of *Phillips v. Hunter* is excluded, as having "nothing to do with the question:" whilst, however, rejecting this case, a passage is extracted from the judgment of Chief Justice *Eyre*, and upon the learned Vice-Chancellor's construction of it, that learned Judge is ranked as of the same opinion as Lords *Ellenborough* and *Kenyon*; the *Duchess of Kingston's* case is excluded; and at the end comes the following decision: "The old authors, and the opinions of Lords *Ellenborough* and *Kenyon*, greatly overweigh the propositions to be extracted from the judgment of Lord *Mansfield*, and the expression of opinion of Mr. Justice *Buller*." Now, one observation occurs to us on this mode of treating the question. When eminent Judges have held contradictory opinions, it is not satisfactory, merely to put them down like algebraical quantities. "Lord *Mansfield*  $a^2 + 1$ , Lord *Ellenborough* and Lord *Kenyon*  $a^3 - 2$ ;" and then say, "difference in favour of my own opinion:" this is all too little to settle a great question; but *their* reasons should be sought for, the merits re-examined, and the whole subject investigated in all its bearings.

Taking the argument, however, as it stands, we beg to point out an error on the

face of it, which seems to us fatal to the decision. Suppose Lord *Ellenborough* to have been of the same opinion as Lord *Mansfield*, would not that fact destroy a result pronounced on the hypothesis of his being not of the same, but of a different opinion? now, this is precisely our objection. Chief Justice *Eyre* has been placed on the wrong side of the algebraical equation; he is quoted, but misunderstood, and in the sense given to the quotation, he contradicts himself in the sentence not quoted immediately following the quotation: in the quotation, he says of a certain kind of judgments, that they are not examinable; he is speaking of judgments *in rem*; and says that a judgment of that particular kind, which passes property locally situate within the jurisdiction of the foreign Court, is conclusive, because of its local operation. It was merely saying, *A.* has recovered property from *B.* in America; the judgment is executed; the property has changed hands, and we cannot allow *B.*, the unsuccessful party, to bring an action for money had and received, which can be maintained only by our examining this judgment. Such is the real meaning of a quotation adduced to shew that Chief Justice *Eyre* thought no foreign judgment examinable: and that only this, or something very different from what the Vice-Chancellor has supposed must have been the meaning, is evident from what immediately follows the quotation; for the Chief Justice goes on to say—

"It is in one way only that the sentence or judgment of the Court of a foreign state is examinable in our Courts, and that is, when the party who claims the benefit of it applies to our Courts to enforce it. When it is thus voluntarily submitted to our jurisdiction, we treat it not as obligatory to the extent to which it would be obligatory perhaps in the country in which it was pronounced, nor as obligatory to the extent to which by our law, sentences and judgments are obligatory; not as conclusive, but as matter in *pais*, as consideration *prima facie* sufficient to raise a promise; we examine it as we do all other considerations of promise, and for that purpose we receive evidence of what the law of the foreign state is, and whether the judgment is warranted by that law;" that is, to pursue our paraphrase,—a foreign judgment may be examined when the successful party brings it before us to enforce it by action, though we could not allow it to be overhauled in a collateral proceeding by an unsuccessful defendant, more especially in this case,

when the judgment was *in rem*. Now *Martin v. Nicholls* was a case in which an action was brought to enforce a judgment, and taking it as a *foreign* judgment,—in which point of view the Vice Chancellor regarded it, it was entirely in the predicament in which, according to Chief Justice *Eyre*, foreign judgments are examinable; it was not a judgment *in rem*, and it was brought before the Court here by the successful party, for the purpose of having it enforced by action. The Vice Chancellor's quotation is the following:—

"If, notwithstanding the bankruptcy, the debtor remained liable to an attachment, according to the laws of that country, the judgment was proper. If, according to the laws of that country, the property in the debt was divested out of the bankrupt debtor, and vested in his assignees, the judgment was improper. But this was a question to be decided in the cause instituted in Pennsylvania by the courts of that country,<sup>d</sup> and not by us. We cannot examine their judgment; and if we could, we have not the means of doing it in this case. It is not stated upon this record, nor can we take notice what the law of Pennsylvania is upon this subject."

The case was this: the plaintiffs were the assignees, and the defendants, at the time the commission issued, creditors, of Blanchard and Lewis: one of the defendants went to America, to transact the business of the firm there; and whilst there, knowing that Blanchard and Lewis had stopped payment, proceeded by garnishment to recover the debt due to his firm in the C. P. of Philadelphia. Certain goods, and also certain credits of the bankrupts were garnished, and eventually, by this process, the defendants recovered their debt in America. The assignees now brought an action to recover back the amount thus obtained in America, as belonging to them by the operation of the Bankrupt Laws of this country. The Court of K. B. thought them entitled to recover, and the judgment was approved in the Exchequer Chamber; but Chief Justice *Eyre* dissented, saying, "the judgment against the garnishee in the Court of Pennsylvania was recovered properly or improperly;" then comes the passage quoted by the Vice Chancellor, founded on the peculiar operation of the judgment in garnishment, followed by this

further observation: "If we had the means, we could not examine a judgment of a court in a foreign state brought before us *in this manner*;" that is, we have not the means, we have not the law of Pennsylvania before us; and if we had, the judgment is not properly before us." And this, and no more than this, it seems to us, was the meaning of Lord *Ellenborough*, in the other passage quoted by the Vice Chancellor:—"I cannot," said his Lordship, "try a writ of error *ad nisi prius* from the Court abroad in *this case*;"—and what was the case? The plaintiff and defendant had been partners; the plaintiff retired from the firm, the defendant covenanting to pay the debts in two years; but the defendant had not done so, but allowed a judgment by default to be recovered by certain creditors in Grenada, upon which a sequestration issued, under which the plaintiff had been obliged to pay the debt and costs of the action. Having thus satisfied the debt and costs, he brings the present action,—upon the judgment? No; upon the defendant's covenant: and then Lord *Ellenborough* says, "I cannot examine the judgment;"—Why? "Because," says the Vice Chancellor, "his Lordship thought foreign judgments privileged from examination;" but what said Mr. Justice *Bayley*, whose observations may fairly be referred to as a contemporary exposition of his noble Chief's meaning; Mr. Justice *Bayley* said, "How is this plaintiff to be called on to unravel these proceedings? as between the parties to the suit, the justice of it might be again litigated, but as against a stranger it cannot: the defendant was a party, and has concurred by not appearing to it, in suffering the plaintiff to be damnified." At all events, Mr. Justice *Bayley* thought a foreign judgment examinable. In *Molony v. Gibbons*,<sup>e</sup> an action on a foreign judgment, Lord *Ellenborough* said, "I will look to these foreign judgments with great jealousy." And in *Buchanan v. Rucker*,<sup>f</sup> "There might be such glaring injustice on the face of a foreign judgment, or it might have a vice rendering it so ludicrous, that it could not raise an assumpsit, and could not be enforced if submitted to the Courts of this country." With these observations we conclude; our object being to remove the doubt raised by the case of *Martin v. Nicholls*. In some future number we shall endeavour to show in what manner a foreign judgment is examinable.

<sup>d</sup> It is evident the American Court was wrong in not deciding the case according to the laws of *this* country; and *Eyre, C. J.*, was under the same mistake, of viewing the case as one which was governed by the law of America.

<sup>e</sup> 2 Camp. N. P. C. 502.

<sup>f</sup> 1 Camp. N. P. C. 62.

## ON ASSIGNMENTS BY TRADERS OF ALL THEIR EFFECTS.

By the 1 Jac. 1, c. 15, s. 2, after enumerating various acts of bankruptcy, it was enacted, that a trader should become a bankrupt by making, or causing to be made, any fraudulent grant or conveyance of his, her, or their lands, tenements, goods, or chattels, to the intent or whereby his, her, or their creditors should or might be defeated or delayed for the recovery of their just and true debts; and under this statute it was held, that a deed whereby a trader assigned all his property, in trust for the benefit of his creditors, was an act of bankruptcy.\* By the 6 Geo. 4, c. 16, s. 3, after enumerating most of the same acts as are mentioned in the former statute, it is enacted, that the trader shall become a bankrupt if he "make, or cause to be made, any fraudulent grant or conveyance of any of his lands, tenements, goods, or chattels, or make, or cause to be made, any fraudulent surrender of any of his copyhold lands or tenements, or make, or cause to be made, any fraudulent gift, delivery, or transfer of any of his goods or chattels; every such trader making, or causing to be made, any of the acts, deeds, or matters aforesaid, *with intent* to defeat or delay his creditors." And the doubt has been, whether an assignment of all a trader's effects would in itself be an act of bankruptcy, although it could not be proved that it was with the intention to defraud creditors. This doubt is now at an end by the decision of the following case:

Trover for certain furniture and goods the property of Henry Grimsdale, the bankrupt. The defendants pleaded—First, not guilty; secondly, that Henry Grimsdale was not a bankrupt; thirdly, that before his bankruptcy, he assigned the said goods and chattels to the defendants. The replication to the third plea, after setting out an indenture of assignment, whereby the said Henry Grimsdale assigned all his property to the defendants, in trust to pay off a mortgage, and afterwards to pay and discharge all his just debts, alleged that the said Henry Grimsdale was a trader; that he was in embarrassed circumstances at the time he executed the assignment; that it was fraudulently executed by the said Henry

Grimsdale; and that no notice was published in the Gazette two months after it was executed; that he thereby became bankrupt; and being indebted to one Harriet Reeves in the sum of 100*l.*, a fiat in bankruptcy issued against him, under which the plaintiffs were appointed assignees. To this replication there was a rejoinder, denying that any debt was due to Harriet Reeves, and also, that the bankrupt executed the deed fraudulently and with intent to defeat or delay his creditors. Notice was given to dispute the act of bankruptcy, and the petitioning creditor's debt. At the trial before *Gurney, B.*, at the Middlesex sittings after last term, the indenture of assignment stated in the replication, was proved to have been executed on the 2d of November, 1832, and the debt to Mrs. Reeves was proved to the satisfaction of the jury. The plaintiffs insisted that the deed was an act of bankruptcy; and the learned Judge being of that opinion, directed the jury to find a verdict for the plaintiffs; which they accordingly did. On a motion for a new trial, *Parke, B.* said,—It was settled by *Robertson v. Liddell*, that an assignment of all a trader's effects was an act of bankruptcy. It was there decided that the words "or whereby" in the statute of James, did not alter the previous words "to the intent;" and that the words "to the extent or whereby his creditors shall or may be defeated or delayed," were to be read "to the intent his creditors shall or whereby they may be defeated." The present statute is the same in effect, only the expressions are more concise, and the words "with intent," &c. occur at the end of the section, as applicable to all the different kinds of acts of bankruptcy mentioned. The present act was not intended to alter the former law in this respect; and it has been clearly settled, that if the necessary consequence of a man's act is to delay his creditors, he must be taken to intend it. When a man assigns all his property, and puts it into a different course of distribution from what the bankrupt laws direct, he commits an act of bankruptcy. This deed, being an assignment by Grimsdale of all his property, is therefore clearly an act of bankruptcy. *Bolland, B.*, and *Gurney, B.*, concurred.—Rule refused. *Stewart v. Moody*, 1 C. M. & R. 777.

\* *Kettle v. Hammond*, 1 Cooke's B. L. 89; *Robertson v. Liddell*, 9 East, 487.

## REVIEW.

*A Practical Guide to Executors and Administrators; designed to enable them to execute the Duties of their Office with Safety and Convenience: comprising a Digest of the Law, Stamp-office and other Directions, Forms, Tables of Duties, and Annuities, &c., &c.; intended also for the use of Attornies and Solicitors.* By Richard Matthews, of the Middle Temple, Esq., Barrister-at-law, author of "A Digest of the Criminal Law, alphabetically arranged." London: Crofts. 1835.

THIS is a concise and practical work on the Law of Executors and Administrators. The style is plain, and so far as possible, free from technicalities, in order to render the work generally useful to the unprofessional reader. It appears to be carefully compiled, and as full and complete as its objects and limits would allow.

Mr. Matthews treats, 1st, of the distinction between real and personal estate, viz. of the estate and things which go to the heir; then of the personal estate and things which go to the executor; and of the wife's property.

2nd. Of wills of realty; wills of personalty; codicils; donatio mortis causa; with practical advice concerning the making of wills.

3rd. Of acts immediately after the death, and of the funeral.

4th. Of renouncing the executorship, and disclaiming estates.

5th. Of things which may be done before proving the will, and therein of the inventory, and of an executor *de son tort*.

6th. When the will should be proved—in what Court, by whom, and in what manner, and of the probate duty.

7th. Of collecting and getting in the deceased's estate.

8th. Of the disposition of the deceased's personal estate, by the executors or administrators, for the purpose of realising money, paying debts and legacies, and of the residue.

9th. Of legacies: who may be a legatee; the different kinds of legacies; the ademption of legacies; the payment of legacies; refunding and abatement of legacies; and of the residue.

10th. Of the payment of the legacy duty; the rate of duty; and regulations for its payment.

11th. Legal and equitable assets in the hands of the executor; exonerating the real out of the personal estate, and marshalling assets.

12th. Of administrations, special, limited, and general; obtaining administration; administering the estate; distribution by special custom—London, York, and Wales.

13th. Of the descent and succession of the executorship and administration.

14th. Liabilities and remedies.

15th. Accounts and allowances.

16th. Seamen and marines.

As a specimen of the work,—showing its practical value, and the author's judgment in treating his subject,—we extract the following useful advice concerning the making of wills:

"*First*, it is evident the paramount duty of all persons having property to dispose of, to 'set their house in order,' and not to neglect one of the most important acts of life until weakness of body or mind renders them unable to exercise that deliberate judgment which is necessary to perform it aright, or until death prevents it entirely. Thousands of persons spend years in anxious labour and care to provide for their families, and at last die, leaving their affairs to trouble and ruin, for want of having directed the disposition of them in their life-time. Even the preposterous notion that persons die soon after making a will, is not yet entirely exploded; though if it even had the appearance of truth, it was only because persons generally leave that important affair undone till they are actually at death's door.

"*Secondly*. Among some classes a notion prevails that less skill is required in the making of a will than in the construction of any other instrument relating to property, and that regular lawyers are, of all others, the last to be preferred. Hence the village schoolmaster, or parish clerk, or at best the clergyman, is called upon when the testator is in extremity, to perform this duty. A review of the preceding sketch of the different kinds of property, and of the various interests and estates which a person may have in them, affords abundant evidence of the fallacy of such a supposition, and of the danger of such a course. When a person intends to leave his property absolutely and at once to particular individuals, he may, perhaps, safely make his own will, in which case he ought to mark carefully the distinction between *real* and *personal* property, and especially the mode of making, executing and attesting a will of the former, and that only such real estate as he is then in possession of will pass; for this reason, (and because if there happen to be two contradictory wills of the same date, or of no date, both will be void,) the will should be carefully dated of the day on which it is made; and if he intends the person to whom he devises it to have more than an estate for life, the words "*heirs and assigns*" ought to be carefully introduced. If he has power by any previous deed or will, to dispose of any estate, he should refer in his will to the power, and strictly comply with all its requirements. Although

the statute of wills does not require sealing, yet as these powers generally require the instrument to be *under seal*, it is always safest to *seal* a will as well as sign it. If he devise a farm in his own occupation, he should mention how the stock, crop, and emblements are to go. So of a house, he should say what fixtures he intends to go with it, and likewise fixtures in trade. He should also be careful to direct out of what part of his estate his debts are to be paid, and how far he wishes his real or personal estate, or both, to be disposed of for that purpose, in case the residue of his personal estate be not sufficient. If he wish any estate to be sold, he should specially devise it to trustees, their heirs and assigns, for that purpose, giving them and *the survivors or survivor of them*, his heirs or assigns, power to effect the sale, and to convey the property, and also to sign receipts for the purchase money, declaring that the purchaser should not be answerable for the loss, misapplication, or nonapplication of the purchase money, nor be bound to see how it is applied; and in order that the trustees may not be induced to disclaim the trust, for fear of personal responsibility, it should be declared that they should not be answerable for involuntary loss, nor be accountable for more money than should be actually received by them, and that they might reimburse themselves all reasonable costs, charges, and expences. Full directions should also be given as to the disposition of the purchase money, when received.

"If copyholds are to be sold, they should not be devised to any body, but simply direction and authority given to sell them, accompanied with such declarations as are above mentioned. By a rule of law, executors may sell and convey personal property for the payment of debts, and may give receipts for the purchase money, without any authority in the will for those purposes. Where a testator, who is possessed of a mortgage of freehold property, has an *infant heir*, he ought to devise the legal estate in the mortgaged property to some person of full age, otherwise upon the transfer or redemption of the mortgage, the mortgagor will be put to the serious cost of applying to the Court of Chancery to direct the infant heir to convey the legal estate in the mortgaged property. Nor must the due appointment of executors be forgotten.

"But where there is any thing more than a direct and absolute gift to the object of the testator's bounty, as where there are to be any of the above mentioned operations of selling, conveying, &c. and especially where it is intended to preserve the property beyond the lives of the first takers for grandchildren, or others, or where it is intended to give females a separate interest, independent of, and not subject to, the debts, control, or engagements of their husbands, the assistance of a regular and respectable professional man ought to be sought in the first instance; for, whatever the vulgar notion upon the subject may be, professional men well know, that more questions, cost and trouble arise, upon "home made wills," by far, than upon others.

"When one employs another to make his will, he ought to disclose the true state of his affairs, and the nature of the property upon which the will is to operate, as well as specify the objects of his bounty, and the various interests and benefits which he intends they should take. All these points being in the first instance, distinctly understood, the professional man will be able to advise the testator as to the best mode of effecting his object, and will be enabled to arrange the will with greater clearness and precision. Although the courts have determined that some formalities which were at one time thought to be essential to the validity of wills, are not so, the young practitioner is advised not to tempt litigation by running too near the boundary, lest he should unfortunately pass it. A surplus of caution does no harm,—a want of it may spoil all. If he be a man of right feeling, the consideration that the comfort and prosperity, or ruin of a whole family may depend upon the manner in which he performs his duty, will prevent him from trifling and 'trying experiments' in so important a matter. This observation applies particularly to the execution by the testator, and the attestation to the will.

"If he be called for in a case of extremity, he will do well to write down his instructions briefly from the testator's mouth, and get them, then and there, executed and attested in due form as a will, until a more regular one can be prepared. As a better measure of precaution, it has been recommended to keep an intended will ready for execution, so worded as to prevent its operation, even upon personalty, until its completion by a further act. The following form was adopted by the late learned Lord Tenterden, Chief Justice of England, viz.: "This paper is *intended* to become, and contains the last will and testament of me, A. B. of &c. *so soon as I shall have signed the same, but not sooner.* I desire," &c. Then followed the body of the will, the appointment of executors, and the usual conclusion, leaving blanks for the day and year, and for the testator's signature; the usual clause of attestation being ready written, leaving space for the names of three witnesses. When drawing near his end, the testator perfected his will by signing it, and three witnesses wrote their names and places of abode at the foot of the attestation. It should be remembered that sudden death may find a man who trusts to such an expedient, without a will, and should it require much alteration at the time (which appears to be the only reason for keeping it unfinished), a new one may be made, or the old one altered by a codicil and republication, almost or quite as quickly. It should also be considered, that a will may be made in such general terms as to be adapted to almost all circumstances, and requiring little or no alteration, through life; taking care to observe the effect produced by marriage and the birth of a child, or any material change in a subsequent purchase of real estate. The prudent course, therefore, is to keep a complete will, guarding, as far as human skill and foresight

can, against any contingency that may happen. It is also always more satisfactory that the property be disposed of by the deceased, and not left to distribution by the law; and the *stamp duty* upon probates of wills is not much more than half that upon letters of administration on an intestacy.

"The testator should be carefully described. His full Christian name, or names, if more than one, his surname, place of abode, trade, occupation, or title, (which are called his additions) should be inserted, and if he has any relations of the same name, he should be clearly distinguished from them, that no doubt may be left as to whose the will is. A single woman should be described as *spinster*, a widow, as *widow*, to shew that she was not married at the time. Persons named in the will should be carefully described, and distinguished from all others of the same name. The terms, senior, junior, son, daughter, uncle, cousin, nephew, brother, father, and the like, in addition to the other description, according as they apply, will be found useful and generally decisive. The will should be dated of the day on which it is made, and it is safest in all cases to seal it, and have it attested by three witnesses. The will of a blind person should be carefully and distinctly read over to him, in the presence of the witnesses, and the same course is advisable in the case of those who cannot read. Lord Coke recommends that to prevent a fraudulent destruction or concealment of the will, *two* be made exactly alike, one to be retained by the testator, and the other placed in the hands of some friend. Where the property is large, even three or more may be advisable, not only to guard against fraud, but also to save expence, for after a will is proved, a copy cannot be obtained without cost and trouble; but great care must be taken that they are all exactly alike in every respect. If the testator cancel or alter that in his own possession, it will be also a cancellation or alteration of the rest. The criminal destruction and concealment of wills is now guarded against by stat. 7 & 8 Geo. 4, c. 29, s. 24, and forgery of them by 11 Geo. 4. and 1 W. 4. c. 66."

## THE GREAT SEAL IN COMMISSION.

We extract the following account of the practice of putting the Great Seal in Commission, from one of the pamphlets noticed in our last Number.

"Notwithstanding Cardinal Wolsey, from his having been a reporter of proceedings in the Star Chamber, had acquired a considerable aptitude for Chancery business, he found it quite impossible to keep under this growing quantity of suits, and on the 11th July, 1529, on the occasion, if I remember right, of the trial of Queen Catherine, a commission was issued directed to the Master of the Rolls,

four Judges, six Masters in Chancery, and ten other persons, authorizing them to hear, examine, and finally decide all suits in Chancery that might be committed to them by the Lord Chancellor. This is the first instance, as far as my reading extends, of a Commission to enable a Chancellor the better to discharge his political functions, by giving him aid in the performance of his judicial; and I shall make no apology for giving a translation of it in this place.

"The King, to his beloved and faithful John Taylor, clerk, Master and Keeper of the Rolls of our Chancery, [here followeth the names of the other Commissioners.]

"Know ye that whereas the most Reverend Father in Christ, Thomas, by Divine permission, Cardinal, Priest, &c. has been employed for the sake of the peace and tranquillity of our kingdom and subjects of England, and for the interest, profit, and utility of the public, in which post he constantly exists; and considering and piously compassionating the insupportable cares, labours, and fatigues, which he on that account undergoes and suffers, and lest such singular fortitude of mind and body should be too much impaired, which God avert, through such fatigues, and he not able to attend in good health as usual to our most necessary affairs with his chiefest care: Being therefore willing that justice should be administered to all and every of our subjects, and fully relying in your fidelity and circumspection, we have appointed you the aforesaid John Taylor, &c. by virtue of these presents granting unto you power and authority to hear all and every the causes, disputes and complaints whatever of our subjects depending before us in our Chancery, or already moved or to be moved therein, and by the said Lord Chancellor committed to you, or any of you, (but not to less than four however,) and that for the future shall be committed to you from time to time, to be heard, examined, and scrutinized, with due regard according to the allegations and proofs, and your own sound discretion, to discuss and finally determine, and to command a full execution thereof. Therefore we command, that with regard to the premises you truly and diligently act and execute every thing with effect. By the tenor of these presents, we give it as a firm command to all and singular our officers and ministers, and subjects, whom it may concern, that in all and singular the premises they be intent and obedient in the execution thereof, as it becometh. In testimony whereof, &c.

"Witness the King at Westminster, this eleventh day of July, 1529."

"This precedent having been once established, there was no reluctance to follow it; and whenever a difficult cause arose—a *Small v. Atwood* of those times—a special commission was issued, not to examine witnesses only, but to hear and determine the suit itself—'ad examinandum testes, et ad audiendum et terminandum.' Sometimes too the matter was got rid of after the manner of Sir John Leach

when Vice-Chancellor, according to the traditions that have reached me, and the whole difficult part of the affair was referred to some Ecclesiastical Master. It has been asserted that the first reference to a Master in Chancery was during the Chancellorship of Sir Christopher Hatton, and by reason of that Chancellor's ignorance. The Hargrave Manuscripts, to which you, Sir, first directed my researches, will afford many earlier examples of such references, if not on account of the Chancellor's lack of knowledge, at least by reason of his want of leisure. That much of the business, since usually disposed of by the Chancellor, had been transferred to the Masters, is pretty clear, from an anecdote told in the life of Lord Bacon. Upon his accession to the Bench he announced that he would himself keep the keys of the Court, and that pleas and demurrers, and motions, should no longer be referred to the Master. After the fall of this great man, Lord Keeper Williams, the last Churchman who has held the Great Seal, entered into a similar resolve. Very different from what Sir John Leach was, he determined, if possible, never to refer causes, as it was in effect only to defer the hearing of them. But, notwithstanding the efforts of Lord Bacon, Archbishop Williams, and other great men who have held the seals, to make the office judicial rather than political, the latter character continued to prevail—the administration of justice in the most important tribunal of the kingdom was uniformly regarded as a subordinate concern, when the object of a political faction was in view; and we find Charles the First priding himself upon an attempt to render the possession of the place less transitory and uncertain, and thus to induce the Lord Chancellor or Lord Keeper to be more attentive to his duties, by securing to him the enjoyment of his post during a period of three years. In spite, however, of this Monarch's exertions, which were probably not very sincere, politics predominated in Chancery; and, as late as the year 1639, a Chancellor (Sir John Finch), and who had been Chief Justice of the Common Pleas, declared that a resolution of the Council Board should be always for him a sufficient ground for making a decree in Chancery! There are, Sir, Equity Lawyers, both amongst the Whigs and the Tories, and in great practice, who, for motives that I cannot but designate as sinister, would run the risk of again introducing amongst us the same state of things. In 1646, the Great Seal, after having passed through various hands, was confided to the Earl of Kent, Lord Grey of Werk, Sir Thomas Widdrington, and the well-known Bulstrode Whitelocke, and with these Master Elkenhead, and a Civilian, Dr. Bennet, were associated for the better adjudication of causes. This method of uniting in the same commission political and judicial persons was by no means new. In 1620, Viscount Mandeville, the Duke of Richmond, the Earl of Pembroke, and Sir Julius Cæsar, the Master of the Rolls, were the Commissioners, and of them the last only could have any qualification for interfering

in the judicial duties annexed to the custody of the Great Seal. This measure of placing the Great Seal in Commission met, two centuries ago, with much greater favour than at present. A writer of that time, if I recollect right, a leading Chancery Barrister, especially rejoiced at the creation of Commissioners. The weight of the Chancery, he quaintly observed, was much too heavy for the shoulders of one Atlas. Whitelocke too thought that the labour, even when divided, was enormous. It is trouble enough, he said, and no easy duty for one man to attend the service of the House, and it is more than doubled by being a Commissioner of the Great Seal. It is not to be wondered, then, if, in the year 1653, a bill was brought in for the appointment of a separate Commissioner, for hearing the existing and future causes. This bill was not passed into a law, and two years afterwards two most incompetent persons were named Commissioners by the Protector, Colonel Fiennes and Lisle: and to this appointment we must attribute the proposals for Local Equity Courts in Yorkshire, Kent, and other counties, that appeared about the year 1657, as well as the demand that commissions might be issued as in former times, not only for taking depositions in particular causes, but for hearing and adjudicating the same. This anxiety produced no beneficial result, except that in 1657, when Bradshaw, Terryll, and Fountaine were named Commissioners, they were empowered to issue a Commission to the Masters in Chancery to assist them in the hearing of causes.

"The Restoration did not diminish the difficulties experienced in the Chancery department. Lord Clarendon was a consummate statesman, but no lawyer, and, like Archbishop Williams and others, he never made a decree in Chancery without the assistance of two Judges. According to present prepossessions he would have been preferred (at least abstracted from the Judges) to the Master of the Rolls and the Vice Chancellor, although aided by the best of the Common Law Judges. It is difficult to discover a reason for such prejudices.

"On the Revolution the great increase of Chancery business having made many apprehend that it was too much to be intrusted to one person, the Seals were again put in Commission; and so little inconvenience was thereby experienced that they remained in Commission not less than five years, and they have several times since been in Commission during periods sometimes of six months and sometimes of twelve months, and sometimes of two years; and it has been the remark of Mr. Michael Angelo Taylor and other approved Chancery Reformers, that at no time have the Suitors' matters been more satisfactorily and speedily disposed of. It must be in your recollection, Sir, that Mr. Taylor frequently, in debates in Parliament, referred with triumph to the state of the Court when the Seals were in Commission, and many of Lord Brougham's observations, prior to his accession to the Bench, have a similar tendency. I would particularly refer to the period when Sir Eardley

Willmot was Chief Commissioner, as illustrating the assertions of Mr. Taylor and Lord Brougham. But whether it be from a fear of incurring the anathema of Lord Hardwicke against him who would permanently disjoin the offices of Chancellor and Speaker of the House of Lords, or from any other cause, certain it is that for the last eighty years, Commissions, which afford the first step towards the attainment of this desirable object, have been in but small esteem."

## SELECTIONS FROM CORRESPONDENCE. No. CI.

### JUDGES' CHAMBERS.

Sir,

Allow me to suggest, that in any new arrangement to be made with respect to the Judges' Chambers, provision should be made, that the Judges should hear summonses in public. A room sufficiently large ought to be allowed for each of the Courts. One room for each Court would be sufficient, as there is never more than one Judge of each Court in attendance at Chambers at the same time.

T. T. T.

### INROLLMENT OF ARTICLES.

Where articles had been fraudulently destroyed by a clerk, and represented by him to be inrolled, a copy may be substituted after the time limited by the act.

This was an application for a rule to inroll a copy *nunc pro tunc*, instead of the original articles, which had been fraudulently destroyed. A draft of the articles was put in under the signatures of the parties, and sworn to.

Rule granted.—*Ex parte Beckington*, E. T. 1835. K. B. P. C.

It appears that this rule would not be available, except under the usual annual Indemnity Act.

### TAXATIONS ON DEBTS UNDER 20l.

Mr. Editor.

It is proper the profession generally should be aware of the construction put by the taxing officers, upon the directions accompanying the scale of costs for debts under 20l.

There is one schedule of fees appended to these directions applicable to actions tried before the sheriff; there is another applicable to actions tried at *Nisi Prius*. I brought an action some time since for a debt under 20l. to which the general issue, and set-off, were pleaded. Although anxious to try it before the sheriff to save expence, I found, on examining the witnesses, (eight in number) that I could not swear "*there was no difficult question of law or fact*," as prescribed by the act creating the writ of trial; I therefore set down the cause at *Nisi Prius*, and after paying the usual heavy fees for setting down the cause, passing record, returning venire, preparing brief, &c. the defendant applied to stay proceedings on payment of debt and costs to be taxed; and

his attorney contended before the master, that I was only entitled to the costs of a writ of trial. I submitted to the master, that *he* had no discretion of deciding the question whether it was a fit case for the Judge or Sheriff; that as the action had been stopped, defendant was bound to pay the costs marked in the 2nd schedule, "*where plaintiff obtains a verdict before a Judge at Nisi Prius for 20l. and under.*"

The master however decided against me. I think he was wrong, but would not risk further expences of *speculative summonses*, to set him right.

I seek however your friendly medium, of apprising the profession of the point; that like myself, by pursuing the only course left open to the attorney who values an oath, their bills may not be pruned of briefs, subpoenas, records, venire, distringas, &c. and the heavy fees out of pocket incidental thereto, by a defendant coming forward at the last moment, to stay an action, which by the very act of so doing he acknowledges to have been brought for a just debt.

VERITAS.

## PROFESSIONAL GRIEVANCES.

### HOLIDAYS AT THE ACCOUNTANT-GENERAL'S OFFICE.

Mr. Editor.

On Monday week last, I accompanied a client (who had come from the country for the purpose), to the office of the Accountant-General, in Chancery Lane, to receive a sum of money out of the Court of Chancery; but to my great surprise (at this busy period of the year,) I found the office closed, and a notice posted up, stating that it would not be re-opened for a week.

It was certainly a beautiful morning, and might indeed be called the first morning of summer—and forsooth "the young gentlemen" in the Register's and Accountant-General's Office had chosen it for the purpose of taking wing, and basking in the first rays of the summer's sun.

I have before had occasion to seek the assistance of your independent and able journal in exposing this mischief, and will (with your permission) again exclaim through its medium, "*This is too bad!*" Had my client, on arriving at my office on the morning in question, found the doors closed, and a notice posted thereon, stating that, tempted by the fineness of the weather, I had started for Paris, and that my clerks were also luxuriating at Richmond, Greenwich, or Gravesend, what would be the consequence and penalty to me? Thus it is that the hard-working branch of the Profession are checked in their industrious career by the idleness or recreation of officers of the Court,—whose "important" duties of *copying, stamping, marking, examining, or signing*, are so oppressive, that every now and then a relaxation of them is necessary.—In the good old days of the venerable Lord Eldon we never heard of such things.

CASTIGATOR.

27 May, 1835.



## ATTORNEYS TO BE RE-ADMITTED,

*On the last day of Trinity Term, 1835.*

## KING'S BENCH.

Bennett, John, Bodmin, Cornwall.  
 Chilton, James, late of No. 1, Freeman's-court, now of No. 1, Fenchurch-street.  
 Coombs, Henry, late of the Close, New Sarum; now of the city of New Sarum.  
 Conway, James, No. 10, Charles-street, Blackfriars-road.  
 Crompton, George, formerly of Chorley, Co. Lancaster, now of Heworth, near York.  
 Emery, Richard, Shrewsbury, Co. Salop.  
 Goode, Samuel, of Lynn, Co. Norfolk.  
 Hallows, William, late of Ashford, Kent, now of 52, Gloucester-street, Queen's-square.  
 Harwar, Charles, of Lees, near Oldham, Lancaster.  
 Head, Robert Thomas, formerly of Sidmouth-street, Mecklenburgh-square; afterwards of Seaton, Co. Devon, now of Exeter.  
 Humphreys, Archer, 85, Leman-street, Goodman's-fields.  
 Jones, John, Brecon.  
 Mountain, Joseph, Cirencester, Co. Gloucester.  
 Mousley, Thomas, of Hanley, parish of Stoke-upon-Trent, Stafford.  
 Phillips, Thomas, formerly of Monmouth; now of No. 6, Upper Ranelagh-street.  
 Robinson, Christian John, Percy-street, Bedford-square.  
 Turner, John, of Middlewich, Co. Chester.  
 Winkworth, Charles, Ramsgate.

## COMMON PLEAS.

Boyce, Francis Lewis, City of Norwich.

## SPECIAL ADMISSION—KING'S BENCH.

*Clerk's Name.*

Parsons, Fred. John, No. 7, South Square, Gray's Inn. *Articled to Gustavus Thos. Taylor, Featherstone-buildings.* To be admitted on the last day of Trinity Term. Notice, dated 29th May, 1835.

## SOLICITORS TO BE ADMITTED IN CHANCERY,

*The day after Trinity Term.*

Parker, James, Chelmsford, Essex.  
 Woolbright, William, of Liverpool.

These being country solicitors, the names are entered with the Clerk at the Public Office in Chancery. The names of the Masters are not given.

Willes, William Phillips, 10, New Milman-street. *Articled to Henry Tuson, Ilchester; assigned to John Galsworthy, of No. 9, Cook's-court, Carey-street.*

This name being that of a town solicitor, is entered with the Secretary of the Master of the Rolls.

## SUPERIOR COURTS.

## Equity Exchequer.

## EQUITABLE MORTGAGE.—NOTICE.—PRIVITY OF LIEN.

*A deposit of admissions in fee and other court-rolls, constituting the title deeds of certain copyhold property, made at different times, under one and the same agreement, to secure repayment of a loan, is an equitable mortgage of that property. Such a mortgage is entitled to priority over a subsequent legal mortgagee for valuable consideration without express notice, if the circumstances of the transaction were such as would induce a prudent lender to inquire as to prior incumbrances.*

The facts of this case, together with the arguments of counsel, and judgment of Lord Chief Baron Lyndhurst, upon a motion to continue an injunction, and on two incidental points of practice, have been reported in the Legal Observer, vol. vii. pp. 384 and 385.

The cause now came on to be heard upon the merits, and was argued by Mr. Wigram and Mr. Sharpe, for the plaintiff; Mr. Simpinson, Mr. Kindersley, and Mr. Chandless for one defendant, and Mr. Bligh and Mr. Bethell, for the others.

Mr. Baron Alderson, before whom it was argued, having taken time to consider the case, gave the following judgment.

It was a bill filed originally by the plaintiffs against Jordan and Bulnois, and afterwards against the assignees of Jordan, he having become a bankrupt; and it prayed that an account might be taken in respect of certain sums of money remaining due to the plaintiffs, and also that it might be declared in respect of the sum ultimately found due, that they should have a priority of claim over the defendant Bulnois, upon copyhold premises called "The Valiant Trooper," a public-house in Goodge-street. The claim of the plaintiffs, as regarded the assignees of Jordan, depended upon the question as to whether certain documents, being deeds of admission relating to this copyhold property, were deposited with the plaintiffs under such circumstances as to give them an equitable mortgage on the property in question; and whether any thing had occurred since such mortgage had been granted, to render it void. He took it to be a well established doctrine, that there might be an equitable mortgage of copyhold property, and that the deposit of the title deeds amounted, under particular circumstances, to an equitable mortgage. In support of this doctrine, there was the authority of Lord Eldon in *ex parte Warner* \* to which Lord Lyndhurst, in a motion in the present case, expressed his adherence. There was a case in opposition to that supposed to have been decided by Sir John Leach, when Vice Chancellor; but he had doubts as to the accuracy of such

\* 19 Vesey, 203.

statement: and when opposed to recognized authorities, he could not entertain any doubt as to which he should follow. He should come to the same conclusion with Lord *Eldon* and Lord *Thurlow*, that in a case of this nature, a deposit of the title deeds of copyhold property would have the same effect as a deposit of those of freehold property.<sup>b</sup> If this then were so, there only remained a question of fact—namely, whether the deeds in question were so deposited as to give the plaintiff an equitable mortgage. It was clear that on the 15th of November, 1827, an advance of a sum of 2,000*l.* was made by the plaintiffs to Jordan, and certain deeds were deposited by him as a security for this amount. Jordan, who was examined, stated that the only deeds intended to be deposited, were those which were actually deposited, which only contained a leasehold interest. On the other hand, the evidence for the plaintiffs shewed that it was agreed that all the interest in the premises should be secured to them. And it was concluded by them, without sufficient examination, that the deeds deposited were to that effect; but on subsequent discovery in 1828, they found that Jordan's copy of admission in fee was not amongst those deeds. They immediately applied to Jordan, and the deed was supplied and the deposit was then completed. It was very much to be regretted, that the parties here did not adopt Lord *Eldon's* suggestion—namely, that there should be a written statement of the terms upon which such agreements were made. It was unnecessary to advert to the case of a partial deposit of deeds. If the plaintiffs established their case, it would shew that the deeds, though deposited at different periods, were all deposited under one and the same agreement. On the 21st of April, 1828, the admission of Barnett was handed over to Jordan at his own request; and on the 28th of April, he returned it to the plaintiffs with other documents, amongst which was his own admission to the fee. Jordan's account of this transaction was, that he left the copy of his admission with the plaintiffs by neglect, and that he took it to them in the hope of obtaining an additional advance, which he did not get, but suffered the deed to remain in their possession. Jordan's account of this transaction was incredible; it was inconsistent with the admitted facts. His statement as to the terms of the original deposit, was clearly irreconcilable. His Lordship did not think the plaintiffs would have made an advance of 2000*l.* upon the security of any thing except the fee of the copyhold premises. The transaction, if the plaintiffs required no security, but relied on the personal security of Jordan, would have been very natural; but they did not rely upon Jordan. It appeared incredible that there had been a deposit merely of the leasehold interest as a security for the sum advanced. What was this leasehold interest? It was an interest which

had then nearly expired, being originally for a term of sixty-two years, and consequently, of small value. But then there was another leasehold interest, in which it was suggested that Jordan had an equitable interest, but in which it was clear he had no legal interest. It was not suggested by himself that he had, but the fact was, that he did not become possessed of it till a considerable period after; and then only under a purchase, for which he gave somewhat less than 100*l.* Now he could not believe that by men of sense this could be taken as a security for 2000*l.*

If he took the evidence on the part of the plaintiffs, the transaction became plain and obvious. They said that Jordan proposed to deposit the deeds of the premises in question, which were valued at 4,000*l.* or 5,000*l.* That was a very natural view of the case; it gave to both parties an aspect of caution; and when he balanced the testimony, he thought it was strongly in favour of the plaintiffs; consequently by the deposit of these deeds, under the circumstances in which they were made, the plaintiffs were entitled to an equitable mortgage in the fee of the premises in question. It was said that there had been a deposit of these deeds with the Messrs. Hoare, and that they had advanced 2,000*l.* upon the security of the leasehold interest. He doubted this, for he found the deposit was made in the year 1827, after the expiration of the leasehold interest; and he therefore believed that it was the intention of the parties that there should be a deposit of the whole of the title deeds, but that they neglected to examine them. Undoubtedly the Messrs. Hoare were not the holders of an equitable mortgage, for they did not discover the omission of the copy of the admission of the fee till afterwards. Part of the deeds deposited were in the year 1829 delivered to Jordan's attorney by the plaintiffs. At that time the whole of the deeds were in possession of the plaintiffs. Now, the only question was, whether the parting with these deeds affected the plaintiffs' claim, the deeds having been restored to them; and in addition, the most important deed never having been parted with.

This led him to the main question in the case, which affected only the defendant Bulnois. Bulnois was possessed of a legal mortgage on these premises to secure a large sum of money, executed after the deposit of Jordan's title deeds with the plaintiffs. The question was, whether Bulnois was a purchaser for a valuable consideration without notice, and therefore entitled to priority over the equitable mortgagee. There was no doubt but that he was a purchaser for a valuable consideration; but the doubt was, whether he was a purchaser without notice. If actual notice was meant, there was no proof of such notice; but constructive notice was sufficient. If, for instance, a party having knowledge of the fact of a deposit of title deeds, omitted to inquire into the circumstances under which such deposit was made, the Court might reasonably infer that he did so in order to avoid

<sup>b</sup> See the cases cited, 7 Leg. Obs. 384.

express notice, and such was held to be equivalent to notice in the case of *Birch v. Elames*.<sup>c</sup> In the case of *Plumb v. Fluit*,<sup>d</sup> it was also laid down, that where a party having such knowledge as would lead an honest man to make further inquiries, and neglects to do so, he must be taken to have had notice of those facts, which, if he had ordinary diligence he must have obtained; and if he be grossly negligent in omitting to make inquiry, it was at all events sufficient to fix him with notice. It was clearly established by the evidence, that it was the practice for persons in the situation of Jordan to deposit with their brewers and spirit merchants their title-deeds, for the purpose of giving them an equitable mortgage for advances made. It was reasonable to conclude, that Bulnois, who was himself a spirit merchant, and with whom Jordan dealt, should be acquainted with this practice; and indeed it appeared by his own account, that when this mortgage was talked of, he was aware of such a practice. He knew that Jordan was indebted to the plaintiffs, for he asked him whether the premises were not under a mortgage to his brewers. He also knew from the transaction itself, that Jordan was pressed for money. Upon the whole, his Lordship thought that in this case there was such gross negligence that it would be a mere cloak to fraud if admitted, and it must be held to fix Bulnois with constructive notice. Bulnois ought not to be placed in a better situation than Jordan himself in respect of the plaintiff, and he was therefore of opinion that the plaintiffs were entitled to an account against the assignees of Jordan, and to a priority of claim over Bulnois.

*Whithread and others v. Bulnois and others*,  
Sittings at Gray's Inn Hall, 12th, 13th, and  
26th of February, 1835.

### King's Bench Practice Court.

**AFFIDAVIT TO HOLD TO BAIL ON BILL OF EXCHANGE.—FATAL DEFECT.—CANCELLING BAIL BOND.**

*An affidavit of debt on a bill of exchange ought to state its amount; and if it does not, it constitutes a fatal defect, which vitiates the whole affidavit, although there may be other independent allegations in the affidavit, or clauses properly stated.*

In this case a rule *nisi* had been obtained for setting aside the bail-bond given in this case, on the ground of a defect in the affidavit of debt. It appeared that the affidavit was for 100*l.*, stated to be due on a bill of exchange, and for a further sum of 100*l.* for money lent and advanced. The objection was, that it did not show the amount of the bill of exchange, which rendered it defective, and it was now sought to set it aside.

On showing cause, it was contended that it did not follow, because the affidavit was defective as to the statement of the bill of exchange, that the whole should be considered bad.

The Court thought, however, that the affi-

davit was not sufficient, it being bad as to part, and therefore directed the rule to be made absolute for setting aside the bail-bond, but without costs.

Rule absolute, without costs. *Raggett v. Guy*, E. T. 1835. K. B. P. C.

**STAY OF PROCEEDINGS.—INDICTMENT FOR PERJURY.—AFFIDAVIT OF DEBT.—CRIMINAL PROCEEDINGS.**

*A stay of the plaintiff's proceedings will not be allowed in a civil case, on account of criminal proceedings going on against one of the parties.*

In this case a rule *nisi* had been obtained for staying the proceedings in this cause until after the plaintiff had taken his trial on an indictment for perjury in his affidavit of debt in this cause.

Cause was shewn against this rule, when it was contended, that in an action like the present, the Court never took such notice of any criminal proceedings against one of the parties as to stay the proceedings in the action on that account.

*Williams*, J. thought it would be a very dangerous precedent were he to order a stay of proceedings until the trial of the indictment, as a defendant might then, in order to gain time, indict a plaintiff for perjury, the trial of which indictment he might postpone for an indefinite period. This rule must therefore be discharged with costs.

Rule discharged, with costs. *Johnson v. Wardle*, E. T. 1835. K. B. P. C.

**CHANGE OF VENUE.—SPECIAL GROUNDS.—APPLICATION ON SPECIAL AFFIDAVITS.—RESIDENCE OF WITNESSES.**

*If a plaintiff is desirous of changing the venue from the county selected by the plaintiff to try his cause, it is necessary that the affidavits on which the application is founded should be special in stating the grounds for the change.*

In this case, the defendant had obtained a rule *nisi* to change the venue in this cause, from London to Lancashire. The application was made on special grounds. The defendant having pleaded, his affidavit stated that all his witnesses resided in Lancashire.

On shewing cause, it was contended, that the defendant's affidavit did not set forth sufficient special grounds. It was not indeed shewn by his affidavit that he intended calling any witnesses at all. The plaintiff's affidavit in answer to those of the defendant, stated, that none of his witnesses resided in Lancashire, and that two of them lived near London.

The Court thought the defendant's affidavit was too general, and did not disclose sufficient special grounds.

Rule discharged, with costs.—*Higgins v. Houseman*, E. T. 1835. K. B. P. C.

<sup>c</sup> 2 Anstr. 427.

<sup>d</sup> *Ibid*. 432.

**ATTACHMENT FOR NONPERFORMANCE OF AN AWARD.—DEMAND OF PERFORMANCE.—POWER OF ATTORNEY.—COMPLETE MATERIALS.**

*When an award is sought to be enforced by an attachment, the service of all necessary documents must be effected at one time, before it can be obtained.*

In this case, an application was made to the Court for an attachment against the defendant for nonperformance of an award, and non-payment of costs pursuant to the Master's allocatur. The facts, as they appeared from the affidavit on which the motion was founded, appeared to be these:—The demand of the amount due on the award was not made by the plaintiff himself, but by a person to whom he had given a warrant of attorney. On this person first calling on the defendant, he served him with a copy of the award and allocatur, shewing him at the same time the original of both, but he had not the power of attorney with him on that occasion. He however made a second visit to the defendant, when he produced the power of attorney, without showing the other documents.

The Court said that the service was insufficient. This rule now prayed therefore cannot be granted.

Rule refused.—*Rogers v. Twissel*, E. T. 1835. K. B. P. C.

**PRISONER'S RULE TO PLEAD.—WAIVER.—SUMMONS FOR TIME TO PLEAD.**

*If a prisoner objects by motion, that he has not received a rule to plead, his application is sufficiently answered by shewing that he has taken out a summons for time to plead.*

A rule nisi had in this case been obtained for setting aside a declaration against a prisoner, on the ground that no rule to plead had been given. The defendant, however, had taken out a summons for time to plead.

On shewing cause, it was contended, that the defendant had waived his right to object on that ground, by taking out a summons for time to plead.

The Court thought that the defendant had waived his right to object by taking out the summons, and therefore discharged the rule.

Rule discharged.—*Nuges v. M'Donell*, E. T. 1835. K. B. P. C.

**NOTICE ATTACHED TO DECLARATION IN EJECTMENT.—JUDGMENT AGAINST THE CASUAL EJECTOR.—MISNOMER.—TENANT'S NAME.**

*Where the tenant's name in the notice at the foot of the declaration is immaterial.*

Motion for judgment against the casual ejector. The only doubt about the case was, that the name of "John" had been substituted for that of "Thomas," the tenant's name, at the foot of the declaration. In every other respect the service was perfectly regular. The

person who served the tenant, had informed him that he was the person who was alluded to in the notice.

The Court thought that sufficient, and granted the rule.

Rule granted.—*Doe d. Frost v. Roe*, E. T. 1835. K. B. P. C.

**NEW RULES OF PLEADING.—INCONSISTENT DEFENCES AND PLEAS.—STRIKING OUT PLEAS.**

*If a defendant has different defences to the same action, he has a right to plead them all, notwithstanding they may be inconsistent, and notwithstanding the new Pleading Rules.*

This was an application for a rule nisi to strike out certain pleas pleaded by the defendant, on the ground of inconsistency.

*Williams*, J. said, that inconsistency in the pleas with each other was no ground for striking them out. If a defendant had several defences to an action, although they may be inconsistent with each other, yet he had still a right to plead them all.

Rule refused.—*Wilkinson v. Small*, E. T. 1835. K. B. P. C.

**ATTORNEY.—ATTACHMENT.—PERSONAL SERVICE.—COSTS.—WAIVER OF PERSONAL SERVICE.**

*If various attempts have been made to serve a defendant with the rule for the payment of costs, with the allocatur indorsed, but which efforts have not proved sufficient to enable the party trying to serve to effect personal service, the fact of the defendant being an attorney, is not sufficient to waive such service.*

This was an application to the Court, for an attachment against an attorney, for non-payment of costs pursuant to the master's allocatur. It appeared from the affidavit in support of the application, that no personal service had been effected. It was however submitted, that the defendant being an attorney, the case was different from that of any other defendant. The affidavit went on to state, that repeated efforts had been made to serve the defendant, but without success.

The Court thought the fact of the defendant being an attorney, was not sufficient for it to dispense with personal service. The attachment, therefore, must not go.

Rule refused.—*Althin v. Toomer*, E. T. 1835. K. B. P. C.

**ATTACHMENT FOR NON-PAYMENT OF COSTS.—LEAVING COPY OF RULE AND ALLOCATUR.—PERSONAL SERVICE.**

*Although personal service is indispensably necessary in all cases to obtain an attachment for non-payment of costs pursuant to the Master's allocatur, yet if all other requisites are complied with, and the de-*

*defendant prevents a copy of the rule being left with him by the person serving, that is immaterial.*

This was an application for an attachment against the defendant, for non-payment of costs pursuant to the Master's allocatur. It appeared from the affidavit of the person endeavouring to serve the defendant, that on the deponent going to the house in which the defendant lived, he saw him, when he produced the original rule and allocatur indorsed thereon, and made a demand of the costs. The defendant, however, immediately shut the door in deponent's face, and said he would not be served. Deponent, however, pushed a copy of the rule and allocatur under the door.

The Court thought that sufficient had been done to effect a service, and directed an attachment to issue.

Rule granted.—*Res v. Koops*, E. T. 1835. K. B. C. P.

**UNIFORMITY OF PROCESS ACT.—INDORSEMENT OF PROCESS.—LACHES.—WAIVER.—ATTORNEY'S RESIDENCE.**

*In the required indorsement on a writ of capias, of the attorney's place of abode, it is not sufficient that the attorney describes himself of "Southampton Buildings."*

In this case a rule nisi had been obtained for discharging the defendant out of custody, on the ground of an insufficient description of the attorney's residence, in the indorsement on the writ of *capias*. The attorney described himself as of "*Southampton Buildings*" only.

Cause was shewn against this rule, when it was submitted that this description was sufficient, it being so well known as the residence of attorneys. Supposing, however, this to be a defective description, the defendant has waived his right to object to it, by allowing more than two months to elapse since the arrest before he made this application.

The Court said that the attorney's description of his residence, was clearly insufficient: but in this case, too great a time had been allowed to elapse, to enable the defendant to avail himself of it. The present rule, must, therefore, be discharged.

Rule discharged.—*Rust v. Chine*, E. T. 1835. K. B. C. P.

**SERVICE OF CLERKSHIP.—INROLLING INDENTURE OF CLERK.—COPY OF INDENTURE. LOSS OF ORIGINAL ARTICLES.**

*The indenture of clerkship of an attorney's clerk, must be inrolled within six months after the execution; but if the original is lost, a copy under special circumstances may be inrolled.*

This was an application to the Court, for its permission to inroll a copy of the indenture of clerkship, instead of the original, under the following circumstances: The clerk, in whose behalf the application was made, had been regularly articulated, and the indenture sent to the town agent's office, for the purpose of inrollment. The clerk, however, employed to get

the indenture inrolled, had since absconded, and there was every reason to believe that he had destroyed the indenture. He had made a charge for the inrollment, although it was ascertained that it had not been inrolled.

The Court said that a copy might be inrolled, instead of the original indenture.

Rule accordingly.—*Ex parte Chapman*, E. T. 1835. K. B. P. C.

**SERVICE OF DECLARATION IN EJECTMENT.—SPECIAL SERVICE.—TENANT KEEPING OUT OF THE WAY TO AVOID BEING SERVED.**

*What will dispense with actual personal service in ejectment.*

Motion for judgment against the casual ejector. The affidavit on which the motion was founded, disclosed the following facts: On deponent going to the premises in question, he found them closed. He however knocked at the door, when the window was opened by the tenant in possession, and some milk thrown over him. The deponent then read aloud the notice, gave the usual explanation, and stuck a copy of the declaration on the outside of the door. To the best of deponent's belief, the tenant was purposely keeping out of the way.

The Court granted a rule nisi, and directed the service to be by sticking it up on the outside of the door.

Rule nisi accordingly.—*Doe d. Wills v. Roe*, E. T. 1835. K. B. P. C.

**ATTACHMENT FOR NON-PAYMENT OF COSTS PURSUANT TO THE MASTER'S ALLOCATUR.—ATTORNEY.—PERSONAL SERVICE.**

*Under what circumstances a service of an attachment for non-payment of costs pursuant to the Master's allocatur, though not personal, will be equivalent to it.*

This was an application for an attachment for non-payment of costs pursuant to the master's allocatur. It appeared from the affidavit on which this application was made, that repeated attempts had been made to effect personal service of the rule and allocatur, but without success. A demand of the costs had been made of the defendant's clerk, at his office. A letter had also been received from the attorney, in which he acknowledged that he was purposely keeping out of the way to avoid being served, and admitted the receipt of the rule and allocatur.

The Court granted a rule to shew cause why personal service of the rule and allocatur should not be dispensed with, and why service on the clerk at the office should not be good service.

Rule nisi accordingly.—*Phillips v. Hutchinson*, E. T. 1835. K. B. P. C.

**DEFENDANT'S DISCHARGE FROM ACTION.—SUMMARY APPLICATION.—STATUTE OF LIMITATIONS.—DEBT BARRED.**

*If a debt has been barred by the statute of limitations, the creditor may still bring his action to recover it, and though his parti-*

• *culars shew it barred, the Court will not stay proceedings.*

This was an application to the Court to set aside the *capias* issued in this case, and discharge the defendant out of custody, on the ground that he had been arrested for a debt, which the plaintiff, by his particulars of demand, had shewn to have been contracted in the year 1822, and which was consequently barred by the statute of limitations.

The Court said the defendant might plead that statute, and thereby prevent the plaintiff from recovering. The defendant might not, however, avail himself of the statute, or there may be sufficient evidence produced at the trial to take the case out of the operation of the statute. The rule, therefore, cannot be granted.

Rule refused.—*Potter v. Macdonnel*, E. T. 1835. K. B. P. C.

NOTICE OF TRIAL.—HOLIDAYS.—EASTER TUESDAY.—DURATION OF TERMS.—DIES NON.

*Although now, both by statute and rule, the days falling between the Thursday next before and the Wednesday after Easter day, are dies non, a notice of trial may be given for Easter Tuesday.*

This was an application for a rule *nisi* to set aside the verdict found for the plaintiff in this cause, and for a new trial, on the ground of a defect in the notice of trial which had been given for Easter Tuesday and continued to a subsequent day, when a verdict was found for the plaintiff. This day, it was contended, had, under the 3 & 4 W. 4, c. 32, s. 43, become a *dies non*.

*Williams, J.*, said, that from the terms of the general rule of H. T. 3 W. 4, which ran thus, "that the days between the Thursday next before and the Wednesday next after Easter day, shall not be reckoned or included in any rules or notices of other proceedings except notices of trial and notices of inquiry in any of the Courts of Law at Westminster," the notice given by the plaintiff in this case must be considered good. By this rule it may be seen in what manner the Judges construed the two acts of parliament, the 11 G. 4, and 1 W. 4, c. 70, s. 6, and the 1 W. 4, c. 3, s. 3. The present case therefore, coming clearly within the above rule of Court, I cannot entertain the application.

Rule refused.—*Charmock v. Smith*, E. T. 1835. K. B. P. C.

SUMMARY APPLICATION AGAINST ATTORNEY.—OBTAINING PROBATE OF WILL.

*In order to induce the Court to interfere summarily to compel a payment of money by an attorney, it must appear that he was employed in that character.*

This was an application for a rule *nisi*, to compel an attorney to refund the sum of 15*l*. paid to him by the applicant, and which he had improperly retained, and to answer the matters

contained in the affidavit. It appeared that the attorney had been instructed to employ a proctor for the purpose of obtaining the probate of a will. The proctor's charge for his services was 15*l*. A check for this amount was deposited in the hands of the attorney, with directions for him to pay it. The check had been presented and paid, but the attorney had appropriated it to his own use.

The Court thought that the attorney could not be compelled summarily to refund the money, as any other person might have been instructed as well as the attorney to employ a proctor. Under these circumstances the Court cannot interfere.

Rule refused.—*Es parte Cowie*, E. T. 1835. K. B. P. C.

AFFIDAVIT.—JURAT.—ILLITERATE PERSON.—COMMISSIONER.—COURT.

*If a person appears, by being a marksman, to be an illiterate deponent, the fact of reading over should appear in the jurat in all cases.*

This was an application to set aside the writ of summons, for irregularity. The irregularity consisted of there being no date in the *teste*. There was however this peculiarity in the case: the affidavit on which the application was founded was made by an illiterate person, and it was not stated in the jurat that the affidavit had been read over to deponent, as required by 31 G. 3, E. T. It was however sworn in Court, and it was therefore submitted that such a course might be dispensed with, as the above rule only made mention of affidavits made before commissioners.

The Court said, that the fact of its having been made in Court made no difference whatever. The established practice is, that affidavits made by illiterate persons should contain such statements, and no deviation from that course can be permitted. This rule therefore cannot be granted on the present affidavit. The jurat however may be amended, and the application renewed.

Rule refused.—*Hayes v. Powell*, E. T. 1835. K. B. P. C.

REMOVAL OF JUDGMENT.—INFERIOR JURISDICTION.—SUPERIOR COURT.—CERTIORARI.

*It is not necessary to obtain a rule nisi for removing the record of a cause from an inferior jurisdiction, in order to issue execution from the Superior Court: the rule is absolute in the first instance.*

This was an application to the Court for a writ of *certiorari*, directed to the Justices of the borough court of Bury St. Edmunds, ordering the removal of the record in this case, so that execution might issue out of this Court, the defendant being out of the jurisdiction of the former Court. The only doubt which existed was, whether the rule should be absolute or *nisi* in the first instance.

The Court granted a rule absolute.

Rule absolute accordingly.—*Pewsey v. Goodey*, E. T. 1835. K. B. P. C.

## NOTES OF THE WEEK.

## HOUSE OF LORDS.

*Bills for second Reading.*

<i>Title of the Bill.</i>	<i>Proposer.</i>
Residence of Clergy.	Lord Brougham.
Pluralities Prevention.	Lord Brougham.
Ecclesiastical Jurisdic- tions.	Lord Brougham.
Illegal Securities.	
Legitimacy of Children.	Lord Lyndhurst.
Law of Patents.	Lord Brougham.

## HOUSE OF COMMONS.

*Bills to be brought in.*

Law of Tenure.	Attorney General.
Law of Escheat.	Attorney General.
Poor Law Amendment.	Mr. Trevor.
Registration of Births, &c.	Mr. Wilks.
Tithes Commutation.	Sir R. Peel, Bart.
Municipal Corporations.	Lord J. Russell.

*Second Reading.*

Law of Libel.	Mr. O'Connell.
Bankruptcy Funds.	Master of the Rolls.
Ecclesiastical Courts.	Sir F. Pollock.
Clergy Discipline.	Sir F. Pollock.
Infants' Property (Ireland).	
Contempts in Equity (Ireland).	
County Coroners.	Mr. Cripps.
Prisoners' Defence.	Mr. Ewart.
Durham Court of Pleas.	
Parish Vestries.	
Loan Societies.	

*In Committee.*

Copyholds Enfranchisement.	Attorney General.
Registration of Voters.	Lord J. Russell.
Dissenters' Marriages.	Sir R. Peel, Bart.
Capital Punishments.	
Limitation of Polls.	

*Third Reading.*

Highways.	Mr. Lefevre.
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*Re-committed.*

Abolishing Imprisonment for Debt, &c.	Attorney General.
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*Passed.*

Execution of Wills.	Attorney General.
Law of Executors, &c.	Attorney General.

## ANSWERS TO QUERIES.

*Law of Landlord and Tenant.*

## TENDER OF RENT. P. 16.

If a tender is once made, the party tendering is presumed in law to be ready to pay the money, if afterwards called upon; therefore, a

right to damages, on account of non-payment of a debt, or non-performance of a duty, may, after being taken away by a tender and refusal, be revived again by a demand subsequent to the tender and refusal: a new cause of action arises from the non-payment, or the non-performance thereof upon such demand. See *Impey's Practice*, tit. Tender, and the authorities there referred to.

GRADUS.

## QUERIES.

*Law of Property and Conveyancing.*

## RENT.—ASSIGNEE.—MORTGAGEE.

*A.* the sub-assignee of a lease, mortgaged the same by deed (with power of sale) to *B.*; *A.* sometime afterwards became bankrupt, when possession of the premises and stock in trade were taken and disposed of in the usual way, by the assignee under the *stat.* In order to avoid liability for rent, the parties acting under the authority of the bankrupt's assignee, a few days before Christmas, delivered the key to the mortgagee, who received the same without making any objection thereto, and the premises have been untenanted ever since, the key still remaining with the mortgagee. Has the assignee legally discharged himself from liability to the rent, he not having complied with the 75th sec. of the 6 G 4, c. 16. And if he has, is not the mortgagee to be considered in the legal possession of the premises, and thereby liable to the rent and covenants in the lease?

A SUBSCRIBER.

## THE EDITOR'S LETTER BOX.

The point in a case at p. 62, appears to be correctly reported as to the result; and some of the minor circumstances, which have been mentioned as incorrectly stated, are not material to the principle decided. It is difficult, in giving a point very concisely, to comprise all the circumstances which the parties interested may deem material. We have only to give just so much as explains sufficiently the doctrine or rule of practice laid down.

The Queries and Answers of K. C.; "Zeta;" A. A. C.; A.; and R. R., have been received.

The letter of J. W. D., on Inconsistent Pleas, shall be attended to.

We thank M. for his communications.

The suggestion of H. G. S., will be considered.

We thank W. for a Dissertation, which, like his former papers, appears to be ably composed; and we hope to find room for it next week.

The letter of "A Sufferer" is acceptable.

In the List of Attorneys to be admitted (p. 57), we are requested to insert the following correction:—Thomas Pinchard, of No. 10, Edmund Place, Aldersgate Street, articulated to Archibald Low, of Portsea, Hants, and assigned to Henry Parker Collett, Chancery Lane; instead of "articled to H. P. Collett, and assigned to Archibald Low."

# The Legal Observer.

Vol. X.

SATURDAY, JUNE 13, 1835. No. CCLXXIV.

— “Quod magis ad nos  
Pertinet, et nescire malum est, agimus.

HORAT.

## CORPORATION REFORM.

THE plan for Corporation Reform is at last before the country, and we have no hesitation in giving it our support and approval. We have frequently urged the necessity of altering that part of the present system which relates to the appointment of Recorders, and have recommended a measure similar to that adopted in the bill. Under it, recorders are to be appointed by the Crown, in any borough which is ready to pay the necessary expenses, and will petition for the purpose. We shall give a statement of the principal features of the measure.

All acts, charters, and customs, inconsistent with the provisions of the bill, are to be repealed; and one hundred and eighty-three cities and boroughs, which are all that are to come within the provisions of the bill, are to be created. These are all to be subjected to a uniform government, which is to consist of a Mayor and Common Council. The common council is to consist of various numbers, not in arithmetical proportion, but in such a manner as is best suited to the population of each particular place, varying from fifteen, in the smallest of such places, the inhabitants of which are about 2000, to ninety, in the largest towns. The largest of the towns are to be divided into wards, and a certain number of common councilmen are to be chosen in each ward. The members of the common council are to be elected for three years; one third of which is to go out annually. No qualification is necessary for the mayor or council. The mayor is to be a Justice of the Peace for the borough and for the county, and to act as returning officer at elections. The Town Council is to appoint the Town Clerk, the Treasurer, and other officers, grant licences, and ap-

point trustees to administer all charity funds vested in the corporations. A Police Committee is to be appointed from the mayor and councilmen: such committee is to appoint constables for the county, as well as the borough.

The Recorders are to be barristers of at least five years standing, to be appointed by the Crown, if the town councils petition for quarter sessions, with powers to such recorders to act for more than one borough. All capital jurisdiction is to be abolished, and criminal jurisdiction is to be limited to that of the quarter sessions.

The municipal constituency is to consist of occupiers of houses, warehouses, counting houses, or shops, rated for three years to the relief of the poor of the borough, and who have paid all rates due for six months before the revision, and who shall be entitled to be burgesses, excluding all who within twelve months of registration shall have received parochial relief or other alms. The burgesses who cease to be occupiers within the borough, or neglect to pay their rates, shall be omitted from the burgess-roll: and after the passing of the act, no person shall be elected or admitted a citizen, or member of any corporate body, in respect of any right or title, other than that of being a settled rate-payer within the borough.

The bill reserves all pecuniary rights vested in the present freemen, as rights of toll or rights of common; but it will destroy all other rights, except they be acquired under the bill as rate-payers. Thus, freedom on account of birth or apprenticeship, will no longer exist, and all exclusive rights of trading will also be abolished. Ninety-nine boroughs are not to be included in the proposed reform.

We have printed an analysis of the bill—by far the most important measure of the session—in another part of this number.



## NEW BILLS IN PARLIAMENT.

## PARISH VESTRIES.

This is intituled "a Bill to amend an Act of the 58th year of the reign of King Geo. 3, for regulating Parish Vestries, in so far as to afford to Westminster and certain parishes within the bills of mortality, in the counties of Middlesex and Surrey, an exemption which is extended in the said Act to London and Southwark."

The preamble recites "that by an act passed in the 58th year of the reign of his Majesty King Geo. 3, intituled, "An Act for the Regulation of Parish Vestries," it is provided and enacted, that nothing in the said act contained shall extend to any parish within the city of London, or to any parish in the borough of Southwark.

That by the said act it is enacted, "That in all such vestries every inhabitant present who shall by the last rate which shall have been made for the relief of the poor, have been assessed and charged upon or in respect of any annual rent, profit or value, not amounting to 50 $\frac{1}{2}$ l., shall have and be entitled to give one vote, and no more; and every inhabitant there present, who shall in such last rate have been assessed or charged upon, or in respect of any annual rent or rents, profit, or value, amounting to 50 $\frac{1}{2}$ l. or upwards (whether in one or more than one sum or charge) shall have and be entitled to give one vote for every 25 $\frac{1}{2}$ l. of annual rent, profit, or value, upon or in respect of which he shall have been assessed or charged in such last rate, so nevertheless that no inhabitant shall be entitled to give more than six votes; and in cases where two or more of the inhabitants present shall be jointly rated, each of them shall be entitled to vote according to the proportion and amount which shall be borne by him of the joint charge; and where one only of the persons jointly rated shall attend, he shall be entitled to vote according to and in respect of the whole of the joint charge.

That it is expedient to limit the operation of the said last recited provision of the said act in so far as regards the city of Westminster and liberties thereof, and as regards the several other parishes within the bills of mortality in the counties of Middlesex and Surrey.

The following is the proposed enactment: that nothing in the said provision of the said act, shall extend or be deemed, taken, or construed to extend to any parish within the city of Westminster, and the liberty of the said city, or to any parish within the bills of mortality in the counties of Middlesex and Surrey; but that the said city and liberty, and the several parishes thereof respectively, and of the said other parishes within the bills of mortality in the counties of Middlesex and Surrey, and each of them respectively, shall to all intents and purposes be exempted from the operation of the said recited provision, as fully and effectually to all intents and purposes whatsoever, as if the said city of Westminster and the several parishes thereof, and

in the liberty of the said city, and the said several other parishes within the bills of mortality in the counties of Middlesex and Surrey, had been specially excepted in and by the said act from the effect and operation of the said act so far as regards the said recited provision.

## MARRIAGES LEGALIZING.

This is a Bill intituled "An Act to limit the time for commencing Suits in the Ecclesiastical Courts, so far as they may affect the children of parents married within the prohibited degrees."

The preamble recites "that the children of parents married within the prohibited degrees are by law legitimate, unless such marriage be declared void by sentence of the Ecclesiastical Court during the life-time of their parents; and it being unreasonable and unjust that the state and condition of children born under such circumstances should remain unsettled for so long a period, it is proposed to be enacted,

"That the children of parents married as aforesaid shall be and continue legitimate, unless a suit be duly instituted for annulling the marriage of their parents within years from the celebration thereof; or in the case of a marriage already had, unless such suit shall have been commenced within years from the time of such marriage, if such marriage shall have been celebrated more than years before the passing of this act; and if such marriage shall have been celebrated within years before the passing of this act, then, unless such suit shall have already been commenced, or shall be commenced within months after the passing of this act; and unless in each of the cases aforesaid, the proceedings in such suit shall have been or shall be prosecuted without wilful delay; provided that if both persons so married as aforesaid shall have been or shall be out of the jurisdiction of the Ecclesiastical Courts of this kingdom within after the time of their marriage, the period of commencing such suit shall be computed, for the purposes of this act, from the time when such persons, or one of them, shall have returned, or shall return within such jurisdiction. That this act shall not extend to that part of the united kingdom called Scotland.

## CONTESTED ELECTIONS.

This is intituled "a Bill to limit the Time of taking the Poll at Contested Elections of Members to serve in Parliament, to one day."

The preamble recites that "it would tend to promote the purity of elections, and the diminution of expense, if the poll at all contested elections of members to serve in parliament were taken in one day. That by the 2 $\frac{1}{2}$  W. 4: (the Reform Act) it is enacted, that such poll may remain open during the space of two days."

The proposed enactments are,  
1. That from and after the passing of this

act, such part of the act as allows the poll to continue open during two days, be repealed.

2. That at every contested election of a knight or knights to serve in parliament for any county, or for any riding, parts or division of a county, the polling shall commence at of the clock in the forenoon of the next day but two after the day fixed for the election, (unless such next day but two be Sunday, and then on the Monday following;) that the polling shall continue during such one day only, and no poll shall be kept open later than of the clock in the afternoon.

3. That at any contested election of a member or members to serve in parliament for any city or borough, the polling shall commence at of the clock in the forenoon of the day next following the day fixed for the election, (unless such day next following be Sunday, and then on the Monday following;) and the polling shall continue during such one day only, and no poll shall be kept open later than of the clock in the afternoon.

4. That nothing in this act shall be construed to apply to Ireland or Scotland.

## LAW OF ATTORNEYS.

### PRACTISING WITHOUT A CERTIFICATE.

A PERSON sworn and admitted an attorney according to the provisions of the 22 G. 2. c. 46, neglected to take out his certificate under the act of 37 G. 3, c. 90, for one year, by means whereof he became off the rolls, and required re-admission; but without such re-admission he took out his certificate for a subsequent year, and an attorney in London acted as his agent in business during such subsequent year. The latter is not liable under the 22 G. 2, c. 46, s. 11, to be struck off the roll for allowing an attorney, who becomes disqualified and off the roll by omitting to take out his certificate, to practise under 37 G. 3, in his name, nor is the former liable to be imprisoned for having practised, as an unqualified person.

A rule nisi had been obtained last Hilary term, calling on Mr. Henry Ross, an attorney residing in London, to shew cause why he should not be struck off the roll of attorneys of the Court; and on Mr. Joseph Hodgson, an attorney residing at Gisburne in Yorkshire, to shew cause why he should not be committed to the prison of this Court for a period not exceeding one year, pursuant to the statute 22 G. 2: c. 46, s. 11, on the ground that Mr. Hodgson had practised as an attorney after he was off the roll, in consequence of having omitted to take out his certificate for one year, without having been re-admitted, notwithstanding

ing he had taken out his certificate for the year during which the business was done; in fact, that though certificated, he was not an attorney; he was off the roll for want of his certificate for a prior year. The rule having been enlarged, now came on to be argued, and the facts of the case were shortly these:

Mr. Hodgson, who had previously to and including the year ending on the 15th of November, 1830, taken out his annual certificate, did not take it out for the next year ending the 15th of November, 1831, so that he was uncertificated for that year, and was consequently off the roll of attorneys, and he could not regularly take out his certificate again until he was re-admitted; nevertheless, without such re-admission, he on the 21st of July, 1832, took out his certificate for the current year, viz. from the 15th of November, 1831, to the 15th of November, 1832; and on the 18th of December, 1832, he took out his certificate for the year commencing 15th of November, 1832, and ending 15th of November 1833; but at the time when the rule was applied for, viz. in Hilary term, 1835, he had not taken out a certificate for the year 1833-4, nor for the year 1834-5. In this state of things an action having been commenced against a person of the name of Walker, Mr. Ross appeared to it on the 24th of June, 1834, and pleaded to it on the 28th of the same month as agent to Mr. Hodgson. On the 22d of July, 1834, the plaintiff's attorneys gave written notices to Mr. Hodgson and Mr. Ross, that a person omitting to take out his certificate for one whole year, became incapable of acting as an attorney in his own name or that of any other person, and was liable to imprisonment for any period not exceeding a year; and that any person acting as agent to such unqualified person, was liable to be struck off the roll.

On the 27th of October, 1834, an order was obtained for changing the attorney in the action, and Mr. Ross was appointed the defendant's attorney instead of Mr. Hodgson, and acted as such in the subsequent proceedings.

On the 25th of November, 1834, Mr. Hodgson obtained a rule for his re-admission, and on the 23rd day of February, 1835, paid the certificate duty for the year commencing 15th of November, 1830, and ending 15th of November, 1831, and for the year 1833-4 and 1834-5, together with the fine on re-admission.

In Hilary term last the present rule was obtained, upon the authority of the 2 G. 2, c. 23, the 22 G. 2, c. 46, s. 11, and the 37 G. 3, c. 90, s. 31.

By the 17th section of the 2d G. 2, c. 23, it is enacted, "That if any sworn attorney of any of the Courts of Law therein mentioned, shall knowingly and willingly permit or suffer any other person or persons to sue out any writ or process, or to commence, prosecute, follow, or defend any action or actions or other proceedings in his name, not being a sworn attorney of one of the said other Courts of Law, or a sworn solicitor of the Court of Chancery, or of some other Court of Equity, and shall be thereof lawfully convicted, every person so convicted

shall from the time of such conviction be disabled and made incapable to act as an attorney in any of the Courts of Law aforesaid, and the admittance of such person to be an attorney of any of the said Courts of Law shall from thenceforth cease and be void."

And by sec. 11 of the 22 G. 2, c. 46, it is enacted, "That if any sworn attorney or solicitor shall act as agent for any person not duly qualified to act as an attorney or solicitor, or permit his name to be used upon the account or for the profit of any unqualified person, or send any process to such unqualified person, thereby to enable him to appear, act, or practise in any respect as an attorney or solicitor, knowing him not to be duly qualified, and complaint shall be made thereof in a summary way to the Court from whence any such process issued, and proof thereof made upon oath to the satisfaction of the Court, every such attorney or solicitor so offending shall be struck off the roll, and for ever after disabled from practising as an attorney or solicitor: and in that case, and upon such complaint and proof made as aforesaid, it shall and may be lawful to and for the said Court to commit such unqualified person so acting or practising as aforesaid to the prison of the said Court for any time not exceeding one year."

And by the 31st sec. of the 37 Geo. 3, c. 90, which imposed a stamp duty on the annual certificate of attorneys, it is enacted, "That every person who shall neglect to obtain his certificate in manner therein-before directed for the space of one whole year, shall from thenceforth be incapable of practising in his own name or in the name of any other person in any of the said Courts, and the admission, entry, inrolment or register of such person shall from thenceforth be null and void."

The question to be decided was, whether Hodgson, having omitted to take out his annual certificate for the year commencing 15th November 1830, and ending 15th November 1831, and thereby become off the roll, and incapable of practising, and his admission null and void, was liable to be committed to prison for any period not exceeding one year, as an unqualified person, under the 22 G. 2, c. 46, s. 11, for having acted as an attorney during the year 1834, even although he had taken out his certificate for that year; and whether Mr. Ross, having acted as his agent during that year, was not liable to be struck off the roll, under the provisions of the same statute.

Sir Gregory Lewin, for Mr. Hodgson, and Mr. Lee, for Mr. Ross, now shewed cause against the rule being made absolute. They contended, that Hodgson had been a regularly admitted attorney, had not entirely forfeited his privileges as such by the mere omission to take out his certificate in proper time, and that until the 37 Geo. 3, he would not on that account have had his name taken off the roll at all; and that statute, as a matter of fiscal regulation, and to secure the payment of the certificate duty, declared that such persons as did not take out their annual certificates within a certain time, should have their names

taken off the roll; but that it left the Court the power of restoring them, and therefore made a great distinction between those attorneys and persons who offended against the provisions of the statutes of the 3 James 1, c. 7, s. 2,<sup>a</sup> and of the 22 G. 2. On these grounds they contended that the present application could not be supported; and that the observations of Lord Denman, in a very recent case of Palmer, an attorney at Birmingham, decided last term, and reported in Mr. Harrison's Reports, shewed that unless a party acted corruptly with a view to gain, in defiance of the statute, that he ought not to be subjected to the very severe penalties now sought to be enforced; and they submitted, that as there was no pretence whatever for a charge of that kind in the present case, the rule ought to be discharged.

Mr. Baines, in support of the rule, cited a case of *Slack v. Wilkins*, lately decided in the Exchequer, to shew that the having been off the rolls, as Hodgson had once been, required that he should be again admitted before he could lawfully practise; and this not having been the case, he was legally subject to have the present rule made absolute against him. It followed of course, that if he was liable, so was Ross, who with a full knowledge of the facts, had allowed Hodgson to act in his name. That Hodgson had so acted, was proved by his own bill to the defendant Walker; and it was clear from the affidavits, that after the notice which was served in July, the parties had continued to act as before, as attorney and agent, and that while they acted in this character, namely in Michaelmas term last, six steps were taken in the progress of the cause of *Walker v. Walker*.

Lord Denman.—This rule must be discharged, the conduct of the parties not bringing them within the operation of the statute of the 22 Geo. 2. c. 46. The object of that statute was to prevent persons not duly qualified from practising, and required that parties should be *examined, sworn, and admitted*, before they could practise as attorneys. Now, *Hodgson*, it appears, had been qualified by having been duly *examined, sworn, and admitted*, an attorney. A person not qualified to practise, is one *not examined, sworn, and admitted*. By the 37 Geo. 3, a person neglecting to take out his certificate in the manner therein directed, is declared to be incapable of practising in any of the Courts therein specified, and that the *admission, entry and enrolment*, or register of such person, shall from thenceforth be null and void. On the word "admission," a very fair doubt may be entertained; but I think the object of the last statute was not that contended for, the *sole* object of that act being to protect the revenue; and

<sup>a</sup> "Any attorney admitting any other to follow any suit in his name, each of them to forfeit 20*l.*; and the attorney in such case shall be excluded from being an attorney for ever thereafter."

that the Court cannot import the disqualification produced by an attorney neglecting to renew his certificate into sec. 11. of the 22 Geo. 2. so as to put him in a situation of one who had not complied with the three requisitions of that statute. I think the case of *Slack v. Wilkins* fortifies this conclusion, and that the reasoning of the Court in that case proceeds on the particular words of that section: the words of the 11th & 12th sections are materially different. Hodgson having once been admitted, is not in my opinion within the 11th section. I do not mean to decide that a person who has been struck off the roll, even under the operation of the 37th Geo. 3, alone, might practise in the name of an attorney on the roll; that could not be allowed on any pretence, and if such a thing was attempted, he would be liable for his misconduct to the general jurisdiction of this Court over its officers, but not in a proceeding of this nature.

*Littledale, J.* The object is to prevent those who have not served clerkships, and been regularly educated, from acting in connivance with agents: now Hodgson has, and therefore I think him not within this clause of the act. The object of 37 Geo. 3. c. 90, is to protect the revenue: a person once examined, sworn, and admitted, is not in my opinion within s. 11, of 22 Geo. 2. c. 46. On the whole, I think the rule should be discharged; but under all the circumstances, *without costs*.

*Patteson, J.* I have had great difficulty in this case, because I can hardly distinguish it from the case of a man who has been struck off the rolls for misconduct; perhaps, however, it may be distinguished: on the whole I concur with the rest of the Court as to the object of s. 11. Though by 37 Geo. 3, his admission had become null and void, that did not undo his clerkship and examination; some of his qualifications still remained, though the admission by 37 Geo. 3, had become void.

*Coleridge, J.* (Of same opinion.) The statute was passed for the purpose of keeping out of the profession persons not qualified by education to act in it. It is a very penal act of parliament, and must be construed with the utmost strictness.

Rule discharged, without costs. In the matter of *Ross and Hodgson*, 9th May, 1835. MS.

## DEFENCE OF LOCAL COURTS.

*To the Editor of the Legal Observer.*

Sir,

I HAD indulged myself with a hope, that any further discussion of this important measure would have been deferred till the bill Sir F. Pollock gave notice he should introduce, had been open in its details to the eyes of the profession. Your correspondent J. W. D., I cannot help thinking, is premature, and has rendered it necessary for me to answer, as well as I can, his arguments against Local Courts generally.

The first matter he mentions is, "time proposed to be saved." It needed not your correspondent's enlightening communication to inform your readers, the majority (if not all) of whom are in the profession, that the regulation of trying causes under 20l. before the sheriff, hastened the administration of justice: but is time so desirable an object, that proper legal knowledge may be dispensed with? And has a sheriff,—neither fitted by education and study, nor rendered capable by experience,—that knowledge of the law which would enable him to discharge the high duty of a Judge with satisfaction to himself or to the suitors? If a sheriff is fit to charge a jury, or to decide technical points, why are Judges of the Common Law Courts selected from men of such eminent rank and such profound knowledge as the bar? Why not place barristers of a shorter standing? Expense would thereby be saved, and time would not be lost.

J. W. D. says, "and let it be recollected, that courts are held by every sheriff six times a year at least." Granted, they sit even twelve times at least, what does that do for the opponents of this measure? A tradesman or a private gentleman is appointed sheriff, and by that office, a Judge, with no previous knowledge of the law; and allowing that experience would render a man capable, before that experience is obtained new sheriffs are appointed, and a fresh beginning rendered necessary. Instead of a Court of Justice, I think it could be more appropriately called, a hot bed for the culture of legal sprouts—private men placed there and grafted, turned out, nipped and spoiled. As to expense, again, for the sake of argument, I will allow to J. W. D., that Local Courts would exceed the Sheriffs' Courts in that respect: but is not the nation well compensated for that extra expense, by having the rights of parties defined by a permanent and capable Judge, instead of an incompetent, ignorant, inexperienced Sheriff? As to appeals: why it is not likely that appeals would be more frequent than they are now. Decisions pronounced by such Courts as the Sheriffs' are so frequently reversed, that it is an encouragement to suitors to appeal.

The well wishers of the present law must regret that such a supporter as J. W. D. should enter into the arena of discussion, with arguments light as air. He shows their own weaknesses. His letter carries an apparent sincerity with it, or I should be inclined to think he was a friend to the measure in disguise of an opponent, and had been racking his brain for a mode of injuring the opponents of Local Courts; for a more effectual manner could not be discovered, than the one he has adopted. In one point I agree with your correspondent, viz. as to the disrepute the profession has got into with the public; but I differ as to the cause. It is the hardship evident upon the face of a bill of costs, that for a debt, small in its amount, such tremendous expense is necessary to ensure its recovery. The respectable part of the profession would gladly see a measure pass the legislature which

would relieve them of the odium. The Local Courts Bill is that measure, and the only one that can remove the stigma; and I regret that their supineness and inactivity causes them to be bleached with the opponents of this most wholesome bill. From experience, I am aware of your impartiality; and though I regret a difference of opinion from yourself, I fear not, that with your usual unbiassed conduct, a fair field will be given for the discussion of this measure, both for friends and opponents.

CONSTANT READER.

## REVIEW.

*The Practice of the Criminal Courts, including the Proceedings before Magistrates in Petty and Quarter Sessions, and at the Assizes.* By George Bolton, Gent. London: A. Maxwell. 1835.

THE object of this work is to afford information, in a concise manner, of the Practice in Criminal Proceedings, which the author thinks is not sufficiently supplied in the voluminous text books on the Criminal Law. He observes also, that the modern publications, however excellent of their kind, are too technical for general use; and he has endeavoured in his work to combine theory and practice, and particularly to elucidate the proceedings before justices of the peace in petty sessions, as well as in court on trial. Of his method of treating the subject, Mr. Bolton says—

“Care has been taken to explain the course to be pursued in cases of felony, from the apprehending of the prisoner to the verdict of the jury, pointing out progressively each step necessary to be taken by the prosecutor and the prisoner; and in the proceedings before magistrates on various subjects in which the law has given them summary jurisdiction, I have introduced the requisite forms in such precise terms as I hope cannot fail to be fully comprehended by all classes of readers.

“It would have been impossible within the compass of this work to embrace the multiplicity of offences which the statute law has declared to be felonies or misdemeanours: I have therefore selected those only of more frequent occurrence. In framing the precedents required under each of the topics treated of, some suitable example, with clauses descriptive of the offence, to meet the law of the case, has been adopted; and directions are added, by which they may readily be adapted to other offences of a similar nature.

“I have been extremely anxious throughout to frame the information and complaint with precision, as upon it are founded all the subsequent proceedings, which of course will be open to objection if the information be defective; for, if by any inadvertency the statement of the offence is not brought within the words and meaning of the statute, the conviction

founded thereon will be quashed on appeal; and many are the cases of failure of justice arising from such neglect.

“I have endeavoured to treat the theoretical part of my subject in as popular a form as it would admit of, bearing in mind that these pages are intended principally for those who are not deeply versed in legal knowledge.

“In the comments, especially those relative to the grand jury, habeas corpus, and certiorari, it will be seen that the observations made are principally intended to convey a knowledge of the manner in which our law is administered in bringing criminals to the bar of justice, pointing out at the same time the difficulties and obstructions which impede that object.”

The following is an outline of the contents of the volume, which will enable our readers to judge of the utility of the book:

1. The apprehension of the offender by warrant issued on the complaint of the prosecutor.
2. The examination of the offender, the process thereon before magistrates, and his commitment for further examination.
3. The re-examination of the prisoner, his commitment for trial, and binding the prosecutor and witnesses to give evidence.
4. Removing the prisoner by habeas corpus, the process thereon, certiorari to remove proceedings, and the subsequent argument in the King's Bench, and bail perfected.
5. Mode of proceeding against criminals by indictment, without process of examination before magistrates in petty sessions, bench warrant issued, and commitment thereon for trial.
6. The proceedings and ceremony of the court of assizes on the trial of prisoners, from the opening thereof to the arraignment at the bar, and thence to the verdict of the jury.
7. Observations on the verdict of, and trials by jury, and on the judgments of the Court on trials for felony, reprieve, pardon, and execution.
8. Malicious injuries to property, and proceedings thereon before magistrates, from the information to the commitment on summary conviction.
9. Riot and assault, and the like proceedings thereon, to the commitment and indictment.
10. Common assault, and like proceedings thereon, to the conviction and commitment.
11. Breach of the peace, and sureties for the same, as well limited as otherwise.
12. Vagrancy, and therein of the efficiency of the act.
13. Game and poaching, and proceedings thereon, to a conviction before justices.

Mr. Bolton has not limited his labors to the present practice, but has suggested several improvements, which we deem it important to bring before our readers, and we strongly recommend them to the consideration of those whom it may peculiarly concern, in reforming abuses and facilitating the administration of justice.

"It is well known to all those who frequent our criminal courts, that much inconvenience arises from the mode adopted in getting the bill presented before the grand jury, and from thence to the court on trial.

"The extreme confusion, anxiety, suspense and delay attending this ceremony can scarcely be conceived, except by those who have experienced these evils. The witnesses, totally unacquainted with, and equally uncertain of the hour when, and the place where, they are required to be in attendance, are first dragged into court through a crowd of persons (who are as much at a loss as themselves where to go, some being present from idle curiosity, and others from want of knowledge wandering about the avenues and purlieus of the court), to be sworn to the evidence to be given by them upon the bill of indictment before the grand jury; from thence they are taken back, through the crowd, to the entrance of the grand jury chamber, to wait their being called on the bill, after which they are required to be in readiness to give evidence in court on the trial: but at what hour, or even on what day, they know not; nor is the attorney, on whom they rely for information, able, with any degree of certainty, to assist them. They wait about, perhaps, the remainder of that day, and all the next, before they are called upon to give evidence in court. It will be objected, however, that there are places provided for the accommodation of witnesses at the expense of the county; but by whom, I ask, are such places principally occupied? Not by witnesses, but by idle frequenters of the court, converting them to the same uses as alehouses for drinking and smoking at pleasure; who then, of any degree of respectability, would enter such places, so diverted from the original purposes for which they were designed?

"The course as now pursued is attended, not only with extreme inconvenience to witnesses and others connected with them, but also with expense to the county, inasmuch as the business is retarded and delayed in its progress, whereas if otherwise conducted and under proper management, it might be expedited, and considerable expense avoided in the remuneration for unnecessary attendance at the court.

"To obviate this inconvenience, I purpose to suggest for the consideration of those of my readers who have influence in county business, the following propositions, the adoption of which, I am persuaded, would be attended with benefit to all parties interested; and should they meet with the approbation of any influential member of the court, I confidently

hope that the evils complained of will speedily be redressed:—

"*First.*—As all recognizances and depositions, as well as instructions for bills of indictment, must be given to the clerk of the assize, or, at sessions, to the clerk of the peace, I propose that the instructions from which the bills of indictment are to be made out should, as received, be numbered 1, 2, 3, 4, &c., according to their priority, and that a number corresponding to that affixed to the instructions be delivered to the solicitor conducting the prosecution.

"That a list of indictments, numbered to correspond in priority with the number on the instructions, be made, and posted up in several parts of the court for public inspection, containing the names of the prosecutor and prisoner, and their respective attorneys.

"That the indictments, in the order in which they are numbered, be laid before the grand jury, and that they proceed with and return them to the court in the same order and priority as received; and that such bills so returned into court be disposed of in the same order, without regard to whether counsel are employed in the case or not; so that public convenience be not allowed to give place to private interest.

"And as the bills continue from time to time to be returned by the grand jury, the same should be notified in the list by the proper officer to be appointed, and when a case is disposed of by the court on trial, it should be marked in the list.

"By this means every person concerned in the business of the court would know with greater precision at what time he must be expected to be called on, and would attend accordingly.

"But should it be deemed desirable by the Judge to have certain bills containing charges of a serious nature, such as murder, or bills in which the witnesses concerned are residing at a considerable distance, tried first, or at any particular time, in order to save expense to the county, then the list should contain the names of those prosecutions so appointed by the Judge, in which case the rule suggested for public convenience would be equally applicable.

"*Second.*—With regard to the confusion attending witnesses being sworn upon the bill prior to going before the grand jury.

"The attorney conducting the prosecution being aware of the number of his bill on the list before spoken of, should in proper time call together the prosecutor and the witnesses to a room to be provided contiguous to the grand jury chamber, and, on their being so assembled, announce to the clerk of the assize (or his deputy, usually sitting in the indictment room), his readiness for such bill to be presented to the grand jury. The officer intrusted with the bill should forthwith deliver it to the jurors; and on the first witness named on the back of such bill being called to give evidence, he should be sworn by the *chairman of the grand jury*, (he being first empowered to do so by an act of Parliament,) and the rest of the witnesses in like manner.

"This would avoid the great confusion which attends the swearing of the witnesses in court according to the present practice, and all would pass off without the slightest delay, suspense, or inconvenience.

"And again, upon the bill being brought into court for trial, the like method should be adopted, to prevent witnesses being scattered about the court and its purlieus (which frequently is the case, so that those most wanted are not to be found), and the delay occasioned in getting them through the crowd to the bar to give evidence.

"The adoption of this course would render it unnecessary to apply to the judge to order all witnesses concerned in the prosecution to leave the court, as they would be already out of court, collected in the witness room contiguous, ready to be called into the witness-box.

"I feel most confident from experience, that, were this plan adopted, much trouble and confusion in court would be avoided, and at the same time would be produced a saving of much expense to each county."

## ON THE LAW OF WILLS.

THE following paper states concisely the general rules and principles of the law relating to Testamentary Dispositions. As this branch of law is likely to undergo some important alterations, it seems desirable that our readers, especially the junior part of them, should be put in possession of the existing law upon this subject.

### Definition.

A will or testament may be defined to be a solemn act or instrument, whereby a person declares his mind and intention as to what he would have done with his property after his death.<sup>a</sup>

### What they may be written on.

A will may be written on any material, or in any language; so as, if it concern property in England, it be framed with the solemnities required by the English law.<sup>b</sup>

### Who may make them.

In general, every person hath full power and liberty to make his own will, who is not under some special prohibition by law or custom, which prohibitions are principally upon these accounts: viz. 1st, for want sufficient discretion; 2dly, for want of sufficient liberty and free will; and, 3dly, on account of their criminal conduct.<sup>c</sup> Infants may be mentioned as an example of the first, married women<sup>d</sup> of the second, and

traitors and felons from the time of conviction, of the third.

### Commencement of Testamentary Capacity.

There appears to be a difference of opinion as to the exact age, when the capacity of a person to make a will of personal estate commences; the better one, and that to be relied on, founded upon an attentive consideration of all the authorities upon the subject, seems to be, that there is no valid objection to the will of a male person made at the age of fourteen, and that of a female at 12.<sup>e</sup> By the words of the Statute of Wills,<sup>f</sup> however, no person can make a will of lands till twenty-one, unless by the special custom of particular places.<sup>g</sup> And it appears that no custom can enable a male infant to make any will, before he is fourteen years of age.<sup>h</sup>

### Extrinsic Formalities.

A will of personal estate need not be executed in the presence of witnesses; it is sufficient for its valid operation as a will, that the *animus testandi* be collected from it; for though it has neither the name of the maker, nor a seal to it, nor witnesses present at its publication, yet the writing may operate as a testament of chattels, if sufficient proof can be had that it is the testator's hand writing.<sup>i</sup> There is an exception to this rule in the case of stock; for by the 33 G. 3, c. 28, s. 14, and 35 G. 3, c. 14, s. 16, it is provided, that all persons possessed of any share or interest in the funds, or any estate therein, may devise the same by will in writing attested by two or more credible witnesses. But according to Lord *Thurlow*, when stock is not so bequeathed, it devolves upon the executor, in trust for those who are entitled to the personal estate, under the residuary bequest; the will operating as a direction to the executor how to apply it, though it was not in strictness devised by the will.<sup>j</sup>

A devise of freehold property need not be under seal as a deed, but must be in writing, and signed by the party devising, or some other person in his presence, and by his express directions, and attested and subscribed in the presence of the devisor by three or

of property given to, or settled upon her for her separate use. *Wagstaff v. Smith*, 9 Vesey, 520; *Parkes v. White*, 11 Vesey, 209; *Wills v. Dawkins*, 12 Vesey, 501; *Essex v. Atkins*, 14 Vesey, 542.

<sup>e</sup> But. Co. Lit. 89 b, u. (6).

<sup>f</sup> 34 & 35 Henry 8, c. 5.

<sup>g</sup> Perk. 221; 3 Atk. 711.

<sup>h</sup> Law of Ex. 155.

<sup>i</sup> Fonbl. on Eq. 102.

<sup>j</sup> 7 Vesey, 448, 452.

<sup>a</sup> Co. Lit. iii; 7 Bac. Abridg. 299.

<sup>b</sup> *Bovey v. Smith*, 1 Vern. 85.

<sup>c</sup> 2 Black. Com. 496.

<sup>d</sup> A feme covert, however, may make a will

four credible witnesses.\* A devise must also be *published*, that is, the deviser must do some act from which it can be concluded that he intended the instrument to operate as a will or devise.<sup>1</sup> The words "signed and published by the said A. B. as and for his last will and testament," are a sufficient publication; and the delivery of a will as a deed, has also been held to be a publication of it.<sup>m</sup>

#### Construction.

Wills are generally construed from the making, unless circumstances, or the tenor of them, shew that the construction should be with reference to the time of the death: the intermediate time is not to be regarded.<sup>n</sup> The construction is the same in courts of law and equity.<sup>o</sup>

The intent of the testator is the first thing to be attended to, if the words will bear it out; but the force of the words may be such as to exclude all reasoning from probable intention.<sup>p</sup>

Effect ought to be given, if possible, to the whole will, and the intention should be collected from every part of the instrument.<sup>q</sup>

A construction may be made to support intention, when plain upon the whole will, even against strict grammatical rules.<sup>r</sup> But an express disposition cannot be controlled by inference.<sup>s</sup>

A devise is to be so expounded as to pursue, if possible, the will of the deviser, who for want of advice or learning may have omitted the legal or proper phrases. And therefore frequently the law dispenses with the want of words in devises, that are absolutely requisite in all other instruments. Thus a fee may be conveyed without words of inheritance; and an estate tail without words of procreation. By a will also an estate may pass by mere implication, without any express words to direct its course; as, where a man devises lands to his heir at law after the death of his wife: here,

\* Statute of Frauds, 29 Car. 2, c. 3. The provisions of this statute not extending to copyholds, a copyholder may devise his estate by an unattested will; and since the statute of 55 G. 3, c. 192, without the form of a previous surrender to the uses thereof. 1 Scriven on Cop. 302.

<sup>1</sup> 3 Atk. 161.

<sup>m</sup> *Trimmer v. Jackson*, 4 Burn's Eccl. Law, 119; *Tollett's case*, Mosely, 46.

<sup>n</sup> 1 Roberts on Wills, 353.

<sup>o</sup> 2 Bl. Rep. 377.

<sup>p</sup> *Brownward v. Edwards*, 2 Ves. sen. 243.

<sup>q</sup> 2 Bulst. 178; *Gittins v. Steele*, 1 Swanst. 24.

<sup>r</sup> 11 Vesey, 148.

<sup>s</sup> 1 Vesey, jun. 169.

though no estate is given to the wife in express terms, yet she shall have an estate for life by implication;<sup>t</sup> for the intent of the testator is clearly to postpone the heir till after her death; and if she does not take, nobody else can.<sup>u</sup>

#### Codicil part of a Will.

A codicil is a supplement to a will, where anything is omitted which the testator would add, or which he would explain, alter, or retract.<sup>v</sup> Whatever number of codicils a man makes, they are all parts of his previous will; insomuch that if a testator, after making his will, makes a codicil or codicils in any way modifying its dispositions, and afterwards by any other testamentary instrument ratifies and confirms his will, he ratifies and confirms it together with the codicils which have been made to it, and subject to whatever changes they have made in it. But if a testator, after making his will, makes another will, inconsistent with the first, and afterwards, by a will or codicil, effectual as such, confirms the prior will, the effect of the intermediate will is, as it seems, destroyed.<sup>w</sup>

#### Difference between the effect of Devises of Real and Personal Property.

All personal property acquired after the date of a will, will pass under a general bequest contained in the will. No will, however, can embrace any freehold property which was not in the testator at the time of its publication. If the testator, therefore, afterwards purchase land, republication will be requisite in order that such land may pass by the devise contained in his will.

#### Revocation.

A will is a species of voluntary conveyance, which does not take effect till the maker's death. Till that time it may be altered or revoked, either expressly or by implication. It is, as the law terms it, ambulatory till the testator's decease.<sup>x</sup> By the stat. 29 Ch. 2, c. 3, s. 6, no devise in writing of lands, &c. shall be revocable, otherwise than by some other will or codicil in writing, or other writing declaring the same; or by burning, cancelling, tearing, or obliterating the same, by the testator himself, or in his presence, and by his direction and consent. Besides the express revocations contemplated by the last mentioned statute, there are various acts of a

<sup>t</sup> 1 Ventr. 376.

<sup>u</sup> 2 Bl. Com. 381.

<sup>v</sup> West Symb. 636; Swinb. 1, sec. 1.

<sup>w</sup> *Crosbie v. Mac Dowal*, 4 Vesey, 610.

<sup>x</sup> Watkins's Principles, 308.



testator which are held to be implied or virtual revocations of a devise. Thus, where a man seised of an estate devises it, and afterwards conveys the estate entirely away, though he takes it back by the same instrument, or by a declaration of uses, it is a revocation, because "he has parted with his whole estate." The estate must remain in the same condition, and unaltered, to the time of the testator's death. Even an act which is incomplete and void at law, has been held to be a revocation of a will: as, for instance, a feoffment without livery: for it is said to import an intention in the testator to revoke.<sup>7</sup> A fine levied by a testator subsequent to his will, operates as a revocation of such will.\*

There are also revocations *pro tanto*; as where there is a conveyance of the whole estate in law, which is intended as a security for money, the revocation shall only be for the particular purpose to let in the incumbrance: for the testator has himself drawn the line how far the revocation shall go, and his intention is plainly shewn.<sup>a</sup>

With respect to the bequests of chattels real, it has been held, that the renewal of a chattel lease, after the testator has executed his will, revokes the bequest thereof, if the testator expresses himself in the present tense: as it must relate to what is in being at the time of making the will, and can mean only the lease and the term which the testator then had: but if the testator gives all the estate and interest which he shall have in the lease at the time of his death, or makes a general devise of the residue of his estate, in such instances the renewed leases will pass.<sup>b</sup> An implied revocation of a will is produced by a subsequent marriage, and the birth of a child or children.<sup>c</sup> And this particular doctrine of implied revocation is equally applicable to a will of real as of personal estate.<sup>d</sup> It is to be observed, however, that marriage alone will not revoke a will.\*

<sup>7</sup> *Beard v. Beard*, 3 Atk. 72; *Sparrow v. Hardcastle*, 3 Atk. 802.

<sup>a</sup> *Packer v. Biscoe*, 3 Moore, 24.

<sup>b</sup> *Huckness v. Bayley*, Prec. Ch. 515.

<sup>c</sup> *Abney v. Miller*, 2 Atk. 598; *Rudstone v. Anderson*, 2 Vesey, sen. 418; *Attorney General v. Downing*, Amb. 573; *Carte v. Carte*, 3 Atk. 173; *Adean v. Templar*, 3 P. Wms. 168.

<sup>d</sup> *Brown v. Thompson*, 3 Eq. Ca. Abr. 413; *Parsons v. Lunar*, 1 Ves. sen. 189; Amb. 557.

<sup>e</sup> *Christopher v. Christopher*, 4 Burr. 2171, 2182; Doug. 35; 5 Term Rep. 58.

<sup>f</sup> *Doe d. Lancashire v. Lancashire*, 5 Term Rep. 49; *Tulbot v. Tulbot*, Haggard, 705.

### Republication.

The effect produced by a republication of a will is, that the terms and words of the will are construed to speak with regard to the property of which the testator is possessed at the date of the republication, just the same as if he had been possessed of such property at the time of making his will. The republication of a will must be attended with the same solemnities which are requisite to be observed at the original publication.<sup>f</sup>

### What Wills require to be proved.

A will of freehold lands need not be proved in the Ecclesiastical Court. The probate cannot be given in evidence in any other Court: the original will must be produced, which may be obtained by application to the Court of Chancery for an order to the Ecclesiastical Court to have the will delivered.<sup>g</sup> But wills of chattels real and personal, which vest in the executors, require proof in the Ecclesiastical Court having jurisdiction where the lands lie. A will may also be proved *per testes* in the Court of Chancery, if there be any doubt of the sanity of the testator, by which means the validity of the will is at once decided on without an issue at law.<sup>h</sup>

## THE SEPARATE ESTATE OF A MARRIED WOMAN.

We extract the following note from Mr. Hayes' work on Conveyancing:

The recent decisions have involved the doctrine concerning separate estate in much perplexity. The following attempt to exhibit the result of those decisions, is submitted with diffidence: I. A gift to the separate use of a woman, who is *not* married when the gift has its inception, operates as a simple gift to her; and therefore, if she marries, the property will not be at her sole disposal during her coverture, nor protected from the control of her husband or from the claims of his creditors. II. A gift to the separate use of a woman who is married when the gift has its inception, determines, as to the right of separate enjoyment, with her *then* coverture, operating, from the period of its determination, as a simple gift to her; and therefore, if she marries again, the property will not be at her disposal during the future coverture, nor protected from the con-

<sup>f</sup> *Bunker v. Cooke*, Dougl. 35.

<sup>g</sup> 1 Atk. 627; 4 Bro. Ch. Ca. 476; Cro. Car. 296, 346; 4 Burn's Eccl. Law, 195.

<sup>h</sup> *Colton v. Wilson*, 1 P. Wms. 239; *Sord. V. & P.* 325, 6th ed.

trol of the future husband or from the claims of his creditors. In each of the cases above proposed, the after contracted marriage will be attended with the same rights and incidents as if no separate enjoyment had been indicated. These are conclusions from the case of *Massey v. Parker*, 2 Myl. & K. 174, decided by the present Master of the Rolls, which seems, however, to be somewhat obscured by the blending of two apparently distinct subjects, namely, the privilege or capacity of a married woman to have separate property, attended with the *jus disponendi* incident to property, and her incapacity, arising from an express prohibition to dispose by way of anticipation. In the cited case, there was no attempt to create an unalienable trust, no clause in restraint of anticipation; but the question was, whether a gift to the separate use, without more, of an unmarried woman (assuming that there were words sufficient to create such a gift, which was also made a question), was effectual, on her afterwards contracting marriage, to secure to her the separate enjoyment of the property given; or in other words, whether the gift then began to confer the privilege or capacity of sole ownership in regard to that property; whereas the decision apparently proceeds upon grounds such as these: that "the legatee, being unmarried at the time of the testatrix' death, the intended restriction was inconsistent with the nature of the interest given, and therefore inoperative; that an attempt so to fetter the interest of a male legatee cannot succeed, (*Brandon v. Robinson*, 18 Ves. 429), and that the same rule applies to an unmarried female legatee, (*Woodmeston v. Walker*, 2 Russ. & Myl. 197; *Brown v. Pocock*, 2 Russ. & Myl. 218; 2 Myl. & K. 189); that such fetters, though binding upon a married female legatee during her coverture, cease upon her becoming discover, (*Barton v. Briscoe*, Jacob, 603); that the only question, therefore, was, whether where such fetters are attempted to be imposed upon an unmarried female legatee, and she marries without obtaining payment of the fund, such fetters are to operate during coverture; and they were inoperative before marriage, because they were inconsistent with the nature of her estate; that the estate and interest were absolute before marriage, and the trustee held the legacy for her absolutely; that she might have taken it herself, or have given it to any one, and why might she not by the act of marriage give it to her husband? and that the very point was decided in *Newton v. Reid*, 4 Sim. 141." Now it is remarkable, that the privilege which equity has conferred upon a married woman, of exercising proprietary rights free from marital controul, is here treated as a restriction or an imposition of fetters; and that (the subject matter being a gift to the separate use of an unmarried woman), the point discussed throughout appears to be, not whether upon the legatee's contracting marriage the privilege, *supervened*, but whether, upon her contracting marriage, the restriction ceased, or the fetters were broken. That the words indicative of separate enjoyment were "inoperative

before marriage," is clear, not because "they were inconsistent with the nature of her estate," but because, the woman being single, their operation was simply impossible in her state. The question of inconsistency can arise only when property is given, while the *jus disponendi* incident to property is attempted to be restricted or fettered; such was the complexion of all the cases cited in the judgment, which, therefore, seem not to have touched the point of the principal case, unless, in deciding that a restriction cannot be prospectively imposed, they are to be considered as having decided that a privilege cannot be prospectively conferred. The legatee's ability to give the fund to the husband was not the matter in controversy, but rather the effect of the act of marriage in giving it to the husband by intendment of law, notwithstanding the declared intention of the will, that on marriage it should be at her sole disposal as the creature of equity. This case, however, may be considered as having established the two propositions already stated, though the reasoning should be thought not entirely conclusive, or the authorities not precisely applicable. III. A prohibition against alienation or anticipation is effectual only when applied to the separate property of a woman; and since a woman cannot, as we have seen, enjoy separate property as against a husband to whom she was not married at the time when the gift had its inception, it follows that the prohibition is, with reference to her coverture by such after taken husband, ineffectual. The adequacy of the gift to create separate property, and the adequacy of the prohibition to restrain its disposition, are, therefore, correlative and coextensive. But—IV. A gift to the separate use of a woman, made in contemplation of her marriage with a particular individual, is presumed to be effectual to constitute her sole owner during the intended coverture, at least if the intended husband assent to the gift; and a restriction on alienation annexed to such gift is of course effectual to the same extent. And, V. A gift, whether the object be male or female, married or unmarried, may be made determinable by a clause of cesser, or defeasible by a gift over, in the event of alienation, total or partial, voluntary or involuntary; for by such a clause or gift the property itself is withdrawn, and not merely a right incident to property is denied. The third and fifth propositions are deduced for the most part from the cases cited in the above judgment. (See also, on this branch of learning, *Adamson v. Armitage*, Coop. 283; *Pritchard v. Ames*, 1 Turn. & R. 222; *Stanton v. Hall*, 2 Russ. & M. 175; *Tyler v. Lake*, 4 Sim. 144; 2 Russ. & M. 183; *Jones v. Salter*, 2 Russ. & M. 208; ——— v. *Lyne*, 1 Yo. 562; *Kensington v. Dolland*, 2 Myl. & K. 184; *Graves v. Dolphin*, 1 Sim. 66.) The design of this note is to shew what the law now is, rather than what it really was, or what it ought to be.

The steps by which the doctrine first slowly advanced, and then suddenly retrograded, appear to be these: equity at an early period,

permitted a woman in the state of coverture, to have sole dominion over property, as well the corpus as the income, and either with or without the machinery of a trusteeship; thus departing from the principle of the common law: at a comparatively modern date, equity, on the ground of its competency to regulate its own creature, sanctioned the desire,—indeed, devised the means,—of rendering separate property unalienable during coverture, which was effected by a simple prohibition against anticipation: then, it was held (though a contrary opinion had prevailed, Sugd. Powr. 1 ed 105, and is still entertained by a high authority,) that an unalienable provision could not thus be made for a male, because the *jus disponendi* is inherent in property, subject only to the equitable exception in favour of coverture:—this principle equally reached, and was of course applied to, the case of an unmarried female, who therefore, notwithstanding the prohibition, might dispose at pleasure: and as it was determined, more recently, that her disposition, while actually discover, was not liable to be defeated or abridged by future coverture, she might dispose absolutely; still it was the general opinion among lawyers, (and the universal practice of conveyancers accorded) that separate estate might be created, and anticipation restrained, by a gift and prohibition made and imposed as well during the existence of coverture, as during its non-existence; or, indeed, during the non-existence of the object, but subject of course to be swept away by alienation during discover. But from this point the doctrine began to recede, for it was now held (*Newton v. Reid, supra*), that a prohibition was void *ab initio*, unless the state of coverture was coexistent with the commencement of the gift; so that the woman must be married at the death of the testator, or the execution of the settlement: and, lastly, it was held (*Massey v. Parker, supra*), that the gift itself, so far as it assumes to create separate property, is also void, *ab initio*, if the same ingredient of contemporaneous coverture be wanting.

### ON THE LIABILITY OF A BAILEE WHERE DEPOSIT IS STOLEN.

WE shall here shortly inquire in what cases a bailee will be liable to a bailor where the property deposited is stolen.

In *Southcote's case*,<sup>a</sup> the plaintiff declared in *detinue*, that he had delivered goods to defendant to be kept by him safely; the defendant confessed such delivery, but pleaded in bar that a person stole them out of his possession; the plaintiff replied, protesting that he

had not been robbed, that the person named in the plea was a servant of defendant, and demanded judgment, which on general demurrer he obtained, because the plaintiff had delivered the goods to be safely kept, and the defendant had taken charge of them upon himself by accepting such delivery, and to keep safely was the same as to keep.

This case has, however, been strongly controverted by Lord Holt, in a leading decision on this subject.<sup>b</sup> He went into the earlier authorities. "The 29 Ass. 28, is the first case in the books upon that learning, and there the opinion is that the bailee is not chargeable if the goods are stolen. As for 8 Edw. 2. Fitz. *Detinue*, 59, where goods were locked in a chest and left with the bailee, and the owner took away the key and the goods were stolen, it was held that the bailee should not answer for the goods. This case they say differs, because the bailor did not trust the bailee with them. But I cannot see the difference, nor why the bailee should not be charged with goods in a chest as well as with goods out of a chest. \* \* \* When I read *Southcote's case* heretofore, I was not so discerning as my brother Powys tells us he was, to disallow that case at first, and came not to be of this opinion till I had well considered and digested the matter. If a bailee keeps the goods bailed to him as he keeps his own, though he keeps his own but negligently, yet he is not chargeable for them, for the keeping them as he keeps his own is an argument for his honesty. *A fortiori*, he shall not be charged where they are stolen without any neglect in him." And concluded by saying, that the bailee is not chargeable without an apparent gross neglect; if there is such a gross neglect it is looked upon as evidence of fraud.

The rule laid down by Lord Holt has been followed by subsequent Judges; and the only question in every case of this nature will be, whether the bailee has been guilty of gross negligence: and as to this, in another leading case,<sup>c</sup> where a person undertakes, without reward, to perform a particular service, when his situation is not such as to imply skill or knowledge in the particular transaction, he will not be responsible for a loss when he has acted *bond fide*, and exercised the same care which he takes of his own affairs.

The point has lately come before the Court of King's Bench in a case,<sup>d</sup> where the circumstances were as follows:

Case, for not taking up a bill for 32*l.* 10*s.* with money which the plaintiff had given to the defendant for that purpose. The declaration contained a count for negligence in losing 32*l.* 10*s.* entrusted by the plaintiff to the defendant's care. Plea: the general issue. The cause was tried at the sittings after Michaelmas

<sup>b</sup> *Coggs v. Bernard*, 2 Lord Raym. 913, n.; 1 Com. 133; 1 Salk. 26.

<sup>c</sup> *Shiells v. Blackburne*, 1 H. Bl. 158.

<sup>d</sup> *Doorman v. Jenkins*, 4 N. & M. 170.

<sup>a</sup> 4 Co. 836; Co. Litt. 89 a.

term, 1833, before Lord Denman, C. J., at Guildhall. The following evidence was given on the part of the plaintiff: The defendant kept the Auction Mart Coffee House, which consisted of a coffee room and several private apartments, together with a *tap room* having a bar. The plaintiff was in the habit of frequenting the coffee room, and on Saturday, 21st July, 1833, gave the defendant 32*l.* 10*s.* for the purpose of taking up a bill which would become due on the following Monday. There was no consideration for the bailment or for the service. The tap room was kept open on Sundays,—the coffee room was closed on that day. The bill was not on the Monday paid by the defendant, as he had engaged to do, nor was the 32*l.* 10*s.* returned to the plaintiff. The defendant had stated to one of the witnesses called by the plaintiff, that on the intervening Sunday (22d July) he had unfortunately left his cash box in the tap room, and that the plaintiff's money, together with about 200*l.* of his own, had been stolen. No evidence was given as to the part of the tap room in which the cash box had been placed, nor as to the manner in which it had been secured. Sir James Scarlett, for the defendant, applied for a nonsuit, on the ground that there was no evidence of negligence such as to charge a bailee without reward; and he cited *Coggs v. Bernard*, 2 Lord Raym. 909; and *Shiells v. Blackburne*, 1 H. Bla. 158. The Lord Chief Justice, however, refused to nonsuit, and the case went to the jury without any evidence on the part of the defendant. His Lordship told the jury, that as the money had been deposited without reward, the question was, whether the defendant had been guilty of gross negligence in respect of the custody of the plaintiff's money, or whether he had used ordinary care; and that gross negligence only would give the plaintiff a right to recover the sum deposited. His Lordship expressed it as his opinion that gross negligence was not in fact proved; but this point being left to the jury, they found a verdict for the plaintiff for 32*l.* 10*s.* Sir James Scarlett, in the following term, obtained a rule nisi for a nonsuit, or a new trial. Taunton, J. said, among other things, "This case is certainly one of some degree of doubt; but after the best consideration I can give the question, I have arrived at the conclusion that the rule ought not to be made absolute. It is very properly admitted, that this being a case of bailment for the benefit of the *bailee* without reward to the *bailee*, the present action cannot be maintained without proof of gross negligence; therefore the only question is, whether there was any evidence, for the consideration of the jury, of negligence of that description? Now if there was any evidence for the jury, it is perfectly clear that the application for a nonsuit cannot be supported, and it is to my mind also pretty clear that the decision of the jury ought to be final. Much has been said about the nature of gross negligence—whether it is a matter of law or matter of fact. I do not think it necessary to enter into that abstract question; indeed I think abstract

questions in general are very dangerous matters to meddle with in a Court of Law. That question, like all other questions, must depend on all the circumstances of the case considered together. There certainly may be instances in which the question of gross negligence consists more of law than of fact, and others in which it consists more of fact than of law. In the case of an action against an attorney for negligence, the question is rather matter of law than fact, for this reason, that an action against an attorney for negligence charges that the defendant being an attorney, and having undertaken to do such and such business, was guilty of such unskilfulness or such negligence in the management of it, that such and such injurious consequences resulted to the plaintiff. There it would be impossible for the jury in nineteen cases out of twenty, to come to any conclusion without being informed by the Court that the negligence or mismanagement of the defendant was necessarily, in point of law, attended with such injurious consequences; so that there it consists rather of matter of law, than matter of fact. But still, even in this instance, I apprehend the jury are to draw a conclusion of fact, whether the attorney was guilty of that negligence or that mismanagement which is charged, and which is the gist of the action. In an action against a surgeon, for negligence, it is more matter of fact than of law; for what law can there be in the question whether of such and such conduct, charged to be mismanagement or negligence, the defendant was or was not guilty? That is a matter for the consideration of the jury, who, upon hearing the evidence, must draw their own conclusions from it; so that there it is more matter of fact than matter of law. Here I should say, under all the circumstances, that the question was a matter of fact to be tried by a jury, more than matter of law." The other Judges, Denman, C. J., and Patteson and Williams, JJ., concurred in discharging the rule.

## ANALYSIS OF THE MUNICIPAL CORPORATIONS BILL.

THE bill is intitled, "A Bill to provide for the Regulation of Municipal Corporations in England and Wales."

The preamble recites that divers bodies corporate at sundry times have been constituted within the cities, towns, and boroughs of England and Wales, to the intent that the same might for ever be and remain well and quietly governed: And that, partly by defects in the charters by which the said bodies corporate have been constituted, partly by neglect and abuse of the privileges by such charters granted and confirmed to the inhabitants of the said cities, towns, and boroughs, and partly by change of circumstances since the said charters

were granted, the said bodies corporate, for the most part, have not of long time been and are not now useful and efficient instruments of local government.

The enactments are as follow :

1. Repeal of all acts, charters, and customs inconsistent with this act.

2. Interpretation clause.

3. Corporations to be styled Mayor and Burgesses.

4. Boundaries of certain boroughs to be those settled by 2 & 3 Will. 4, c. 64.—Boundaries of other boroughs, to be settled by the King in Council.

5. Every place included within the bounds of a borough, to be part of such borough.

6. Occupiers of houses and shops rated in three years to the relief of the poor, entitled to be burgesses, if resident within seven miles.

7. Occupiers may claim to be rated.

8. Burgesses who cease to be occupiers within the borough, or neglect to pay their rates, to be omitted from the burgess roll; but within two years, may be restored at the next revision of the burgess roll.

9. No new burgesses to be admitted who are not qualified under this act.

10. Burgesses not to have individual benefit from common lands, &c., who were not entitled thereunto before the passing of this act.

11. Exclusive rights of trading abolished.

12. Overseers to make lists of all persons entitled to be burgesses in their respective parishes.

13. Persons omitted from the overseers' lists to give notice to the town clerk.—Notices as to persons not entitled to be retained in the lists.—Lists of claimants, and of persons objected to, to be published, &c.

14. Mayor to revise lists, and upon due proof to insert and expunge names.—Power to rectify mistakes in the lists.

15. Mayor, on revising the lists, to have power of adjourning, of administering oaths, &c. and shall settle and sign the lists in open court.

16. Borough list to be kept by the town clerk.—Lists to be copied into books, with the names numbered.—Such book to be the register of voters, from which election shall be made.—No stamp duty payable on enrolment.

17. Copies of the burgess roll to be printed for sale.

18. Expenses of overseers, how to be defrayed.

19. Mayor and council to be chosen in every borough.

20. Who qualified to be chosen mayor or councillor.

21. Who shall vote in the election for councillors.

22. Councillors to be chosen on the 25th October in every year.—No election to take place on Sunday.

23. One-third part of the council to go out of office annually.

24. Elections to be held before mayor.—Mode of voting.

25. Polling-booths to be provided.

26. No inquiry of the voter, except as to his identity, and whether he has voted before at the same election.—Forms of questions as to these points.

27. Result of election, how to be declared.

28. Town clerk to preside at election in case of the death or inability of mayor at that time.

29. Existing mayors and councils to go out of office on election of councils under this act.

30. Certain boroughs to be divided into wards.

31. Councillors to be elected in wards by the burgesses of such wards.

32. Burgesses to vote for the councillors of the ward in which their property is situate.

33. Lists of the burgesses in each ward to be made out yearly.

34. Manner of proceeding, if any person is elected a councillor in more than one ward.

35. Occasional vacancies in the council to be filled up by fresh election.

36. Council to elect the mayor every year from the councillors.

37. Mayor and councillors not to act until they have made a declaration of acceptance of office.

38. Every burgess elected to the office of councillor, and every councillor elected to the office of mayor, shall accept the office, or pay a fine to the borough fund.—Exemptions.

39. Any mayor, or councillor, if he shall be declared bankrupt or insolvent, or absent himself from the borough, shall lose his office.

40. Penalty on person not qualified, &c. acting as mayor or councillor.—Proviso.

41. The mayor to be a justice of the peace for the borough and for the county; and returning officer at elections of members to serve in parliament.

42. Power to council to appoint town clerk, treasurer, and other officers; and to take security for due discharge of their official duties.—Salaries.

43. Treasurer to pay no money but by order of council.

44. Officers to account, &c. according to the orders of the council.—Summary remedy against officers for not accounting, &c.—Proviso.—Remedy by action.

45. Councils of cities and towns which are counties, to name a sheriff.

46. In certain boroughs, council to appoint a coroner.

47. County coroners to act in other boroughs.

48. Officers to continue until removed.

49. Officers to receive compensation on removal.

50. Questions to be decided by a majority of councillors present; one third part of whole number to be a quorum.—Notice of meetings of council.

51. Power to council to appoint committees.

52. Ale-house licenses to be granted by council.

53. Council to have the power of justices under 3 G. 4, c. 77.

54. Town clerk to give notice of meeting.

55. Recognizances to be signed by mayor, or two councillors.

56. Council to appoint charitable trustees.  
 57. Money to the credit of trustees to be transferred.—Existing contracts, debts, &c. to be enforced and recovered.—Suits pending to be carried on.  
 58. Trustees to appoint a secretary and treasurer, &c.  
 59. Officers to account to the trustees.  
 60. Treasurer to pay money only to order of trustees.  
 61. Majority of trustees may act.  
 62. Council to become trustees of all acts, of which corporators were *ex officio* sole trustees.  
 63. Council to appoint a limited number of councillors to be joint trustees of certain acts.  
 64. Powers vested in trustees may be transferred to councillors.  
 65. A watch committee, to consist of the mayor and councilmen; such committee to appoint constables for the borough.—Constables to be for the county, &c. as well as borough.  
 66. Watch committee to make regulations for the management of the constables.  
 67. Power to constables to apprehend disorderly persons, &c.  
 68. Constables attending at the watch-houses in the night, may take bail by recognizance from persons brought before them for petty misdemeanors; such recognizance to be conditioned for the appearance of the parties before a magistrate.—In default of appearance, recognizance to be forfeited.—Time of hearing may be postponed.  
 69. Penalties on constables for neglect of duty.  
 70. Penalty for assaults on constables.—Proviso.  
 71. Regulation and payment of expenses.—Rewards for activity, &c.  
 72. Magistrates to appoint annually a certain number of persons to act as special constables in case of need.—1 & 2 W. 4, c. 41.—Payment of special constables.  
 73. On notice of appointment of constables, the present provisions in local acts as to watching, &c. to cease.—Watch boxes, arms, &c. to be given up for the use of the constables appointed under this act.—Penalty for not giving them up.  
 74. Proviso as to rates in arrear and as to debts.  
 75. Power for council to order parts of borough, not within local act, as to lighting, to be included in such act.—Proviso as to amount of rate for lighting.  
 76. Council may assume the powers of inspectors under 3 & 4 W. 4, c. 20, for lighting any part of a borough not within a local act for lighting the same.  
 77. Council to have power to make bye laws.  
 78. As to breaches of bye laws.  
 79. All corporate property and all fines to be received on account of a borough fund.—Salaries of recorder, town clerk, treasurer and other officers, and election expenses, to be paid out of such fund.—If the fund be insufficient,

the council shall order a rate to make up such deficiency.  
 80. Auditors to be annually chosen.  
 81. Accounts of receipts and disbursements to be kept audited and published.  
 82. Council of certain boroughs to name persons to receive commission of justice of peace.  
 83. Councils may make bye laws on which the crown may appoint salaried justices.  
 84. Council to provide a police office.  
 85. Justices need not be qualified by estate, not to sit in courts of gaol delivery or quarter sessions, nor to levy rates, nor grant ale-house licenses.  
 86. Justices to appoint a clerk, who shall not be the town clerk or of the council, nor be concerned in the prosecution of offenders committed by the borough justices.  
 87. Recorder to be appointed by his majesty in certain boroughs.—Recorder to be a justice of the peace for the borough and for the county.—Not to be councillor or police magistrate.  
 88. Justices to make declaration before acting.  
 89. Sessions of the peace to be held for the borough.—Recorder to be sole Judge.  
 90. Mayor, in the absence of the recorder, may open and adjourn the court.  
 91. Capital jurisdictions, and all other criminal jurisdictions in boroughs, other than are specified in this act, abolished.  
 92. Justices of certain counties of cities and towns to commit to neighbouring county until a commission of gaol delivery issues for their own county.  
 93. Offenders committed to borough sessions whose jurisdiction is taken away, to be tried in the adjoining county.  
 94. County justices to have jurisdiction in all boroughs which have not a separate court of the peace under this act.  
 95. Certain boroughs not to be assessed to county rates.  
 96. Boroughs to pay the expenses of prosecutions at the assizes.—Disputes referred to arbitration, as provided in 5 G. 4, c. 85.  
 97. Boroughs to pay a proportion of other county expenditure.  
 98. Borough courts of record to be holden as heretofore, but in certain cases with extended jurisdiction; Recorder, &c. to be sole Judge.  
 99. Council to appoint registrar and other necessary officers of the court.  
 100. Existing suits not to abate by reason of the change of jurisdiction.  
 101. Who to be jurors.—Summoning of jurors, &c.—Fine on jurors for non-attendance.  
 102. Councillors, &c. exempt from serving on juries; burgesses of boroughs, which have quarter sessions, exempt from juries of county quarter sessions.  
 103. All chartered exemptions from serving on juries abolished.—6 G. 4, c. 50, in part repealed.  
 104. Fees payable to the clerk of the peace,

clerk to the magistrates, and registrar and officers of the court of record.

105. Table of fees to be hung up.

106. Application of penalties.

107. Limitation of time for prosecution of offences punishable on summary conviction under this act, and summoning offenders.

108. Power to summon witnesses.—Penalty for disobedience of summons, &c.—No witness or justice to be incompetent on the ground of rateability.

109. Payment of penalties, and mode of levying the same.

110. Form of conviction.

111. Appeal against convictions under this act.

112. No certiorari, &c.—As to informality in warrants, &c.

113. Venue in proceedings against persons acting under this act.—Notice of action.—General issue.—Tender of amends, &c.

114. The King empowered to grant charter of incorporation.

115. Act may be altered this session.

## NOTES OF THE WEEK.

### HOUSE OF LORDS.

#### *Bills for second Reading.*

<i>Title of the Bill.</i>	<i>Proposer.</i>
Residence of Clergy.	Lord Brougham.
Pluralities Prevention.	Lord Brougham.
Ecclesiastical Jurisdic- tions.	Lord Brougham.
Illegal Securities.	
Law of Patents.	Lord Brougham.

#### *In Committee.*

Legitimacy of Children. Lord Lyndhurst.

### HOUSE OF COMMONS.

#### *Bills to be brought in.*

Law of Tenure.	Attorney General.
Law of Reheat.	Attorney General.
Poor Law Amendment.	Mr. Trevor.
Registration of Births, &c.	Mr. Wilks.
Tithes Commutation.	Sir R. Peel, Bart.

#### *Second Reading.*

Municipal Corporations.	Lord J. Russell.
	15th June.
Law of Libel.	Mr. O'Connell.
Bankruptcy Funds.	Master of the Rolls.

Ecclesiastical Courts. Sir F. Pollock.  
Clergy Discipline. Sir F. Pollock.  
Infants' Property (Ireland).  
Contempts in Equity (Ireland).  
Durham Court of Pleas.  
Parish Vestries.  
Offences against Person.

#### *In Committee.*

County Coroners.	Mr. Cripps.
Prisoners' Defence.	Mr. Ewart.
Loan Societies.	
Copyholds Enfranchisement.	Attorney General.
Registration of Voters.	Lord J. Russell.
Dissenters' Marriages.	Sir R. Peel, Bart.
Limitation of Polls.	

#### *Passed.*

Highways. Mr. Lefevre.

#### *Consideration of Report.*

Abolishing Imprisonment for Debt, &c. Attorney General.  
17th June.  
Capital Punishments.

### KING'S BENCH TRIALS IN TERM.

Causes entered for the Sitting in the present Term will be tried on Tuesday, notwithstanding their being defended by counsel, unless an affidavit of the merits of the cases respectively be made, in which case, if the Sitting Judge should think proper, they, or some of them, will keep their places in the paper. This applies to such Causes as heretofore would have stood over to the First Sitting-day after Term, with Judgment of the Term. It does not apply to Middlesex, these Sittings.

### EXCHEQUER OF PLEAS SITTINGS AFTER TERM.

The Entry of Causes for the Sittings after Term in *Middlesex*, closes on Tuesday evening, June 16th, at eight o'clock. For *London*, on Wednesday evening, June 17th.

Causes entered for the Sittings in Term and not tried at those Sittings, are placed after the Remanets in the List for After Term, and before the causes entered for After Term.

## LECTURES AT THE INCORPORATED LAW SOCIETY.

## LAW OF LIFE INSURANCE.

We are enabled to give an abridgment of the late Mr. Dodd's Lecture on the Law of *Life Insurance*,—a subject which we think will be interesting to the Members of the Profession, both as respects their clients and themselves.

The contract of Life Assurance is, in effect, one by which the insurer engages in consideration of a premium, to assure to the assured, his own life or that of another person, either perpetually or for a limited time; and on the failure of the life, to pay to the assured or his representatives a certain sum of money. Where the life assured is that of a third party, and not the party making the insurance, the law requires that the party making the insurance should have an interest in the life insured.

The force of the term *insure*, seems to imply, that the party insuring has some interest in the event or thing insured; and an engagement by *A.* with *C.*, that *B.* shall live for five years, or that *A.* shall pay 1000*l.* on his death, is in fact nothing else than a *mere wager* on the length of *A.*'s life, unless *C.* have some pecuniary interest in its duration. To prevent wagering and gambling of this description, the statute 14 G. 3, c. 48, enacts that no insurance shall be made by any person, body politic or corporate, on lives, or on any other event wherein the person for whose benefit or on whose account the policy is made has no interest, or by way of *gaming* or *trading*.

2dly. That in any policy on lives or other events, the name of the person interested, or on whose account it is made, must be inserted.

3dly. That no greater sum shall be recovered or received from the insurer, than the amount of the interest of the insured.

With respect to the *nature of the interest*, it has been held, that the mere relationship of father and son does not give either of them such an interest in the life of the other, as to enable him to ensure his life. The son may, in point of fact, materially rely on the support of his father, and *vice versa*; but in either case the claim for maintenance is merely one of affection, and not legally capable of being enforced; it does not therefore amount to that positive pecuniary interest, which may be the subject of insurance.

On the other hand, a creditor has been always held to have a legal interest to the extent of his debt, since the means of satisfying the debt must mainly depend on the personal exertions of the debtor. *Anderson v. Edie*, Park's Insurance, 7th edit. 640. But this debt must be one capable of being enforced; and therefore, a creditor on a note of hand given for a gambling debt, or any illegal consideration, has not an insurable interest. *Dwyer v. Edie*, Buller, J., Park. 639.

In the time of Lord Mansfield, a policy was NO. CCLXXIV.

opened in due form and subscribed, as to the much disputed point, What was the sex of the French Chevalier D'Eon? The Court disposed of an action on a common wager, on the same delicate point, after much argument, on the ground of the investigation requiring indecent evidence, and tending to disturb the peace of the individual. But the action on the policy of insurance was got rid of, on the short ground that the case was within the before-mentioned statute, and that the parties had no interest in the event insured. *Roebuck v. Hamerton*, Coop. 737.

The executor of a creditor, was decided by Lord Kenyon to have sufficient interest in a debtor's life, to make a legal insurance on it, since the debt was assets, and the testator's interest vested in the executor. *Tidswell v. Ankerstein*, Peake's Ca. 151.

The famous case of *Godsall v. Bolders*, 9 East, 72, has elucidated and certainly extended this doctrine, of the necessity of an interest in the party insuring. Messrs. Godsall were creditors of Mr. Pitt, and insured his life to the amount of their debt. On Mr. Pitt's death a sum of money was voted by parliament for payment of his debts, out of which fund Messrs. Godsall were paid in full. They then brought an action on the policy against the Insurance Office. After full argument, the Court of King's Bench held that the action was not maintainable, since insurance was essentially a contract of *indemnity against loss*, and the plaintiffs in this case had sustained no loss.

Mr. Dodd then entered into an examination of the arguments of Mr. Babbage, in his able and useful work on Life Insurance, p. 145, in which the soundness of this decision, as well as the conscientiousness of the defence, is impugned. Mr. Babbage endeavours to draw a distinction between the insurance of a ship, and of a life, and contends that while the former is essentially a contract to indemnify against any kind of loss, the latter is an absolute engagement to pay a certain sum on the death of the party insured, without reference to any damage, in fact, sustained by the insured in consequence of such death. Against this doctrine Mr. Dodd very ably contended, amongst other things observing, that Mr. Babbage was erroneous in asserting that "indemnity was no part of the contract," for not only do Lord Mansfield and Lord Ellenborough, Mr. Justice Buller and Mr. Justice Lawrence, regard insurance as merely a contract of indemnity; but there is not a single writer on the subject, who does not regard "loss," "prejudice," "damage," actually suffered, as essential to ground an action against the insurer. If insurance is anything beyond a contract of indemnity, it becomes at once a contract of speculation and wagering, and the provisions requiring an interest in the insured are altogether nugatory and superfluous. In *Lucena v. Crawford*, 2 Bos. & Pul. New Rep. p. 300, Mr. Justice Lawrence, after referring to the high authorities, Valin, Roccus, and Scaccia, says, "these definitions by writers of different countries, are in effect the same, and amount



to this—that insurance is a contract by which the one party, in consideration of a price paid to him, adequate to the risk, becomes security to the other, that he shall not suffer loss, prejudice, or damage, by the happening of the perils specified, to certain things which may be exposed to them.”

In a late case, Lord *Tenterden*, at *nisi prius*, grounded his judgment, which was not afterwards questioned, on evidence of the practice of paying policies without inquiring as to the continuance of the insurable interest. Morris put up by auction a policy of the Pelican Office for 700*l.*, entered into by Morris on the life of one Hornaby, and the plaintiff's testator (Barber) purchased the policy. Morris's interest in Hornaby's life arose out of a redeemable annuity payable by Hornaby to him. Immediately after the sale of the policy to the plaintiff's testator, Hornaby redeemed this annuity; and from that time, Morris's interest in her life ceasing, it is clear that, according to *Goodsall v. Bolders*, the office was not legally bound to pay the policy. The plaintiff therefore brought an action against the vendor, Morris, assigning for breach that Morris had no title to sell the policy absolutely, since he had only a conditional interest in the life insured; and then alleged, that on the cessation of that interest by the redemption of the annuity, the policy became of no value to the plaintiff's testator. Lord *Tenterden* held, that the defendant was not liable, since in selling the policy, he had acted on his knowledge of the practice of the office; and although payment could not be enforced after the interest had ceased by the redemption of Hornaby's annuity, still the defendant knew that the policy would in fact be paid by the office. *Barber v. Morris*, 2 Moo. & Mal. 66.

It is hardly necessary to say, that a party holding funded or landed property upon the life of another, has such an interest in his life as enables him legally to insure it. Such insurances are very frequent.

In every contract of insurance, it is of course of the utmost necessity that the insurer should be most accurately informed of the state of facts existing at the time of the insurance; and as these facts—whether it be the health and condition of a living subject, or of a ship or other property—are of course principally in the knowledge of the party making the insurance, the greatest fairness and good faith are requisite on his part in answering all inquiries of the insurer, and communicating all material facts with truth and accuracy. Any fraudulent misrepresentation vitiates the policy.

The older policies are generally founded on warranties, and statements of so vague and loose a nature, that the decisions upon them are now of very slight importance. The defence in such cases was necessarily confined to the establishment of fraud on the part of the assured; whereas, under the more improved and specific forms of policies and declarations now employed, the breach of any of

the several specific warranties and statements given by the assured, and even the non-communication of any fact which a jury deem material to be communicated, will defeat the claim on the office, though the defence may not disclose wilful misrepresentation and positive fraud.

In every case, the question, whether a warranty has been violated or observed—whether a disease is one tending to shorten life or not—whether inquiries have been fairly and honestly answered, or the reverse—whether any given fact was or was not material to be communicated to the insurers: these are all questions of fact for the jury, after hearing the evidence. As such cases therefore most commonly resolve themselves into questions of fact, the points of law reported on them are not very numerous.

It is the duty of the judge to place before the minds of the jury the precise question of fact on which the case turns; and he is not justified in leaving it generally and vaguely to them to say whether there has been misrepresentation or concealment, or not. *Morrison v. Muspratt*, 4 Bing. 60. The reference, in order to be fair and satisfactory, must be the usual and late medical attendant of the party. *Everett v. Desborough*, 5 Bing. 503.

The question as to the materiality of the communication of particular facts must of course in every case much depend upon the tenor of the inquiries made. Facts which need not necessarily be communicated in answer to specific questions which do not lead to or touch them, will become material where there is also a general sweeping inquiry on the part of the insurers. Thus in the case of a policy on the life of the Duke of Saxe Gotha, in which the office made of a referee abroad, this inquiry, “whether he knew any other circumstances that ought to be communicated to the directors?” it was held, that the circumstance of the Duke's mental faculties being affected, was (according to the evidence of surgeons) a fact material to be communicated in answer to this inquiry. It has also been held by Mr. Justice *Bayley*, “that the proper question is, whether any particular circumstance was *in fact* material, and *not* whether the party *believed* it to be so. The contrary doctrine would lead to frequent suppression of information, and it would often be extremely difficult to shew that the party neglecting to give the information thought it material. But if it be held, that all material facts must be disclosed, it will be to the interest of the assured to make a full and fair disclosure of all the information within their reach.” *Lindenau v. Desborough*, 8 B. & C. 592.

In a case where the party insured was in gaol at the time of the insurance, and this fact was not communicated, but it was stated generally that she resided at Fisherton, the Court held, the being in gaol was at all events a fact the jury should have been called upon to pronounce either material or otherwise. One physician deposed that it might slightly increase the risk of life, and it was therefore a

question fit for the jury. *Huguenin v. Rayley*, 6 Taunt. 188. See also the case at *nisi prius* of *Edwards v. Barrow*, C. P. 1830, Ellis's Insurance, 116.

When an insurance is effected on the life of another, it is of the last importance that the party making it should himself ascertain that all inquiries are fairly answered, and all material facts honorably communicated to the office; for if he leaves this duty (as sometimes happens) to the party whose life is to be insured, and if that party commit any misrepresentation or concealment, it will vitiate the policy as much as if made by the insured himself. The life to be insured is in such cases the agent of the insured, who is consequently bound by his acts and conduct; and it makes no difference in such a case, that the party effecting the insurance is unacquainted with the life insured, and lives at a distance, and is wholly free from privity to the misrepresentation. Nor will it make any difference, that the agent of the office knows the life, and solicits the insurance, and undertakes to make all necessary inquiries, and do all that is required by the office: still if the life to be insured commit any fraud or concealment, the insuring party is bound by it, and cannot recover on the policy. This position is fully established by the case of *Everett v. Deaborough*, the Secretary of the Atlas Office, 5 Bing. 508. See also *Duckett v. Williams*, 2 Crom. & Mee. 348.

It is obvious therefore, that insurance is a contract *uberrima fidei*—requiring the strictest good faith; and that as the inquiries and statements of the offices are now framed, nothing short of the most perfect candour and unreserved disclosure as to the party's health and condition, can render the recovery on the policy secure. The older cases must not now be looked to as guides, since they depended on the vague form of the declarations and inquiries then used, and on a far more narrow and literal construction than Courts now give to a contract resting on the basis of good faith and mutual confidence.

Where an insurance of a life is limited to a year, or any definite period, it is of course indispensable to shew that his death happened within the period limited; and though a party should receive a mortal wound just before the time expired, still if he died after the expiration of the time, the office would not be liable. *Lockyer v. Offley*, 1 T. R. 254. In some cases, when parties are abroad, or travelling by sea or land, the exact time of the death may not be easy of ascertainment, and it is then always a question of fact for the jury, whether it happened within the period of the insurance, or afterwards. Every insurance is, in fact, limited to the period during which the premiums are paid up to the office. By the general practice, the premiums are payable yearly, with a provision that the policy shall be void unless the premium is duly paid within fifteen days of the day on which it becomes due. It must always be remembered, that these days are strictly days of grace, an indulgence allowed by the

office, which enables the insured, *provided the life still continue*, (sometimes, though rarely, it is also provided that the life must remain in *equally good health as on the day when the premium became due*) to pay up the premium, and keep the policy alive; but suppose the life dies after the day of payment, but before the fifteen days are out, the policy is at an end, and the executors of the insured are not allowed to pay up the premium, and make their claim on the office. *Want v. Blunt*, 12 East, 183. It is clear, therefore, that there is a risk in allowing the premium to remain unpaid a single day beyond the specified day of payment; and when the age of the insured is advanced, or his health precarious, this should always be attended to. It should be also borne in mind, that the same strictness applies to the cases of fire-insurance. For instance, if a fire should happen within the fifteen days allowed as an indulgence, it is quite clear that the office would not be liable; and upon this ground it has been decided by Lord *Ellenborough*, that the omission to pay the premium at the day, is a breach of a covenant to keep leasehold premises insured, and works a forfeiture, under the proviso for re-entry; and this, notwithstanding no fire had occurred, and the office had actually allowed the premium to be paid up, and given a receipt for it. *Doe d. Pitt v. Shewin*, 3 Camp. 134.

A discussion has arisen in some cases, whether an insurance from the "day of the date," or, "from the date," is inclusive or exclusive, a point which has given rise to some not very profitable subtlety and nicety of argument in *Pugh v. Duke of Leeds*, Cowp. 714, and in *Styles v. Wardle*, 4 Barn. and Cres. 908. But most policies now state expressly that the day of the commencement and of the termination of the risk, are both inclusive. But suppose the case of the risk never having commenced (as *e. g.* if the insured turned out to have never had any legal interest in the life,) and this without any fraud on the part of the assured, I think it clear in such case, the premium would have been paid without legal consideration, and might be recovered as money had and received to the use of the executors. If fraud be committed by the insurers, the policy is void, and the premium maybe recovered back.

A policy of insurance being a chose in action, is not assignable *at law*. All questions, therefore, as to the assignment, (which is a most frequent species of security); what constitutes a valid assignment; the priority of a first or second assignee,—depend entirely on the decisions of Courts of Equity, and do not properly fall within my province. I will merely observe, that a party having an interest in the life, may make a valid assignment of the policy to another; and when a valid assignment is made, a Court of Equity will compel the assignor to permit the assignee to bring an action on the policy in his name. (See *Ashley v. Ashley*, 3 Simons, 151.) It is important, however, to observe, that according to late decisions in Equity, the assignment of a po-

licy is not completely valid and effectual, unless notice is given to the office of the assignment; for if the assignor of the policy become bankrupt after having assigned the policy, and before notice is given to the office, the policy will pass to the assignees as remaining in the order and disposition of the bankrupt within the 72d section of the 6 Geo. 4. c. 16, and the claim of the particular assignee will thus be defeated. This important doctrine, which had been settled as applying to the assignment of trust funds and debts in the cases of *Dearl v. Hull*, and *Lovendge v. Cooper*, 3 Russell, 1, is now established as to assignments of policies, by the Vice Chancellor's decision in *Williams v. Thorpe*, 2 Simons, 257; and it is not merely in the event of the assured's bankruptcy that a party taking an assignment of a policy, may be postponed, unless he give notice to the office, for it will be the same if the assured make a second assignment of the policy, and the second assignee give notice to the office. In such a case it appears clear from the above cases, that the first assignee not having given notice (though with the policy in his hands,) will be postponed to the second assignee, who has not the policy, but has given notice to the office. Whether the principle of these cases, is or is not sound in holding that the same rule applies to the assignment of a policy as to the assignment of a bond or other debt actually due, I will not inquire; but till they are overruled, I recommend every person who takes an assignment of a policy as security, to give immediate notice to the office where the policy is effected.

In a well known case, on a policy on the life of Mr. Christie Burton, an attempt was made to recover interest on the insurance money; but the Court of King's Bench decided against it, since the policy was not a mercantile instrument, and there was no contract or usage express or implied to pay it. It is clear, however, that now by virtue of the 3 & 4 W. 4. c. 42. sec. 28, the Jury have the power of giving interest on the sum insured, from the time when it became payable.

Questions as to return of premium, which are so frequent and so difficult on ship policies, very rarely occur on policies on lives. The policies of most offices contain some express provision on the subject. In the absence of any such provision, the rule is that although the office may be entitled to resist paying the policy, yet if the risk has once actually commenced, the insured cannot claim a return of premium. In *Godsall v. Boldero*, 9 East, 72, the office paid a small sum into Court for premium, but the Court took no notice of it; and it is quite clear that the risk on Mr. Pitt's life having commenced, since the insured had a sufficient interest till the payment of the debt by parliament, Messrs. Godsall were not entitled to claim a return of premium. In a case of *fraud* on the part of the insured, it is of course out of the question that he should recover back the premium after failing on the policy.

## PROFESSIONAL GRIEVANCES.

### SIX CLERKS' OFFICE.

To the Editor of the *Legal Observer*.

SIR,

The letter in your No. of the 30th of May, from your correspondent "Adviser," who, I am glad, seems disposed to carry on with me the exposure of the abuses in this office, induces me again to sit down to the attack; and concurring in all that he has stated on the subject of office copies, he will allow me to go at once to the root of the evil, and ask, why is the system of office copying of Pleadings continued in the Court of Chancery, when it is abolished in the Courts of Common Law? It is too recent for any attorney to forget the annoyance of continually searching the Clerk of the Papers Office for special pleas, and also running there immediately before signing judgment, besides the money paid for office copies, tallying with the system in the Six Clerks' Office, save that the abuse abolished is not to be compared in extent with that which is suffered to remain in the Six Clerks' Office.

I ask again, why is the system in one Court abolished, and continued in the other? Is it because there are more drones to compensate in the Court of Chancery? And when I see it stated in the daily prints, that one clerk in Court is deriving from copy money alone, 2000*l.* a year, and he is but one of "the sixty clerks" revelling in the abuse, I can imagine the vested interests form an almost insurmountable barrier; but in order to diminish the compensation to be paid, if that should appear just, and sufficient properly paid appointments, upon the reformation of the present system, could not be found for all the persons entitled, it does seem to me to be perfectly fair, instead of calculating the income upon the present exorbitant charge of ten-pence a folio, that six-pence should be deducted, leaving four-pence a folio, a sum held to be sufficient remuneration to solicitors for the like work; and it is not to be forgotten, too, that some part of the ten-pence should have been struck off with the four-penny stamp on each sheet remitted by government, and it is so at common law; but there you see the taxing officer had no opportunity of pocketing the difference, and he took care the public had the full benefit intended by the legislature.

I will not presume to point out how the record composed of the Bill, Answer, and Depositions, is to be placed in the hands of the Court and the parties—that will be a matter easily accomplished. The first step to which is, to make known and thoroughly understood, an extravagant abuse to which nearly every family in the kingdom contributes. The evils in this office are so manifest, that one is led to believe

that the difficulties standing in the way of their removal, may be greater than is easily conceived; but as the Judges of the Court of Chancery have undoubtedly the power to regulate the Six Clerks' Office, and the fees of the Clerks in Court, I would humbly pray their honors to begin a reform, abolishing all fees now paid to the Clerks in Court for work which they do not, or are not required to perform, by the solicitors, in the same manner as was done a few years since, "with the fees of 3s. 4d. for every day a cause is in the paper for hearing, and 6s. 8d. for every day a cause, appeal, rehearing, further direction, plea, demurrer, or exceptions, shall be in hearing, or in the paper after part heard."

A SUFFERER.

## SUGGESTIONS FOR IMPROVING THE LAW.

### No. VIII.

#### REGISTRATION OF BILLS OF SALE.

*To the Editor of the Legal Observer.*

SIR,

I perceive in your Number of the 23d of May, an article on the subject of Bills of Sale, which, though it certainly offers an improvement on the present practice in relation to them, does not I think, provide a sufficiently simple mode of making them really useful. I beg, therefore, to send you a scheme, by the adoption of which I do not doubt that Bills of Sale would become a valuable security, and not be, as at present, the cause of a vast deal of litigation.

Every bill of sale should have a schedule of the goods intended to be conveyed, which bill of sale should be lodged with the sheriff, who should then proceed to give the person public and open possession of each chattel mentioned in the bill of sale. The sheriff should make a memorandum on the bill of sale of this fact. Thus, when an execution came to the sheriff to levy on the goods of the person giving the bill of sale, he would know on what to make his levy.

The adoption of some such a plan as this is imperiously called for; it being notorious that nothing gives rise to such frequent disputes as bills of sales. And by this means, the interest of the person taking such bill of sale would not be liable to such uncertainty as at present, whilst the person suing out a *f. fa.* would be better satisfied with the genuineness of the bill of sale. He would of course be at liberty to set aside the bill of sale, if he found out that it was collusive, there being in fact no consideration for the same.

H. G. S.

## INCONSISTENT PLEAS.

A few words on the above subject may perhaps be useful at the present time.

It would appear perhaps strange to a practical individual who has watched the alterations and improvements which within the last five years have taken place in the mode of pleading, that a person, notwithstanding the precaution of a summons, and the leave of a Judge to plead several matters, should be allowed to place on record two or three pleas at variance with each other.

A few days since, I was bound to oppose a summons to plead three pleas to the first count of a declaration on a bill of exchange, the first denying the making.

Secondly, denying any consideration having been received.

Thirdly, denying that due notice of the dishonour had not been given.

In the first place, the making is absolutely denied: that being the case, and supposing there was any truth in the plea, it would be folly to suppose that any notice of the presentment and dishonour would have been requisite, or that he had not received consideration for his acceptance; but notwithstanding the Judge allowed them to be pleaded, inconsistent and absurd as they were, which only shews the folly of taking out a summons to plead several matters, and the inutility and waste of time in attempting to oppose it.

Though it may be contended, and very properly so, that a defendant has a right to traverse the whole of the allegations of a plaintiff, and to raise issues where he has an available ground of defence, and it is also true that the two last pleas would not be pleaded, or introduced into evidence under the first, still I maintain that on every principle, if the two last pleas were proper ones, the first should have been struck out, and thereby have rendered them somewhat consistent and intelligible; since the placing such pleas on record, only multiplies the issues and puts the plaintiff to unwarranted and unnecessary expense.

Sham pleas are now carried on to an inconceivable extent, and the difficulty of annulling them still greater than it formerly was: surely this circumstance deserves attention, now the Rules are framed expressly to simplify the practice, and to render the proceedings at once brief and intelligible. Perhaps some one in the proper quarter may notice this.

J. W. D.

## SUPERIOR COURTS.

## Rolls Court.

## PRACTICE.—SECURITY FOR COSTS.

*A plaintiff going abroad after decree for an account against executors, who admit assets, but deny plaintiff's interest in the matter, is as much bound to give security for costs of the defendants, as if he were abroad at the commencement of the suit.*

This was a motion that the plaintiff be ordered to give security for costs of the suit, upon affidavit that he was going to reside in Java, in the East Indies.

Mr. Koe, in support of the motion, said the suit was for the administration of a testator's effects. The executors, who were defendants, admitted effects to the amount of 60,000*l.* and more, but they insisted that this plaintiff had no claim. A decree for an account was pronounced in the usual way, without contest.

Mr. Stuart, for the plaintiff, said there was no precedent for an order to give security for costs after decree pronounced. Any one being a party interested was competent to prosecute the suit after decree.

The Vice Chancellor, having examined the decree, said, that the defendants had coupled that admission of assets with a denial that the plaintiff had any demand. If there was a fund in Court, or if the defendants had admitted assets in which the plaintiff had an interest, it might vary the case; but he saw no difference between the case of a cause advanced as far as decree, and a cause just commenced, except that the security might be more material in the former case, from the very heavy load of costs already incurred. The motion was therefore granted, to stay proceedings on the part of the plaintiff, until he should give security for costs.

*Phillips v. Thornton.*—Lincoln's Inn. Sittings before Easter.

## PRACTICE COMMITMENT.

*A warrant of commitment for contempt, signed by the Lord Chancellor, is good, and may be executed after he ceased to be Lord Chancellor.*

Mr. Bethell moved on behalf of a prisoner, that he be discharged from his commitment, on the ground of illegality. The order to commit had been signed by Lord Chancellor Brougham, but the party was not captured in it until Lord Brougham resigned the great seal and Lord Lyndhurst accepted it.

Mr. Wray opposed the application, and pointed out the inconveniences that would follow, if it were decided that the orders made by the Lord Chancellor, or any other Judge, were of no validity after he ceased to be such Judge.

The Master of the Rolls, after considering the point, said he was of opinion that the warrant

of commitment signed by Lord Brougham was in force, until it was *functum officio* by the capture of the party. His Honor therefore refused the application.

*Ex parte Foster.*—At the Rolls; Sittings before Easter.

## CHARITABLE BEQUESTS.—SUPERSTITIOUS USES.

*A bequest to be appropriated to the promotion of the Roman Catholic and Christian religion, is valid since the passing of the act 1 & 2 W. 4, c. 115; and semble, that act has a retrospective operation, except when the bequests were in litigation at the passing of it. Bequests to priests and chapels for the benefit of their prayers and masses, are void, but not within the act 1 Edward 6, c. 14, and therefore not to be possessed or controlled by the crown, but they fall to the next of kin as not disposed of.*

A lady of the name of Townsend gave by her will divers legacies, and gave the residue of her estate and effects to Sir Henry Lawson and Simon Scrope, Esq., and she appointed other persons executors. The testatrix also left a paper which was entitled "omitted in my will chapels and priests," and which contained these bequests: "To the chapel in St. George's Fields, London Road, 10*l.*; to St. Patrick's chapel, 10*l.*; to Litchfield chapel, 10*l.*" She then gave several small sums to Catholic clergymen, and added this note, "whatever I have left to priests and chapels, it is my wish that the same shall be paid as soon as possible, that I may have the benefit of their prayers and masses." There was further a letter to Sir Henry Lawson and Mr. Scrope, which contained a declaration of trust of the bequest of the residue. This had been proved as testamentary, and was as follows: "I have herewith sent you a duplicate of my will, whereby you will perceive that I have taken the liberty of bequeathing to you the residue of my property, in confidence that you will appropriate the same in the manner most consonant to my wishes; which are, that a sum of 10*l.* be given to the Roman Catholic minister of the chapel at Greenwich, to the minister of the chapel in St. George's Fields, to the minister of Sutton Street chapel, and to the minister of the Roman Catholic chapel at York, for the benefit of their prayers for the repose of my soul and that of my deceased husband John Townsend; and I desire the remainder to be appropriated in such a way as you may judge best calculated to promote the knowledge of the Roman Catholic Christian religion, amongst the poor and ignorant inhabitants of Swaledale and Wenslowdale in the county of York."

The next of kin of the testatrix filed a bill in Chancery, praying to be declared entitled to so much of the bequests as, they submitted, became void within the Mortmain Acts. Upon the hearing before the Master of the Rolls, two questions were made (they are sufficiently stat-

ed in his Honor's judgment), and were argued for two days by Mr. *Bickersteth* and Mr. *Bethell* for the next of kin, Mr. *Lynch* and Mr. *Purvis* for the trustees and persons claiming the bequests, and by Mr. *Wray* for the crown.

His Honor the *Master of the Rolls*, in giving his judgment, after stating the substance of the testamentary papers and the various legacies, said, that these bequests were objected to on two grounds; first, it was contended, that the gifts to the priests and chapels were to superstitious uses, and were therefore void; and secondly, that the gift of the residue being expressly directed to be appropriated to promote the Roman Catholic religion, was also void. His Honor would first consider the objection to the gift of the residue. By the 2 & 3 W. 4, c. 115, "an Act for the better securing the charitable donations and bequests of his majesty's subjects in Great Britain, professing the Roman Catholic religion," after reciting the Toleration Act (1 William and Mary, c. 18) exempting protestant dissenters from the operation of certain penal laws to which they were subject; and after further reciting the operation of some disabling laws in Scotland on Roman Catholics, it is enacted that Roman Catholics be thenceforward subject to the same laws as protestant dissenters in respect to their schools, places of religious worship, education and charitable purposes, and the property held therewith and the persons employed about the same. The third section provided that the act was not to affect suits then pending, or any property then in litigation in any Court of Law or Equity; and by the fifth section all property held for religious, educational, or charitable purposes, was still to be subject to the last Mortmain Act (9 G. 2, c. 36). In the late case of *Bradshaw v. Tasker*,<sup>a</sup> it was held by Lord Chancellor *Brougham*, that this act (1 & 2 W. 4), was retrospective, and the exception in the third section could not operate in the present case, for this property was not in "litigation, discussion, or dispute," in 1832, when that act passed. The letter directing the application of the residue was not proved as a testamentary paper until January 1834, and the bill was filed by the next of kin, not for the purpose of disputing the gift, for promoting the catholic religion, but for claiming the other legacies, on the ground that they were undisposed of, or void under the Mortmain Acts.<sup>b</sup> Under these circumstances, it was unnecessary to consider what the law was in respect to bequests in favor of the religious worship and charities of catholic subjects before 1832. His Honor had only to inquire what the law was in regard to such bequests of protestant dissenters, on a footing with whom the act referred to put catholics, in respect to their places of worship and education. The trustees in this residue were directed by the letter to appropriate the remainder of the testatrix's property in such way as they may judge best calculated to

promote a knowledge of the Roman Catholic Christian Religion amongst the poor and ignorant, &c." In the case of *Bradshaw v. Tasker*, the gift was to the trustees of Catholic schools, to be employed in carrying on the good designs of such schools; and that gift was held valid. Could it therefore be said that a gift to promote such designs was different in principle from a gift to be appropriated in promoting a knowledge of the Roman Catholic Christian Religion? In the case of the *Attorney-General v. Pearson*,<sup>c</sup> Lord *Eldon* said that "the Court will administer a fund belonging to Protestant Dissenters, professing no doctrine contrary to law, although contrary to the doctrines of the established church." In the case of the *Attorney General v. Hickman*,<sup>d</sup> it was established that a gift for encouraging such "non-conformist ministers as preached God's holy word, and for bringing up young persons intended to labour in God's vineyard, was not illegal." The same principle was followed in the case of *Wall v. Child*<sup>e</sup>; and these authorities and the act of 1 & 2 W. 4., left no doubt in his Honor's mind as to the validity of the gift of the residue in this case. With respect to the first named gifts to priests and chapels, these were in no wise affected by that act which applied only to schools, places of religious worship, and education. Taking these gifts in connection with the letter, he took it to be quite clear they were not intended for the priests generally, and for the support of the chapels, but given as expressed in the letter, for the benefit and repose of the testatrix's soul, and that of her deceased husband: the question therefore was, whether those gifts were void as being for superstitious uses? It was truly observed by Sir *William Grant*, in the case of *Carey v. Abbot*,<sup>f</sup> "that there was no statute for making a gift to superstitious uses void generally." The act of 1st Ed. 6, c. 14. did not declare such gifts to be unlawful, but made only such void as it specified. The legacies in question were not within the words of the act of Edward, but that statute had been considered as establishing the illegality of certain gifts. Many cases containing such gifts were collected in *Duke*,<sup>g</sup> and decided to have been superstitious uses, and intended to have been suppressed by the statute. His Honor was of opinion that the legacies which are given here for the purpose of obtaining prayers and masses for the soul of the testatrix, are void, on the ground of the general illegality of the objects which they are intended to answer, and not because they fall in terms within the statute of Edw. 6. The remaining question is, how the funds appropriated to those legacies are to be disposed of? When a legacy is given to a charitable purpose, and that purpose fails, it is the duty of the crown to regulate the manner in which the fund devoted to charitable purposes should be applied. In the present

<sup>a</sup> 2 Myl. & K. 221.

<sup>b</sup> See *Giblett v. Hodson*, 9 L. O. 299.

<sup>c</sup> 8 Meriv. 353. 409. <sup>d</sup> 2 Eq. Ca. Ab. 193.

<sup>e</sup> Amb. 504.

<sup>f</sup> 7 Ves. 490.

<sup>g</sup> See *Duke upon Charitable Uses*, p. 456.

case, according to the construction which he put upon the gifts, there was nothing charitable in their objects. They were not intended to benefit the priests, but their object was to secure some supposed benefit to the testatrix herself; and therefore the crown had no ground of claim, the matter not coming within the meaning of the statute. The duty of directing the application of the fund therefore did not devolve upon the crown, but the next of kin were entitled to the legacies which have become void by reason of the illegality of the purpose for which they were given.

*West v. Shuttleworth*, Feb. 28, March 3, and April 16, 1835.

### King's Bench.

[Before the Four Judges.]

SHERIFF.—INTERPLEADER ACT.—OBEDIENCE TO WRIT.

*When the Court has permitted a sheriff to withdraw from possession under a *fi. fa.* he cannot afterwards be compelled to re-enter.*

In this case, an application was made by a sheriff under the Interpleader Act, about three years ago, for the purpose of relieving himself from the claims set up by the defendant's assignees on the property seized under a *fi. fa.* sued out by the plaintiff. The Court afterwards permitted the sheriff to withdraw until the question as to the validity of the commission should be disposed of, with leave for him to re-enter after that period. This question having been decided, a rule *nisi* was obtained by the plaintiff calling on the sheriff and assignees to shew cause why he should not re-enter.

On the part of the assignees, it was submitted, that the Court had no power to compel the sheriff to re-enter against his inclination.

On behalf of the sheriff it was contended, that he was not bound to execute the writ originally issued, it having become *functus*.

In support of the rule, it was urged, that the writ came into full force when the question as to the bankruptcy was decided, and that, therefore, he was bound to execute it.

Lord Denman, C. J. said, that the sheriff might re-enter if he pleased; but the Court could not compel him so to do.

Rule discharged, the plaintiff to pay the costs of all parties.—*Wilton v. Chambers*, E. T. 1835. K. B. F. J.

### King's Bench Practice Court.

SERVICE OF DECLARATION.—ENTERING APPEARANCE.—SIGNING JUDGMENT.—ARRESTING JUDGMENT.—NULLITY.—IRREGULARITY.—WAIVER.

*No legal judgment can be signed unless an appearance has been entered by or for the*

*defendant; and if it is it amounts to a nullity, which no act of the defendant can waive.*

In this case a rule *nisi* had been obtained to set aside the declaration, and arrest the interlocutory judgment signed by the plaintiff in this case, upon the ground that no appearance had been entered either by the defendant himself or by the plaintiff for him, before the declaration and judgment. It appeared that the plaintiff sued out his writ of summons, and a declaration was delivered at the defendant's chambers. No appearance was entered by either party, but the defendant accepted the declaration and never returned it.

On shewing cause, it was contended, that the defendant was too late to object now to this irregularity, he having been aware of it on the 6th of April, and the present motion not having been made till the 5th of May. Another objection also presented itself—the defendant by accepting the declaration had evidently taken another step in the cause, and thereby brought himself within 1 Reg. Gen. H. T. 2 W. 4, s. 33.

In support of the rule, it was contended, that as the Uniformity of Process Act had provided three forms of entering an appearance for a defendant, a judgment signed without one of those forms being adopted, was in fact signing a judgment against a person not before the Court, and therefore must be looked upon as a nullity, and which could not be waived by any act of the defendant.

*Williams, J.*, was of opinion, that the proceedings were clearly a nullity, and of course could not be waived. The present rule must therefore be made absolute, but without costs.

Rule absolute, without costs.—*Roberts v. Spurr*, E. T. 1835. K. B. P. C.

INTERPLEADER ACT.—SHERIFF.—CONFLICTING CLAIMS.—LATE CLAIMS.—SHERIFF'S LACHES.—RELIEF BY COURT.

*How late a sheriff may come to the Court under the Interpleader Act after claims made, and yet be entitled to relief under it.*

This was a rule which had been obtained by a sheriff under the Interpleader Act. The facts of the case appeared to be these. The sheriff had received the *fi. fa.* on the 24th of December. He also received a written notice on the 28th, that a fiat of bankruptcy was about to issue. He did not apply to the Court for relief till the 16th of April.

On the part of the execution creditor, it was submitted, that the sheriff was too late to obtain relief.

On behalf of the sheriff, however, it was contended, that there was sufficient excuse for his not having applied sooner. True it was, that he received notice of an intended *fiat* on the 28th of December; but no appointment of an assignee took place until the 7th of April, and therefore no one could be legally brought before the Court; and he applied to the Court on

the 16th of April, which was the second day of the term. He had also had reason to think negotiations were going on for a settlement of the claims.

*Williams, J.*, said, that he considered sufficient excuse had been given by the sheriff for not coming sooner to the Court; and directed the present rule to be enlarged, and an issue to be tried to decide whether the goods were the property of the claimant or the defendant.

Rule accordingly.—*Barker v. Phipson*, E. T. 1835. K. B. P. C.

RE-ADMISSION OF ATTORNEY.—TAKING OUT OF CERTIFICATE.—AGENT'S NEGLIGENCE.—TERM'S NOTICE.

*Under what circumstances the Court will allow an attorney who has ceased to take out, to be re-admitted without a term's notice.*

This was an application to the Court to re-admit an attorney without a term's notice. The attorney had regularly taken out his certificate and practised as an attorney for many years; but in consequence of the neglect of his town agents, he had not renewed it since his last expired, which was in the year 1833. In the year 1834 he had sent instructions to his agents to take out his certificate for that year, and continue so to do every year. They however neglected these instructions. He had not practised since his last certificate expired, except by preparing a lease, for which he never had nor ever should receive any remuneration.

The Court ordered him to be re-admitted on payment of a fine of 20s., and the arrears of duty, but without a term's notice.

Re-admitted accordingly.—*Ex parte Thorpe*, E. T. 1835. K. B. P. C.

ATTACHMENT FOR NON-PAYMENT OF COSTS.—CONTEMPT.—MASTER'S ALLOCATUR.—AFFIDAVIT.

*The date of an affidavit is in some cases immaterial, in obtaining an attachment for non-payment of costs.*

This was an application for an attachment for non-payment of costs, pursuant to the Master's allocatur. The peculiarity in the case was this: The affidavit on which this application was founded, was dated the 2d of February, it not having come to hand sufficiently early to make the motion in Hilary term. This, it was submitted, was immaterial, because the contempt arose from the circumstance of the defendant refusing to pay the sum found to be due by the master, when properly demanded of him.

The Court granted a rule.

Rule granted.—*Rex v. Rogers*, E. T. 1835. K. B. P. C.

ARREST WITHOUT PROBABLE CAUSE.—COSTS. ARBITRATION.—AWARD.—ARBITRATOR'S DISCRETION.

*The Court has no power, or will not interfere to give a defendant his costs for having been arrested without reasonable and probable cause, if that question has been left to an arbitrator, but he has omitted to decide on it.*

This was an application for a rule nisi for the defendant's costs, under the 43 G. 3, c. 46, s. 3, upon the ground of his having been arrested for a larger sum than the plaintiff ultimately recovered, without reasonable or probable cause. He had been arrested for 109l. 7s. 6d. The facts of the case appeared to be these. The cause had been referred by an order of *Nisi Prius*, which invested the arbitrator with the same power, with respect to the defendant's costs, as the Court itself possessed. He accordingly published his award, which directed that the defendant should pay the sum of 50l. 6s. 0½d. to the plaintiff, and that the costs should abide the event of such award: but it made no mention whatever of the defendant's costs.

The Court said, that as to the arrest being without reasonable or probable cause, that could only be determined by the arbitrator himself. If such a rule as the one now sought were to be granted, it would be depriving the arbitrator of the power which was originally given him by the order of *Nisi Prius*. This rule therefore cannot be granted.

Rule refused.—*Greenwood v. Johnson*, E. T. 1835. K. B. P. C.

DEPOSIT OF MONEY WITH SHERIFF IN LIEU OF BAIL.—TAKING SUCH MONEY OUT OF COURT.—PUTTING IN SPECIAL BAIL.

*When a defendant has deposited a certain sum, with a certain sum for costs, pursuant to the statute, instead of bail, in the hands of the sheriff, he may, in order to take it out of Court, generally state that bail has been justified.*

In this case a rule nisi had been obtained for taking out of Court 40l. and 10l. for costs, which had been deposited in lieu of bail under the 43 Geo. 3. c. 46, special bail having been justified.

On shewing cause against this rule, it was contended that the affidavit on which the rule had been obtained, was insufficient. The objection to the affidavit was, that although it stated bail had justified, it did not state that they had justified in due time. Under these circumstances, it was contended that the defendant was not entitled to have the money out of Court.

The Court said, that unless an affidavit were produced on the part of the plaintiff, stating that the bail had not justified in due time, it was just for it to presume that they had done so. The present rule must therefore be made absolute.

Rule absolute.

*Young v. Maltby*, E. T. 1835. K. B. P. C.



**TWO ARRESTS FOR THE SAME CAUSE OF ACTION.—DISCONTINUANCE OF FORMER ACTION.—ACCRUING CLAIM.**

*It is no objection to an arrest, that the defendant has already been sued for the same cause of action.*

In this case a rule *nisi* had been obtained for discharging the defendant out of custody, on the ground of having been arrested after a suit for the same cause of action had been commenced by serviceable process. The defendant had been sued by serviceable process for an amount of rent due to the plaintiff. Other rent having become due, the plaintiff arrested the defendant for it before the conclusion of the first action. The defendant paid the debt and costs in the latter action. Subsequently, the plaintiff arrested the defendant for a portion of the rent, for which the first action had been brought, although he had never discontinued his proceedings in that suit, and the cause had been set down for trial.

On shewing cause against this rule, it was submitted that this was no more than a common case of arrest, without discontinuance of the suit commenced by serviceable process, and that the Courts had frequently permitted such a course to be pursued.

*Williams, J.* was of opinion that as it was clearly shewn by the affidavits, that the rent for which the defendant was arrested in the first instance, formed no part of that for which the serviceable process was sued out, the plaintiff's proceedings in that respect were perfectly regular. The next question then was, whether or not the plaintiff was justified in arresting the defendant for a cause of action which he had commenced by serviceable process. I think there is no objection to that course. The present rule must therefore be discharged, but without costs.

Rule discharged, without costs.—*Brickline and Creditors v. Smallwood*, E. T. 1835. K. B. P. C.

**EJECTMENT.—LANDLORD AND TENANT.—JUDGMENT.—EXECUTION.—WRIT OF POSSESSION.—SETTING ASIDE PROCEEDINGS ON PAYMENT OF COSTS.**

*Where a tenant makes an improper application to the Court to set aside proceedings in ejectment which have proceeded as far as execution, he must pay the costs of such application.*

The defendant in this case, against whom an action of ejectment was brought, was a sub-lessee. In the original lease were two covenants, one for payment of certain rent, and another for repairing. Neither of these covenants having been fulfilled, the superior landlord brought his ejectment on the clause of re-entry. The tenant not appearing to enter into the consent rule, final judgment was ultimately pronounced, and execution issued. Under the writ of execution, possession was taken by the landlord; and then the tenant made an application, and obtained a rule to shew

cause why on payment of the rent due and costs in the action, the judgment and execution should not be set aside.

On shewing cause against this rule all the above facts were disclosed.

*Williams, J.* thought that such an application could not be sustained, and therefore discharged the rule with costs.

Rule discharged with costs.—*Doe d. Lambert v. Roe*, E. T. 1835. K. B. P. C.

**FOREIGNER.—STAY OF PROCEEDINGS.—SECURITY FOR COSTS.—LAST DAY OF TERM.**

*Although a stay of proceedings is in general allowed where a rule for security for costs is granted on the ground of a plaintiff being abroad, that will not be done on the last day of term.*

This was an application for a rule *nisi* to compel the plaintiff to give security for costs, he being abroad. The only doubt about the application was, whether the rule could be drawn up with a stay of proceedings, it being the last day of term.

The Court said that under these circumstances, the rule could not be drawn up to operate as a stay of proceedings.

Rule *nisi* accordingly.—*Gronow v. Pointer*, E. T. 1835. K. B. P. C.

**SUBPENA.—WITNESS.—DISOBEDIENCE.—NON-ATTENDANCE.—ATTACHMENT.—CALLING ON SUBPENA.**

*What is not a sufficient excuse for not obeying a subpoena.*

In this case a rule *nisi* had been obtained for an attachment against a witness for disobedience to a crown office subpoena. When the trial was called on, the witness was called both outside and inside the Court. The plaintiff's attorney held in his hand the subpoena. It appeared that the witness had attended at half-past nine o'clock in pursuance of his subpoena, but finding it was not likely the cause would be called on at that hour, it standing second in the list, he left the Court. He, however, left a person to watch the business of the Court, with directions for him to fetch witness, when there was a probability of his being wanted. The cause came on sooner than was anticipated, and the witness when called was not to be found, although he came into Court shortly afterwards.

On shewing cause, it was contended that this was a sufficient excuse for the witness's apparent neglect.

*Williams, J.* with respect to the first question, as to the subpoena being in the hands of the plaintiff's attorney, I think that is immaterial, it having been produced and exhibited in Court. The next question which presents itself is, whether or not the witness has shewn a sufficient reason for his non-attendance. I am of opinion, that he has by no means excused his neglect, therefore the present rule for an attachment must be made absolute.

Rule absolute.—*Rex v. Fenn*, E. T. 1835. K. B. P. C.

ATTORNEY.—JUDICIAL NOTICE.—OFFICER OF THE COURT.—ANSWERING MATTERS OF AFFIDAVIT.—ATTACHMENT.

*Where an appeal is made against an attorney for an attachment, the Court will take judicial notice of his being on the roll.*

A rule nisi had in this case been obtained, calling on an attorney to shew cause why an attachment should not issue against him for disobedience to a judge's order, which had been a rule of Court.

On shewing cause against this rule it was objected, that as the affidavit did not shew that the attorney was an attorney of this Court, the Court had no jurisdiction to inquire into his conduct.

The Court thought that judicial notice might be taken of his being an attorney of the Court. The case was then proceeded in.

*Ex parte Caroline Hore*, E. T. 1835. K. B. P. C.

SETTING ASIDE JUDGMENT.—ISSUING EXECUTION.—COUNTY COURT.—SHERIFF.—MANDAMUS.

*The fact of a judgment being set aside, no matter by whom, will prevent the sheriff being compelled by mandamus to issue execution.*

In this case a rule nisi had been obtained for a mandamus to be directed to the sheriff of Buckinghamshire, commanding him to issue execution on a judgment which the defendant had suffered by default. The action was commenced in the county court, and in consequence of the defendant not having pleaded thereto, interlocutory judgment was signed by the plaintiff. A writ of inquiry was afterwards executed, and final judgment entered for the sum of 5*l.* 1*s.*

On shewing cause against this rule, affidavits were produced, which state, that the rule for the mandamus was obtained subsequently to the sheriff's having set aside the judgment. This, it was submitted, was sufficient to entitle the sheriff to have the rule discharged.

The Court said, that as the plaintiff would derive no advantage by its making the rule absolute, there being no judgment in existence, and by its discharging it his remedy against the sheriff would in no way be affected, the present rule must be discharged, and with costs.

Rule discharged, with costs. *Eldridge v. Fletcher*, E. T. 1835. K. B. P. C.

EJECTMENT.—SERVICE OF DECLARATION.—DECEPTION.—SPECIAL SERVICE.

*Under what circumstances the Court may be induced to waive the necessity of personal service in serving ejectment declarations.*

Motion for judgment against the casual ejector. The facts disclosed by the affidavit were these. That the deponent, on going to the premises in question, saw the tenant in

possession, to whom he commenced reading the notice at the foot of the declaration. He however informed deponent that he did not occupy those premises, and then induced the deponent to go to the door of the house, when it was shut on him. He finished reading the notice, and pushed the copy of the declaration under the door.

The Court granted a rule for judgment.

Rule granted.—*Doe d. Frith v. Roe*, E. T. 1835. K. B. P. C.

REMOVAL FROM INFERIOR COURT.—HABEAS CORPUS.—VERDICT.—SWEARING JURY.—JUDGMENT BY DEFAULT.

*If a verdict has passed, whether on a trial or writ of inquiry, in an inferior jurisdiction, it cannot be removed by habeas corpus.*

This was an action which it appeared had been commenced in the Palace Court, and in which the defendant had suffered judgment by default. A writ of inquiry was then issued, and a verdict found by the jury. Subsequently a writ of habeas corpus was sued out to remove the cause.

A rule nisi was now obtained for issuing a *procedendo* into the Palace Court, on the ground of the habeas corpus not having been sued out sufficiently early. The jury had assessed their damages before the writ was delivered.

Cause was shewn against this rule, when it was contended, that according to the terms of 21 Jac. 1, c. 23, s. 2, which applied only to cases where issue or demurrer was joined, the writ had issued sufficiently early. The present case therefore could not be within the meaning of that section, no issue or demurrer having been here joined.

In support of the rule it was submitted, that although this case might not come within the exact meaning of the words of the statute of James, yet it came within the mischief contemplated by that act, and also the stat. 43 Eliz. c. 5. Under these circumstances, it was hoped the present rule would be discharged.

*Curr. adv. vult.*

*Williams*, J. said, the question appears to be, whether or not the present case is within the statute of Eliz. c. 5, s. 2? I am of opinion that it is. It is then contended, that because the stat. of James directs that the writ must be delivered "before issue or demurrer joined," the case of a judgment by default is not within the act, there being neither issue nor demurrer joined in such a case. If, however, that statute did not apply, the statute of Eliz. would embrace such a case as the present. The present rule must therefore be made absolute for a *procedendo*.

Rule absolute.—*Smith v. Sterling*, E. T. 1835. K. B. P. C.

**PAYMENT OF DEBT AND COSTS.—DISCHARGE OF DEFENDANT.—SHERIFF.—DETAINING IN CUSTODY.**

*There is no pretence, under any circumstances, for keeping a defendant in custody of the sheriff, after debt and costs have been paid.*

This was a rule *nisi* to discharge the defendant out of custody of the sheriff, on the ground of the debt and costs having been paid by the under-sheriff, while under pressure of an attachment. It appeared that the rule had been served on the sheriff, as well as the plaintiff, although it was only against the plaintiff.

Accordingly counsel appeared on the part of the sheriff, and contended that he was justified in detaining the defendant in custody, he never having paid the debt and costs.

*Williams, J.* said, that as the rule was against the plaintiff only, and the sheriff was not named in it, he could not be heard. In the absence therefore of the plaintiff, the present rule must be absolute, with costs.

Rule absolute, with costs.—*Rimmer v. Turner, E. T. 1835. K. B. P. C.*

**JUDGMENT AS IN CASE OF A NONSUIT.—WITHDRAWING RECORD.—ATTORNEY'S DISCRETION.**

*When withdrawing a record is excused by a desire to try a cause by a special jury.*

In this case a rule *nisi* had been obtained for judgment as in case of a nonsuit.

On shewing cause, he was fully prepared to try the cause at the last assizes for the county of Suffolk, but was advised by his counsel not to try it by a common jury. He therefore, for the purpose of obtaining a special jury, withdrew the record.

The Court thought that sufficient excuse had been shewn by the plaintiff's attorney for not proceeding to trial. The present rule must therefore be discharged, on the plaintiff giving a peremptory undertaking to proceed to trial at the next assizes.

Rule discharged accordingly.—*Webber v. Roe, E. T. 1835. K. B. P. C.*

**INTERPLEADER ACT.—SHERIFF.—ADVERSE CLAIMS.—ASSIGNEE.—BANKRUPT LAWS.**

*Whenever various claims are made on the part of different persons, on goods seized by the sheriff, he is bound in all cases to come to the Court as early as possible in the term during which such claim is made, if it is made in term.*

In this case a rule *nisi* had been obtained on the part of the sheriff, for relief under the Interpleader Act. The facts of the case appeared to be these: In November, the sheriff had seized under *a ff. sa.*, and possession was taken on the 21st of Jan. On the 23d, notice was received by the sheriff of a fiat of bankruptcy having issued; and on the 26th, of a mortgagee's

claim to the goods. The assignees commenced their action against the sheriff on the 25th of March, and on the 26th the execution creditor ruled him to return the writ. The sheriff's application for relief was not made till Easter term.

On shewing cause against the rule, it was contended on the part of all the claimants, that the Court could not grant the sheriff the relief sought, he not having applied sufficiently early.

On the part of the sheriff it was submitted, that it was unreasonable to expect him to apply to the Court in Hilary term, he not having received notice of any claims till the 23d of January, and the term ended on the 31st.

The Court thought the sheriff had allowed too great a time to elapse before he made his application to the Court, and therefore directed the rule to be discharged, the costs of all parties to be paid by the sheriff.

Rule discharged accordingly.—*Ridgway v. Fisher, E. T. 1835. K. B. P. C.*

**SHERIFF.—COUNTY COURT.—MANDAMUS.—PLAINT.—EXECUTION.—SETTING ASIDE JUDGMENT.**

*If a rule for a mandamus is obtained, for compelling a sheriff to issue execution on a judgment in the county court, it is sufficiently answered by shewing that it has been set aside.*

A rule had been obtained to shew cause why a *mandamus* should not go to the sheriff of Buckinghamshire, to compel him to issue a *levari facias*, and make an execution on the goods of Fletcher. There was a plaint in debt in the County Court, and the usual proceedings, to which the defendant did not plead, whereon final judgment was signed. There were three counts in the declaration, each of which was for the sum of 39s., and judgment was entered up for the sum of 5l. 17s., which was more than the Court had jurisdiction for. The declaration also did not state that the cause of action accrued within the jurisdiction. The sheriff being advised that the judgment was erroneous, set it aside, and annulled it before this rule was moved for.

On shewing cause it was contended, that it was impossible to obey the writ, as the sheriff had set aside the judgment; and that if the sheriff was wrong in setting it aside, the *mandamus* would not go.

In support of the rule it was contended, that the ground for the *mandamus* was good, and that the sheriff could not deprive the plaintiff of his judgment, by taking on himself to set aside the judgment.

*Coleridge, J.*—If the sheriff has done an illegal act in setting aside the judgment, I do not deprive the plaintiff of his remedy by discharging this rule. If he had done this after this rule was moved for, I should have treated it as if he had not done so.

*Eldridge v. Fletcher, E. T. 1835. K. B. P. C.*

**SECOND ARREST FOR THE SAME CAUSE.—WATCHING.—PRODUCTION OF WARRANT.—SPECIAL BAILIFF.**

*If an arrest is to be effected, in order to constitute it, the warrant must be produced, or some other act done to shew that the party is acting under it.*

A rule nisi had in this case been obtained for discharging the defendant out of custody, on the ground of his having been twice arrested for the same cause of action. The facts appeared to be these: On the plaintiff's suing out his *capias*, the sheriff, at the plaintiff's solicitation, allowed the warrant to be directed to his own bailiff. The bailiff, accompanied by his son and a clerk to the plaintiff, met with the defendant, when they informed him he must go with them, if he did not assign a certain portion of his property to the plaintiff. This however he would not consent to, except on certain conditions. It was then suggested, that the plaintiff's clerk should go to his master, and ascertain from him whether or not he would accede to these terms. The clerk inquired of the defendant, how he was to know that he would not endeavour to run away while he was gone, and directed him to remain with the sheriff's officer. Not having returned, and as it was getting late, the officer proposed that the defendant should go and sleep at the house of his sister-in-law, and that his son should sleep in the same apartment with him, which was accordingly done. The arrangements between the plaintiff and defendant having been completed, the following morning all the parties left the defendant. The plaintiff having heard that the defendant intended leaving the country, arrested the defendant.

On shewing cause it was contended, that that which was said to be an arrest in the first instance was in fact no arrest, no warrant having been produced, nor in fact anything said or done to the defendant to constitute an arrest. It was nothing more than a close watching, with instructions to the officer to arrest, if he attempted to escape from such watching.

The Court was of opinion that no arrest had really taken place; but that all that was done by the officer merely constituted a close watching. Under these circumstances, the present rule must be discharged, but without costs.

Rule discharged, without costs.—*Robins v. Hender*, E. T. 1835. K. B. P. C.

**ATTORNEY.—ANSWERING THE MATTERS IN THE AFFIDAVIT.—LAST DAY OF TERM.—PRACTICE.**

*If it is required to make an attorney answer the matters in the affidavit, the application must not be deferred until the last day of term.*

In this case an application was made on the last day of term for a rule nisi to compel an attorney to answer the matters contained in the affidavit on which the motion was founded,

and which complained of certain misconduct on the part of that attorney.

The Court said, that it could not grant such a rule on the last day of term, it being in direct opposition to the practice of the Court so to do.

Rule refused.—*In re Wilson*, E. T. 1835. K. B. P. C.

**ANSWERS TO QUERIES.**

**Law of Property and Coparcenage.**

**INHERITANCE. P. 32.**

1. It is not stated in the query, either whether *D.* left issue, or whether her father survived her. If she left issue, there can be no doubt that her share (one-fourth in coparcenary) would descend to her eldest or only son, or in default of sons, to her daughter or daughters. If she died without issue and her father were dead, her moiety of *A.*'s moiety would descend to her sister *C.*, who would thereupon become sole coparcener of that moiety, *C.* and *B.* being equal coparceners after the death of *D.*, in the same manner as *A.* and *B.* were in the life-time of *A.* If *D.*'s father survived her, (which is probably the case the querist supposes,) it may be a question whether *D.*'s sister or father would be her heir. If *D.*'s estate had been taken by purchase, her father would inherit rather than her sister. And as the presumption is, by the statute, in favour of a title by purchase in the deceased, the father would be entitled, unless the sister (on whom the *onus probandi* is thrown by the statute,) could prove that *D.* had taken by descent. But in the present instance *D.* took by descent, and *C.*, her sister, would, no doubt, be able to prove it. Therefore *C.* would inherit in the same way as in the second case which I supposed; with this difference, however, that in that case, being heir of all *D.*'s estates, whether taken by descent or by purchase, she would not have to shew how *D.* acquired her share; whereas in this case she is heir only of estates by descent, and must therefore shew the title of *D.* J. H. H.

2. The share of *D.* will descend to the heir of *W.*, the purchaser; therefore *B.*, the daughter of *W.*, will be entitled to one moiety, and *C.*, his grand-daughter, to the other.

LECTOR.

**DEVISE, CONTINGENT OR EXECUTORY.**

**P. 31.**

I read the whole of p. 2, in Mr. Fearn's Treatise, and found among the instances given in illustration of Mr. F.'s positions, the following:—"If *A.* convey or devise land to *C.* for life, and after *C.*'s decease to *B.*, *B.*'s estate is vested in him in interest;" but do not see what it has to do with the present question. I admit it as true doctrine. Perhaps what Mr. Fearn says at p. 217, will shew *T. O. B.* the difference between the two cases. "In short, upon a careful attention to this subject,

we shall find, that wherever the preceding estate is limited, so as to determine on an event which certainly must happen; and the remainder is so limited to a person *in esse*, and *ascertained*, that the preceding estate may, by any means, determine before the expiration of the estate limited in remainder: *such remainder is vested*. On the contrary, *wherever the remainder is limited to a person not in esse, or not ascertained, there the remainder is contingent*." In the case put by Mr. Fearn, the remainder was limited to a person *in esse*, and *ascertained*. In the case under discussion, the remainder was limited to a person *not in esse*, and *not ascertained*. The question is not what the testator meant, but what construction the law puts upon his expressions. I dare say there was never a case yet, in which a testator ever wished that a remainder which he had limited should fail for want of a particular estate to support it, and yet the law enforces such an effect from such a cause.

SPES.

## STOCK.—WIFE.—TENANT FOR LIFE. P. 64.

By the common law, the husband is entitled to administer the effects of the wife, and his representatives are entitled to the beneficial interest in those effects, although he should not have taken out administration. The *right* of the husband does not, I apprehend, depend upon the grant of administration, though his *legal title* may. He is entitled to the beneficial interest in his character of surviving husband; for if he were only entitled in his character of administrator his representatives would have no claim, but would lose their equitable, as they do lose their legal title, by his neglecting to administer. If this which I have stated be law, then, in the case put by "Ambler," the husband's representatives will be entitled; for immediately upon the wife's death he takes an equitable vested reversionary interest, and the administrator for the time being of the wife's effects will have the legal interest. The only difference between this case and the ordinary one is, that here, although the husband had taken out administration, he could not have actually reduced the chose into possession until the death of the tenant for life, when in the ordinary case he might have immediately reduced it. But if he had acquired a vested interest, I can perceive no distinction in principle between his right to a chose incapable *at the time* of being reduced, and to one which could be so reduced. That the mere reduction into possession only affects the *legal title*, is proved by the fact, that where the husband takes out administration, but neglects to get in all the effects before his decease, although the next of kin of the wife are entitled to administer, they hold as trustees for the representatives of the husband; and what real distinction is there for the purposes of this case, between a husband who cannot and a husband who does not obtain possession?—For cases upon this subject, *vide Kindleside v. Cleaver*, 1 Hagg. 345; 2 Hagg. App. 169; *Reece v.*

*Stafford*, 1 Hagg. 347; *In the goods of Gill*, 1 Hagg. 341; *Humphrey v. Bullen*, 1 Atk. 458; *Elliott v. Collier*, 3 Atk. 526; and *Carr v. Rees*, cited 1 P. Wms. 381.

W. Y. C.

## QUERIES.

## Eato of Attorneys.

## SIGNED BILL.

An attorney delivers a bill containing taxable items, which is headed thus:—"Dr Mr. J. S. to J. N.," which words and names are in the attorney's handwriting. Would this be considered (the attorney having written his name on the bill) a compliance with the statute requiring an attorney's signature to such bills of costs? S. H.

## NOTICE OF ADMISSION.

*A. B.*, articulated to *C. D.*, gives notice previous to Trinity term, of intention to be admitted in the following Michaelmas term. After Trinity term his articles are assigned to *E. F.* Can *A. B.* still get admitted in Michaelmas term, or must he give fresh notice for the ensuing Hilary Term, in consequence of his assignment? L.

## ARTICLED CLERK.

*A. B.*, under articles to *C. D.*, a solicitor in town, has served him for three years; his health now compels him to go into the country, and to avoid losing time, he wishes to serve under *E. F.*, a solicitor there, for one year, and at the expiration of that year to complete the service of his articles under his present master, *C. D.* What is necessary in this case? An assignment of *A. B.*'s articles for the period of one year, expressing *A. B.*'s intention to return? or would a certificate of the fourth year's service, indorsed by the country solicitor on the original articles, be sufficient? *C. D.* is *not* the agent of *E. F.* There would be no difficulty if *A. B.* had been articulated in the country and came up to the agent; or if, in the present case, he had served *four* instead of *three* years, and wished to complete his *first* in the country. In the last instance an assignment would be requisite; and so I think it would be in *A. B.*'s case. W. W. B.

## Eato of Property and Conveyancing.

## WARD OF CHANCERY.

A ward of the Court of Chancery, a female, is contemplating a marriage, but would like to know in what manner the Court would settle the property. If the marriage take place without the approval of the Court, how would the property be settled afterwards, both real and personal? A.

**DOWER.**

A conveyance is made of a small property to *A. B.*, to hold to the said *A. B.*, his heirs and assigns, to such uses as the said *A. B.* shall by deed, &c. appoint; and in default of appointment, to the use of the said *A. B.*, his heirs and assigns for ever. *A. B.*, by deed duly executed and attested, appointed to the use of *C. D.*, his heirs and assigns for ever. *C. D.* has since sold the estate, and the purchaser's solicitor objects to the title, on the ground that the wife of *A. B.* is dowerable. Is the objection valid? *Vide Ray v. Pung*, 5 Barn. & Ald. 561, and cases therein referred to. W. W.

**MORTGAGE.—TRANSFER.**

*A.* mortgages leaseholds to *B.* and *C.*, who are trustees, and advance the money out of the trust fund, and they afterwards assign the mortgage money and leaseholds to *C.* and one *D.*, who pay off the mortgage. Is such an assignment good, or must *B.* and *C.* assign to a trustee, and the latter re-assign to *C.* and *D.*? Y.

**TRUST.—CREDITOR.**

*A. B.*, in 1828, being possessed of personal property to the extent of from 15,000 to 20,000*l.* (chiefly out on mortgage), assigned the whole to trustees, to receive the interest and proceeds, and pay the same to him for life, and after his decease, to divide the principal amongst his children in certain proportions. *A. B.*'s chief object being to save the legacy duty, which would otherwise be payable on his death. He had no freehold property at the time the deed was executed, nor has he acquired any since. In 1833, *A. B.* joined in a note of hand at three months for 1500*l.*, as an accommodation to a friend. The note was dishonoured—proceedings were taken thereon, and judgment obtained against both parties by the holder. *A. B.*, being desirous still further of serving his friend, paid off 500*l.* with interest and costs, and gave his own bond for the remaining 1000*l.* at 5 per cent., as a collateral security with the judgment, with which the holder was satisfied, being at that time in ignorance of the assignment to the trustees before mentioned. *A. B.* is now on the point of death, and as the creditor has nothing to rely on but his bond and judgment, he is anxious to know whether the securities will be available against the trust fund; for, with the exception of some trifling household furniture, *A. B.* has no other visible assets. The question is, whether such a clandestine assignment, although in favour of children, can defeat the just claim of a subsequent bond fide creditor? H. P.

**VESTING OF LEGACY.**

*A.*, by his will duly executed, directs thus: "all the remainder of my property to be divided between my nephews and nieces now living."

At the time of making his will he had eight nephews and nieces, but two of them die previous to the testator, who dies without altering his will. 1st, Does the word "*now*" mean the time of making his will, or at his death? 2d, Who takes the shares of the two who died previous to the testator—the surviving nephews and nieces, the next of kin (being personality) of the two deceased, or the next of kin of testator? MENTOR.

**AD VALOREM STAMP.**

*A.* borrows a sum of money from *B.* and gives him a promissory note for the same. *A.* at the same time deposits deeds with *B.*, and executes a deed of covenant to execute a regular mortgage for securing the money if the promissory note should not be paid when due. Will the deed of covenant require more than a 3*s.* stamp? W. B.

**ARREARS OF RENT.—PURCHASER.**

*A.*, by lease and release, conveyed an estate to *B.* in fee: at the time the conveyance was executed there were two years rent due from the tenant in possession to *A.*; but no mention is made of it in the conveyance. Is the right to distrain for the rent so in arrear vested in *A.* or *B.*? and to whom will it belong when recovered? CAROLUS.

**COVENANT.—UNDERLEASE.**

*A.* covenants, in a lease from *B.* that he will not, "alien, sell, or assign the premises or any other part thereof without the licence of *B.* the lessor." Will such covenant prevent *A.* from granting an underlease of such premises? W. S.

**EXPENCES OF SALE.—STATUTE OF FRAUDS.**

Upon a sale by auction of a real estate, *A.* was declared the highest bidder; but at the close of the sale he refused to sign the usual agreement, or to pay the deposit or auction duty. The estate was at a subsequent day sold to *B.* for a less sum than was bid by *A.* at the first sale. Can the vendor recover the difference and expences from *A.*, or is he not barred by the statute of frauds, it being only a parol agreement? Had the auctioneer at the first sale signed the agreement as the agent of *A.* could not the vendor have supported a bill against *A.* for a specific performance? T. W. H.

**LEGATEE'S AGE.—BAPTISM.**

*A.* dying, leaves *B.* a legacy thus: "I also leave to *B.*—*l.*" Now, as *B.* was not christened till he was five years old, by his register he stands only sixteen, whereas his actual age is twenty-one: the executor on this account refuses to pay the legacy. Among other proofs, allowable in law, by which an executor may con-

sider himself authorised to pay a legacy, would an authenticated entry of *B.*'s birth in the family bible by a parent be sufficient? And does the legacy bear interest from the death of the testator, or the majority of the legatee?

Q.

## WITNESS.—LEGACY.

Testator by codicil bequeathed a legacy to *A.* *B.* *A. B.* being a witness to the will, does such a request invalidate his attestation, or is he thereby disabled from taking the legacy?

H. M. J.

## WILL.—WITNESS.—TRUSTEE.

*A. B.* died in 1829, and by his will devised all his freehold and other property to two trustees. The will is attested by three witnesses, one of whom is a trustee. Is the will sufficiently attested, and can the trustees pass the freehold estate?

A SUBSCRIBER.

## TRUSTEE.—PURCHASE.

*A.*, as trustee for sale under a will, disposes of the trust estate by public auction to *B.*; after which, and the trust affairs being completely settled, he obtains a general release from all the parties interested under the will. After the lapse of a short time *A.* purchases the estate of *B.*, which he sold to him in his capacity of trustee: Is the re-conveyance to the trustee valid? And would a Court of Equity, from the circumstances, consider the connection between the trustee and trust estate as satisfactorily dissolved?

W. T.

## Common Law.

## RATING BUILDINGS.

In making an assessment for the relief of the poor, ought not houses and other buildings to be rated at a less sum, in proportion to their annual value, than lands?—buildings being liable to outgoings for repairs, insurance, &c.

A.

## FEME COVERT.—TRADER.

Is a married woman carrying on business for her own benefit in the county of *Middlesex*, by virtue of a deed of settlement, subject to the Bankrupt Laws? What remedy or remedies have the creditors against her, or her estate, for their debts contracted by her in the way of trade, supposing them to have had notice of the settlement, and the trustees not to have interfered in the business? Would a husband be liable to be sued with his wife for her debts contracted in her separate trade, if the creditors had no notice of the settlement, and supposing the husband not to have interfered in the business?

Y. Z.

## PARTNERS.—FORMER BANKRUPTCY.

*A.* and *B.* contemplate a partnership. *A.* has been a bankrupt three times previously. Can *A.*'s former creditors come upon *B.*'s property in the new concern? Can they have any claim upon *A.* and *B.*'s joint stock for a larger amount than what stands to the credit of *A.* in the books of *A.* and *B.*?

J. T. A.

## Practice.

## PLAINTIFF'S DEATH.—SECOND ARREST.

*A.* arrested *B.* for the recovery of a sum of money alleged to be due to him for money lent and advanced, upon which bail was put in and justified. *A.* died before declaration, by which event, it is presumed, the action became abated. Can *A.*'s executor hold *B.* to bail for the same cause of action without the leave of the Court, and without payment of the costs in the action by *A.*?

J. W. D.

## Law of Landlord and Tenant.

## HUSBAND AND WIFE.—DISTRESS.

*A feme sole* is seised of lands in fee, and lets the same to a tenant from year to year, and marries; rent becomes in arrear during the coverture. Who is to distrain, husband alone, or husband and wife conjointly? If husband alone, will his signature to warrant of distress suffice, or should the wife also sign?

J. T. A.

## THE EDITOR'S LETTER-BOX.

In order to comprise in the publication for this week some important matter, and to dispose of the arrear of Reports and other pressing articles, we have resorted to a Double Number.

We have still to request the forbearance of some of our correspondents, of whose communications we hope gradually to avail ourselves.

We presume *J. S.* did not expect his critique on "*Aspiro's*" last letter to be published. We, however, recommend "*Aspiro*" to be more careful in future as to his composition.

"A Constant Reader" shall be attended to.

The letters of *S. T. B.* and *F. B.* are under consideration.

The Queries and Answers of "*Gradus*," *C. S.*; "*Equity*;" *T. O. B.*, and "*Spes*," have been received.

# The Legal Observer.

Vol. X.

SATURDAY, JUNE 20, 1835. No. CCLXXV.

— "Quod magis ad nos  
Pertinet, et nescire malum est, agitamus.

HOMAT.

## ON THE LAW RELATING TO BRIBERY.

We shall now shortly state the principal points connected with the Law of Bribery on Elections for Parliament, with reference to the alterations proposed to be made in it.

Before the stat. 2 G. 2, c. 24, there are not any traces either of actions or prosecutions for bribery at elections. Informations for this offence were not granted until about the time of the general election in 1754; and the first case in which an information at common law was prosecuted with effect was the case of *Rex v. Pitt*, Burr. 1335; 1 Bl. Rep. 642. S. C.

By the 2 G. 2, c. 24, it is enacted that if any person, having or claiming to have a right to vote in the election of any member, shall ask, receive, or take any money or other reward by way of gift, loan, or other device, or agree or contract for any money, gift, office, employment, or other reward, to give his vote, or refuse to give it, or if any person by himself, or any person employed by him, shall, by any gift or reward, or by any promise, agreement, or security for any gift or reward, corrupt any person to give, or to forbear to give, his vote in any such election, such person shall, for every such offence, forfeit the sum of 500*l*.

By the 49 G. 3, c. 118, it is enacted, that "any person giving or causing to be given, directly or indirectly, or agreeing to give any sum of money, gift, or reward, to any person, upon any agreement that such person to whom such gift or promise should be made, should by himself or any other person at his solicitation or command, procure, or endeavour to procure, the return of any person to serve in parliament for any county, &c. should, if not returned himself to parliament, for every such gift or promise, forfeit 1000*l*.; and the person so returned, and so having given, &c., should

NO. CCLXXV.

be disabled and incapacitated to serve in that parliament for such county, &c.; and any person receiving or accepting, himself or by any other person, any such sum, should forfeit 500*l*."

We shall now briefly state the particulars in which it is proposed to alter the law relating to bribery by a bill lately introduced in the present parliament. It is first proposed to repeal the present acts relating to it, which we have already noticed, and to substitute the following penalties for those imposed by them.

He who corruptly procures or promotes the return of any person, if the offender holds office under his Majesty - - - £1000

Any other person so offending - 500

He who corruptly obtains, or attempts to obtain any vote, for every offence - - - 100

He who gives any thing for loss of time or expenses, or any meat or drink for voting - - - 50

He who receives any thing for voting - - - 50

He who threatens a voter, to compel or prevent his voting - - 50

Any candidate, &c. giving or allowing any ribbon, &c. - - 10

And it is further proposed to be enacted, that if any person shall procure or endeavour to procure the commission of any act of violence or intimidation, or use or cause to be used, any threat, with intent to prevent or hinder any person from giving his vote, or in order to compel him to give him his vote for any particular candidate, he shall, for every such offence, forfeit the sum of 50*l*.

Doubts have been frequently entertained whether any or what allowance might be made by any candidate for loss of time or expenses in voting. See *Bremridge v. Campbell*, 5 C. & P. 186; *Baynton v. Cattle*, 1 Moo. & Rob. 245. These doubts it is now

K



proposed to set at rest, by enacting that if any person shall at any time, directly or indirectly, give, offer, or allow, or in any way promise to or for the use or advantage of any voter, any gift, reward, or compensation of any kind, as a consideration in whole or in part, for any loss of time, or expense incurred or to be incurred by or in travelling to or from, or in attending at any such election for the purpose of voting, he shall, for every such offence, forfeit the sum of 50*l*.

The supply in meat, drink, or entertainments during certain days, is to be taken as sufficient evidence that such meat, drink, entertainment, or provision, was corruptly given, unless the contrary be proved.

Members, together with the other oaths, are to take an oath that they have not been returned corruptly. A similar oath is to be taken by voters; and if any returning officer shall admit any person to vote without taking such oath, he shall forfeit 50*l*.

On any petition being presented against the return of any member, the Committee is to inquire into and report upon any offences against this act, charged to have been committed at any former election.

It is further proposed to be enacted, that it shall not be lawful for witnesses to object to answer questions on the ground of criminalising themselves.

The time for discovery is to be limited to three months next after any offence committed against the act, instead of twelve months after the election, as under 2 G. 2, c. 24, s. 8.

Any person making a false oath under the act, shall be guilty of perjury, and be forever disabled to vote at any election, or sit in parliament for ever.

By the present act the time for recovering penalties is fixed at two years,—as to which see 2 G. 2, c. 24, s. 11; 9 G. 2, c. 38; *Petree v. White*, 3 T. R. 5. It is now proposed to limit it to six months after the offence has been committed.

protecting of them in the rights intended to be secured by such letters patent, as for the more ample benefit of the public from the same.”

The following is the substance of the proposed enactments, with some of the more important clauses set out fully.

1 & 2. Any person having obtained letters patent for any invention, may, within two years, enter a disclaimer of any part of his specification. Such disclaimer to be filed by the secretary of patents, and published. Residue of specification not to be deemed void by reason of want of originality in part disclaimed.—Penalty on secretary for neglect of publication.—Publication of the nature of the invention for which letters patent have been obtained.

3. That if any action at law or any suit in equity shall be brought for an account in respect of any alleged infringement of such letters patent heretofore or hereafter granted, or any *scire facias* to repeal such letters patent; and if a verdict shall pass for the patentee, or if a final decree or decretal order shall be made upon the merits of the suit, it shall be lawful for the Judge before whom such action shall be tried to certify on the back of the record, or the Judge who shall make such decree or order, to give a certificate under his hand, that the validity of the patent came in question before him, which record or certificate being given in evidence in any other suit or action whatever touching such patent, if a verdict shall pass, or decree or decretal order be made in favor of such patentee, he shall receive treble costs in such suit or action, to be taxed at three times the taxed costs, unless the Judge making such second or other decree or order, or trying any such second or other action, shall certify that he ought not to have such treble costs.

4. Mode of proceeding in case of application for the prolongation of the term of a patent.

5. That any person purchasing from another the property of and in any invention by him made, may afterwards obtain in his own name letters patent, in like manner as he might have done, in case he had been himself the inventor, and shall have and enjoy all privileges and rights, in courts of law and equity and elsewhere, which the inventor himself might have had, in case he had obtained such letters patent. That such purchaser shall be stated in the specification to be enrolled, and also that such purchaser shall produce before the Attorney-General or Solicitor General, before obtaining such letters patent, the deed of agreement of purchase. That in any suit or action touching such letters patent, brought by or against such purchaser, all evidence which would have been admissible against such inventor, if he had obtained such letters patent, and been a party to such suit or action, shall be admissible against such purchaser, and that the inventor shall not himself be an admissible witness in behalf of such purchaser in any such action or suit. That whatever matter or thing would have made such letters patent void or voidable in case such inventor had obtained such letters patent, shall, if proved in any suit

## NEW BILLS IN PARLIAMENT.

### LETTERS PATENT AMENDMENT.

THIS is a Bill intituled “An act to amend the Law touching Letters Patent for Inventions.”

The preamble recites that “it is expedient to make certain additions to and alterations in the present law, touching letters patent granted to authors of inventions, as well for the better

or action by or against such purchaser, also make his letters patent void or voidable.

6. What shall be deemed the date of the letters patent.

7. Attorney General may require the person to alter the title and statement of the invention.

8. Persons may sell or transfer their right, or grant licences to others.

9. That in any action brought against any person for infringing any letters patent, the defendant, on pleading the general issue, shall give to the plaintiff, and in any *scire facias* to repeal such letters patent, the plaintiff shall file with his declaration, a notice of any objections on which he means to rely at the trial of such action; and no objection shall be allowed to be made in behalf of such defendant or plaintiff respectively at such trial, unless he prove service of such notice of objection upon plaintiff or defendant respectively twenty-one days at least before such trial. That any Judge at chambers may, on summons served by such defendant or plaintiff on such plaintiff or defendant respectively, to shew cause why he should not be allowed to offer other objections whereof notice hath not been given as aforesaid, give leave to offer such objection, on such terms as to such Judge shall seem fit.

10. Penalty for using, unauthorized, the name of a patentee, &c.

#### BRIBERY AT ELECTIONS.

This is entitled "a Bill more effectually to prevent Bribery and Corruption, and unnecessary Charge and Expense in the Election of Members to serve in Parliament."

The preamble recites, "it is expedient that the several statutes now in force in the united kingdom relating to bribery, and charge and expense in the election of members to serve in parliament, should be repealed, and that the provisions therein contained should be amended and consolidated in one act, and that further and more effectual means should be adopted for the prevention, detection, and punishment of corruption in any way relating to such election."

The following is the substance of the proposed enactments:

1. Certain statutes repealed.
2. Corruptly procuring or promoting return.
3. Corruptly obtaining votes.
4. Repaying or compensating any person who has corrupted others.
5. Using violence or threats.
6. Persons guilty of bribery incapacitated from sitting in parliament.
7. Allowances for loss of time or expenses in voting.
8. Giving meat, drink, or provision.
9. Giving, meat, drink, &c. during certain days.
10. Giving cockades.
11. Persons reported by committee to be guilty of bribery, incapacitated from sitting in parliament.

12. Penalty for receiving money for voting.
13. Receiving compensation for loss of time, or for expenses.—Voter acting as counsel, &c.
14. Electors not bound to serve as special constables.
15. Oath to be taken by members in the House of Commons.
16. Oath to be taken by voters.
17. Penalty on returning officer's admitting persons to vote without being sworn.
18. Oath to be taken by returning officer.
19. Corruption at former elections.
20. Not lawful for witnesses to object to answer questions on the ground of the same criminating them.
21. Discoverer indemnified.
22. Making false oath or giving false evidence.
23. Sheriffs to publish notices.
24. Recovery of penalties.
25. Limitation of proceedings.

#### TRANSFER OF STOCK.—TITLE.

In many, if not all, the Loan Acts, the mode of transferring stock is prescribed by the following words: "There shall be kept in the office of the accountant in London, books wherein transfers of stock shall be entered, which entries shall be signed by the parties making such transfers, or by their attorneys, authorised by writing under their hand and seal, and attested by two witnesses, and the persons to whom such transfers shall be made shall underwrite their acceptance, and no other method of transferring stock shall be good." The assignment by the stockholder, and the acceptance by the assignees, complete the transfer. The Bank have no part in this transaction; they have only to see that it is properly registered in their books.

The above observations were made by *Best, C. J.*, in *Davis v. Bank of England*, 2 Bing. 393, where a party sought a compensation from the bank in having allowed the stock to be changed into another person's name under a forged power, as also for the dividends which would be payable thereon; and it was there decided, that such a transfer was invalid, and that the stock was still the property of the plaintiff, and that he might recover the dividends on such stock, although he knew it had been transferred some months before under a forged power to another name, and though he had omitted to inform the Bank thereof, and did not demand payment till after the escape of the offender. The following remarks will be found in *Best, C. J.*'s judgment.

"The Bank cannot refuse to pay the dividends to subsequent purchasers of these stocks. It has ever been the object of the legislature to give facility to the transfer of shares in the public funds. This facility of transfer is one of the advantages belonging to this species of property, and this advantage would be destroyed if a purchaser was obliged to look to the regularity of the transfers to all the various

persons through whom such stock has passed. It is impossible to trace the title of stock, as you can that of an estate. You cannot look further, nor is it the practice ever to attempt to look further, than the Bank books, for the title of the person who proposes to transfer to you. We know that funds will not be issued from the Exchequer to pay the dividends on the stock in the plaintiff's name, and the same stock in other person's names. We feel that these circumstances may occasion difficulty and embarrassment to the Bank. We think, however, that the Bank should be subjected to such difficulty and embarrassment, rather than the stockholder should suffer injustice. It is the duty of the bank to see that the power is properly executed."

Some questions have been raised, as to whether stock differs from other personal estate, it having been declared such by the acts creating it (see 7 Ann. c. 7; 1 Geo. 1, c. 19). Since portions of wills are obliged to be registered with the Bank, they have rather assumed to see to the specific legatee of stock having that transferred to him which the will professed to give, and this even against the executor. That they were not bound to notice the trusts, was decided by Lord *Rosslyn*, in the *Bank of England v. Parsons*, 5 Ves. 665. The practice of resisting the transfer continued up to the time of the case of *Franklyn v. Bank of England*, in which there was a specific bequest of stock, but no assent of the executor shewn. The executor applied to transfer, and on refusal, a bill was filed, and the Court of Chancery having directed a case, the Court of King's Bench (9 B. & C. 156) decided, that the Bank was liable to an action for refusing to transfer; on which a transfer was decreed. 1 Russ. 576. Since this case, it is understood the Bank no longer interferes. This proves, in a measure, that stock is like other specific personalty. And the rule existing at the bank is, that all the executors should join in transferring the stock.

This seems to be a rule adopted more for the security of the persons entitled to the stock under the will, than any security to themselves. The personal property of a testator being at the controul of any one or more of the executors, independent of the others, is the most probable cause of the great strictness which prevailed in courts of equity against the executor who joined in the receipt of money or other act with his co-executor, in case any loss happened at a future time through the default of the co-executor. The rule, as regarded trustees, was less strict, from the circumstance of the joining of both being requisite in any act affecting the trust property. The rule, however, respecting executors, has been much relaxed of late; as in case the party joining, for conformity sake, can shew that the funds were requisite, and were applied for the purposes of the will, he may thereby exempt himself from the loss created by the default of the co-executor. See *Shiphoote v. Hinchinbrooke*, 11 Ves. 252; and 16 Ves. 478. *Brice v. Stokes*, 11 Ves. 324-5; 3 Swan. 64;

1 Mer. 712. Such being the case, a party may not be in danger, if he concurs with his co-executor, in pursuance of the above Bank rule, if satisfied the sale is requisite, and the proceeds are duly applied.

But this is far from satisfactory, as a party may be residing at a distance from his co-executor, and unable to judge of the necessity of the joint act, or the application of the proceeds. It may therefore be as well to consider how far this joining is requisite beyond the rule above laid down. The rule seems to have arisen from the Bank considering that the acts creating the stock had made it different in its nature from other personal property, and that the acts requiring the will to be registered with the Bank, made them trustees for the parties entitled under the will. That they do not so become trustees is now well established, and that they are not bound to look beyond the legal title in the executors. After a review of all the cases, Lord *Gifford* thus expresses himself (1 Russ. 597): "It must be taken now to be the law, that stock, like all other personal property, is assets in the hands of the executor. The consequence necessarily follows, that it must vest in the executor; and till the executor assents, the legatee has no right to the legacy. The executor stands in the ordinary situation of an executor claiming from the Bank, for the purpose of administration, a transfer of stock which the testator died possessed of. The result of the authorities is, that he has a right to do so, notwithstanding the enactments of the statutes to which I have alluded; these enactments being, perhaps, to be reconciled and accounted for on the ground mentioned by Lord *Thurlow*, viz. that a proviso, enabling the holders of stock to devise it, was introduced with a view to restrict the operation of the antecedent clause, which might otherwise have been considered as preventing the disposition of stock by will."

Stock in any case does not seem to differ from other personal property; and such being the case, the transfer by one executor would seem to be sufficient, notwithstanding the rule laid down by the Bank. Where, however, the executor has assented to the specific legacy, there, of course, the property has ceased to be in the power of the executor; and of course, with notice of such assent, the Bank would be justified in refusing the transfer. There is one strong ground in favour of the Bank refusing to transfer, viz. as each executor has power of disposing of the personal estate, so may he equally assent; and in such case, if one has assented, the Bank may consider themselves liable in case they allow the other to transfer, although they have no notice of the previous assent; but such would not be the case, as the legal title is not complete until the party taking under the will has shewn his assent to take the stock in the Bank books; therefore in this case stock is not different from other specific articles of personalty, to which the executor might make a good title to a purchaser without notice of the assent, possession being requisite to complete the title. Where

the same persons are both executors and trustees under the will, and the stock has been vested in their names, then of course it would be requisite for all to join in the transfer, as that would be considered an assent by them as executors that there was sufficient to answer the trust, and then the general rule as to transfer by trustees would of course prevail. See *Shiphoole v. Hinchinbrooke*, 11 Ves. 252.

It has already been shewn that the Bank is liable for allowing stock to be transferred under a forged power. The party who has been thus defrauded may also recover the proceeds of the stock, if he can trace them into the hands of third parties. This last point was decided in the recent case of *Marsh v. Keating*, Bing. N. S. 198.

On the whole, stock may be considered one of the most eligible kinds of property in the kingdom, as the purchaser has no title to look into; and if fraud should deprive him of it, he has a powerful body, in the Bank, to look to for redress.

#### ON POWERS OF ENTRY ON THE NON-PAYMENT OF A RENT-CHARGE.

It is the usual practice to secure the re-payment of a rent-charge, by powers of distress and entry on the lands charged, either to the grantee, or to a trustee for him. It has lately been made a question, whether if the rent-charge were in arrear, these powers can be exercised without any previous demand of the rent-charge, when the words of the powers are silent in this respect.

As to the power of distress, it would seem to be necessary to shew a previous demand;<sup>a</sup> but some doubt has existed, whether an ejectment could be brought by a grantee or devisee under the power of entry, without proof of a previous demand. It will be easy to shew that no reason exists for this doubt as to the power of entry.

In an anonymous case in *Dyer*,<sup>b</sup> it was held, that no demand by the devisee of a rent-charge was necessary to be made before the exercise of a right of entry, and even that the heir of the grantee might so enter, after the death of the grantee. In *Pearson v. Sorrel*,<sup>c</sup> *Pember-*

*ton*, C. J. held at *Nisi Prius*, that if legacies be given by will, with a direction, that in case of non-payment, the legatees may enter and enjoy the profits of such and such land till satisfied, no demand is necessary, for it is no forfeiture, but an executory devise, although there be no time and place appointed for payment; and the reporter adds, "so was the case of *Tyrral v. Gossick* here." In the case of *Jemmott v. Cowley*,<sup>d</sup> a rent-charge in fee was given, with power for the grantee, his heirs, &c. if the rent should be in arrear, to enter into the lands, and hold them until they should be satisfied therent. As reported by Keble, it appears there was a question as to the sufficiency of a demand made in this form: "I come to demand;" and this was held to be sufficient, the entry being by way of distress, and not penalty of forfeiture. It is to be observed, that when the entry is for a forfeiture, a demand is clearly necessary.<sup>e</sup>

The point has come before the Court in a very recent case,<sup>f</sup> in which the circumstances were these:

Ejectment for lands in the county of York. At the trial before *Alderson, J.*, at the York Spring Assizes, 1832, the plaintiff was nonsuited, subject to the opinion of this Court upon the following case:—21st August, 1800. Thomas Bias the elder, devised the premises to his son Thomas in fee, subject to an annuity of 30*l.* to his daughter Hannah, (the lessor of the plaintiff,) payable quarterly, which he thereby charged upon the said lands; and the testator declared his will to be, that if the annuity should be unpaid for twenty days after the day of payment, being lawfully demanded, it should be lawful for Hannah to enter and distrain; and in case the annuity should be behind and unpaid for forty days next after any of the days of payment, it should be lawful for Hannah to enter into and enjoy the lands so charged, and receive the rents, issues, and profits thereof, for her own use and benefit, until she should be thereby paid and satisfied all the arrears of her annuity, with all costs, &c., or until the person then entitled to immediate possession of the premises should pay her all the arrears of the annuity incurred before, and that should be incurred, during such times as they should respectively receive the rents, issues, and profits thereof, or be entitled to receive the same, together with all costs, &c.

<sup>a</sup> See *Anon. Dyer*, 348 a; but see *Kind v. Amery*, Hatton, 23; *Browne v. Duntery*, Hobart, 208.

<sup>b</sup> Dy. 348, a.

<sup>c</sup> 2 Show. 185; 1 Vin. Abr. 508.

<sup>d</sup> 1 Saund. 112 b; 1 Keb. 784; 1 Lev. 170.

<sup>e</sup> Com. Dig. Rent, (D. 3.) a; *Doe v. Musters*, 2 B. & C. 490.

<sup>f</sup> *Doe. d. Bias v. Horsley*, 3 Nev. & M. 567.

Upon the death of the testator in 1802, his son Thomas entered, and resided on the premises till 1829, when he let them to Messrs. W. & W., who continued in possession as his tenants till Lady Day 1830. Certain persons to whom the premises had been mortgaged, then took possession, and continued in possession until Lady Day 1831, when the defendant entered as their tenant. The annuity was in arrear from 1823 to 1828. Messrs. W. & W., and afterwards the mortgagees, by themselves or their tenant, have regularly paid the annuity to Hannah during the time they have had possession. No demand of payment of any of the quarterly payments, or arrears of annuity, or of possession of the lands, was proved. The jury found, that five years of the annuity from 1823 to 1828, still remained unpaid at the time of the bringing of the ejectment. The learned Judge being of opinion that a demand was necessary, nonsuited the plaintiff.

After the case was argued, Lord Denman, C. J. said,—“The question was, whether the annuity being unpaid for six weeks, a demand of it was necessary before the right of entry for nonpayment accrued. At the trial, my brother Alderson, nonsuited the plaintiff for want of a demand, after consulting my brother Patteson. This circumstance, rather than any doubt entertained by the Court on the argument, made us pause before we came to a decision. But we have reason to believe that the learned Judge who presided at the trial, acted from no strong or decided opinion; and the judgment I am about to pronounce, has the concurrence of Mr. Justice Patteson.” After stating some of the cases before adverted to, his Lordship delivered judgment for the plaintiff.

## PRIVILEGE FROM ARREST.

### WRIT OF PRIVILEGE.

*To the Editor of the Legal Observer.*

Sir,

OBSERVING in your last Analytical Digest, under the head “Arrest,” an abstracted report of the case of the King’s Somerset Herald (*Leslie v. Disney*), which case is likewise reported in *Crom. Mee. & Roscoe*, 578, and 3 Dowl. 437, I beg leave to call your attention to the following facts and circumstances that subsequently took place in reference to that case.

On the application made by Mr. Kelly to the Court of Exchequer last Michaelmas term, for the defendant’s discharge, an affidavit made by defendant, precisely similar to the one I now send you, was produced and read on his behalf; yet the Court left him to his writ of privilege. The defendant’s attorney conceiv-

ing that no writ of privilege was issuable for the King’s Somerset Herald, made inquiries on the subject, the result whereof is stated in his affidavit sent herewith. He therefore took out a Judge’s summons to shew cause why the defendant should not be discharged out of the custody of the marshal, &c. upon entering a common appearance. This summons was opposed by counsel (Mr. Chitty). The defendant’s attorney thought the matter so clear that he did not deem it necessary to put his client to the expense of counsel; and after the question had been fully considered, Mr. Justice Bonanquet, who communicated with his learned brethren Patteson and Gurney, ordered “that the defendant, upon entering an appearance, be discharged out of the custody of the marshal of the King’s Bench Prison as to this action, he being privileged from arrest, the said defendant herely undertaking to bring no action.” Dated 1st April, 1835.

The Courts having for a long series of years, as appears by reported cases, left parties claiming privilege from arrest to their writ of privilege, without taking into their consideration whether such a writ was or was not issuable, I have thought it to be my duty to furnish you with the particulars of this case, as no doubt it will be a standing decision, and therefore direct the profession as to future practice on the subject. J. P.

We have received this communication from the defendant’s attorney, and have seen the original affidavits, of which the following is the substance:

The affidavit of the defendant’s attorney stated, that in Michaelmas term last an application was made to discharge the defendant out of custody, on the ground that he was his Majesty’s Somerset Herald at Arms, and privileged from arrest; that such application was opposed on the part of the plaintiff, and the Court, without deciding the question, whether the defendant was or was not privileged, left him to his writ of privilege. An application to the Clerk of the Crown in Chancery was made, and the Clerk stated that no such writ had to his knowledge ever been issued from his office, nor did he believe that any such writ of privilege was issuable for his Majesty’s Somerset Herald at Arms. The Clerk of the Petty Bag Office also stated that no such writ had ever issued from the Petty Bag Office, he having carefully searched to ascertain if any such writ had ever so issued, and that in his opinion no writ of privilege could issue for his Majesty’s Somerset Herald at Arms; and that the granting of writs of privilege were restricted to officers whose admissions were recorded in the courts from which such writs of privileges respectively issued. The Signer of the Writs in the Court of King’s Bench, the Prothonotary in the Court of Common Pleas, and the Signer of the Writs in

the Court of Exchequer, likewise stated that the only writs of privilege issued by them respectively were writs of privilege for the attorneys and other officers of the said courts respectively, and that such writs of privilege are not issued without a certificate from the proper officers of the said courts respectively, certifying that the person claiming such writ is an attorney or officer of the said courts respectively.

The defendant's affidavit stated, that by letters patent under the great seal of Great Britain, bearing date the 23d day of September, 1813, he the defendant was appointed his Majesty's Somerset Herald at Arms; and by such letters patent all the rights, privileges, and immunities appurtenant to the office of Somerset Herald were granted to and conferred upon him, and he hath ever since filled the duties of such office, and now remains such herald.—That as such herald, he is one of the King's servants in ordinary, and receives a salary and other fees from the Lord Chamberlain of his Majesty's household, and has the livery or dress of office; and he also receives fees as one of the King's household servants, on all creations of title by his Majesty.—That his duty is to attend his Majesty personally, wherever and whenever required; and that he is liable at any moment to be required so to attend, and that he hath on many occasions personally attended upon the persons of his late Majesty King George the Fourth, and of his present Majesty, in the fulfilment of his duties as such herald; and among other duties, to attend his Majesty upon all occasions of his Majesty's going down to open or prorogue parliament, upon all royal marriages or funerals, on his Majesty's public attendance at the Chapel Royal, upon coronations, upon all Saints and Collar days, upon all installations and investitures, and on other state occasions and public ceremonials.—That on the late occasion of his Majesty's opening parliament, he was, among other heralds, summoned to attend his Majesty, but could not do so by reason of his being detained in the custody of the marshal of the King's Bench prison.

That it appears by the records of the College of Arms, that in or about the month of November, 1693, Peers Manduit, Windsor Herald at Arms, was arrested and detained in custody by the Sheriffs of London, by virtue of a writ of *capias*, issued out of the Court of Common Pleas against him at the suit of Mary Deeble, and that such arrest took place during the privilege of Parliament.—That the said Peers Manduit presented a petition to the House of Lords, complaining of a breach of privilege of Parliament, and petitioning to be discharged out of custody, he being such Herald as aforesaid, and therefore the King's servant in ordinary, and that such petition being brought into Parliament, it was questioned by the Earl of Mulgrave whether the Heralds were the King's servants within the check roll of the house-

hold; and thereupon the same petition was referred to the committee of privileges, and the committee were furnished with the following certificates, namely, a certificate of first gentleman usher, dated the 16th day of November 1693, certifying that the King's Heralds and pursuivants at arms are included in the list of King's servants, who receive fees of honor upon Knights, Barons, &c., and do receive their shares of those fees as being the King's servants by virtue of the patent under the Great Seal of England, whereby he the said usher was empowered to receive and pay the same: Also a certificate of the Board of Green Cloth, dated the 20th day of November, 1693, certifying that the Heralds at Arms had allowed them upon the establishment among the officers of their Majesties' household, in the year 1662, a mess of meat upon festival days, and that they were and had been assessed and rated amongst their Majesties' household servants for all the then late taxes charged by act of parliament, notwithstanding their residences in town: Also a certificate of the Lord Chamberlain of his Majesty's Household, dated on the same 16th day of November, certifying that the King's Heralds and Pursuivants of Arms, being their Majesties' servants in ordinary, did, upon notice from him the said chamberlain, attend their Majesties' royal persons in their proceedings to parliament and going to chapel, and upon all other public ceremonies, according to the duty of their places, whenever they should be thereunto commanded: And also a certificate of "Robert Nott, Deputy," dated the 17th day of November aforesaid, certifying that the King's Heralds and Pursuivants of Arms, as being their Majesties' servants in ordinary, attending immediately upon their Majesties' person, do wear their Majesties' livery, namely, coats of their Majesties' arms, provided for them at their Majesties' charge, and delivered to them out of their Majesties' great wardrobe, and that the said Peers Manduit, Windsor Herald, had had and received such livery out of their Majesties' wardrobe, as belonging to his said office of Windsor Herald to their Majesties; and that by an order of the House of Lords, directed to the Sheriffs of London and Middlesex, and dated the 21st day of November aforesaid, made upon the report of the Lords' Committee for privileges, setting forth that their Lordships had considered the said petition, and were of opinion that the said Peers Manduit ought to be allowed privilege of parliament, as being one of the King's servants; and "It was ordered by their Lordships, that the said Peers Manduit should be, and he was thereby discharged from the imprisonment and restraint he then laid under at the suit of Mary Deeble."

## REVIEW.

*A Practical Treatise on the Law of Life Annuities, with the Statutes and Precedents; to which are added, Observations on the present System of Life Assurance, and a Scheme for a New Company, with various Tables.* By James Birch Kelly, of the Inner Temple. London: A. Maxwell. 1835.

THERE are several works on the subjects of Life Annuities and Life Assurance—some of them treating of the law only, and others of the nature, policy, and principles of the transactions to which the law applies. In the volume before us Mr. Kelly's object has been to furnish a plain and practical statement of the Law of Life Annuities, including the Cases decided to the present time; and he has limited himself to such transactions as come within the scope of the Annuity Acts. He has endeavoured, in particular, to make the work useful to solicitors, with reference particularly to summary applications to the Courts for redress.

"Pains have been taken to procure every decision of importance since the last act of 53 Geo. 3, c. 141, (A. D. 1813), while many decisions under the former statute, which have now become inapplicable, have been omitted.

"The alteration of the law concerning bankrupts and insolvent debtors, so far as it relates to annuities, has also been regarded.

"The subject is divided into chapters, embracing the history and nature of life annuities—an inquiry how far they have been deemed within the usury laws—an analysis of the act, with the reported decisions under each section—the remedies afforded in cases of bankruptcy and insolvency—an examination of the jurisdiction of the courts of law and equity—observations on the practice of annuities, and the remedies of the grantee and grantor. An appendix is subjoined, containing a collection of the most useful and approved modern precedents; and all the annuity acts will be found at the commencement of the work.

"The value of life annuities must obviously depend on a variety of data—on the nature of the security—the age of the parties—and the value of money at the time of the contract, as well as the probabilities of its fluctuation. Numerous incidental circumstances also frequently occur at the time to influence the judgment of the parties concerned; and the eligibility of the transaction must ultimately be decided by the degree of risk which the purchaser is disposed to incur. Several of the elements of the calculation are incapable of being reduced to rule; but the author has endeavoured to concentrate as large a portion as possible of the means of information on the subject, by furnishing the reader with the latest and best tables, some of which have never ap-

peared in any former work. To establish the value of these tables, it is only necessary to name the author's much esteemed friend, Mr. Finlaison, as their framer, who is too well known, both in this country and throughout Europe, for his profound knowledge in the science of financial mathematics, to render comments necessary."

The author gives a concise account of the progress of annuity transactions, the origin of which he ascribes to the Usury Laws; and then proceeds to the legal definition of an annuity, and classes each kind under its appropriate head. An analysis of the Annuity Act follows, with decisions under each section. The practice in these transactions is then detailed. The remedies of annuitants are next treated of in cases of bankruptcy and insolvency, and the valuation of annuities. He then considers the jurisdiction of the Courts in annuity transactions, both at law and in equity. The various remedies of grantees and grantors are next stated, including the setting aside deeds, laches, and costs. Such is a short outline of the contents of the volume; and the several matters treated of are accompanied by numerous remarks and directions, which appear to us to be judiciously made, and likely to be useful to the practitioner in this branch of the law of property.

Mr. Kelly has also directed his attention to Life Assurances; but he does not enter, except briefly and incidentally, on the law of that subject, but describes the respective advantages proposed by the several Metropolitan Insurance Offices, and concludes with a Scheme for a Mutual Life Assurance Company, with a scale of premiums framed expressly for it, on terms most advantageous to the assured, and on a scale of premiums as low as is consistent with safety.

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#### LOCAL COURTS.—MUNICIPAL CORPORATIONS.

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IN our last Number (p. 113) we stated our general approval of the leading objects of the Municipal Corporations Bill, but had not then an opportunity of considering the effect of the proposed extension of the jurisdiction of the old Borough Courts. It is material for the profession to notice the clauses on this subject. The 98th section extends the jurisdiction to actions of assumpsit, covenant, and debt, whether by specialty or not; also to trespass, trover, and ejectment, provided that the damages or

rent sought to be recovered shall not exceed 20*l*. The following is the section :

"That in every borough in which by charter or custom there is or ought to be holden a court of record for the trial of civil actions, not regulated by the provisions of any local act of parliament, the recorder, or in the absence of the recorder, or in case there shall not be a recorder, the mayor of such borough shall be the judge of such court ; and every such judge shall hold the said court at such times and places, and with such rules of practice, and with the same powers and jurisdiction as be- longed to the said court at the time of passing this act. That in every case in which such court had not, before the passing of this act, authority to try such actions as are hereinafter next mentioned, such court shall have author- ity to try actions of *assumpsit*, *covenant*, and *debt*, whether the debt be by *specialty* or on *simple contract*, and all actions of *trespass* or *trover* for taking goods and chattels, pro- vided the sum or damages sought to be re- covered shall not exceed *twenty pounds*, and all actions of *ejectment* between landlord and tenant, wherein the annual rent of the premises of which possession is sought to be recovered shall not exceed twenty pounds. That every such judge respectively, from time to time, may make rules for regulating the practice of such court over which he presides ; but so that no such rules shall be of force until they shall have been allowed and confirmed by three or more Judges of the Superior Courts of Com- mon Law at Westminster."

The 99th section relates to the appoint- ment of Registrars and other Officers of Courts, and is as follows :

"That the council of every borough in which there shall be holden a court of record for the trial of civil actions as aforesaid, shall appoint a registrar of such court, and such other officers and servants as are necessary for carrying on the business and executing the process of such court. That no registrar or other officer of such court shall, by himself or his partners, practise as an attorney in such court."

Section 100 provides that existing suits shall not abate. It is as follows :

"That no suit commenced in any court of record in any borough before the first day of March, 1836, shall abate by reason of any change that shall have been worked in the con- stitution of such court by the provisions of this act, but that the same may be heard and deter- mined as if it had been commenced before such judge."

We presume the power remains of removing the actions from these Local Courts to the Superior Courts, either for the purpose of trial, or after trial to take the opinion of the Judges at Westminster Hall on the law of the case.

We had understood that nothing more

would be attempted in regard to the adminis- tration of justice in these Local Courts than extending their jurisdiction to actions for sums under 10*l*., and enabling them to try causes sent from the Superior Courts under 20*l*. ; but that in all cases they were to be con- fined to the recovery of debts, and that ac- tions in ejectment, trespass, covenant, and other important cases, would be reserved for the Superior Courts. The enlarged scope of the Bill requires serious consideration.

## FURTHER OBJECTIONS TO THE IMPRISONMENT FOR DEBT BILL.

We deem it important to bring to the notice of our readers the following remarks, made by Mr. Freshfield, on the effect of this Bill on the Judges of the Court of Review, and the Judges of the Insolvent Debtors' Court. Whilst en- gaged more especially in promoting the inter- ests of the profession at large, we are desirous not to lose sight of what is due to the Judges of every Court ; and we think the observations of Mr. Freshfield (as reported in the Mirror of Parliament), are most important.

"The bill in its present form (said Mr. Fresh- field), materially affects two courts of justice erected for administering the effects of debt- ors,—the one called the Bankruptcy Court, and the other called the Insolvent Debtors' Court ;—and it appears to be intended that the judges of the Bankruptcy Court, with the exception of the chief judge, shall act as commissioners for carrying into effect such of the matters to be transacted under the proposed act, as are of a ministerial character ; and as I consider such an office beneath the dignity of those learned persons, and inferior to the duties which they engaged to perform, when they became judges of the Court of Bankruptcy,—I must hope that my honourable and learned friend Sir J. Camp- bell, obtained the distinct concurrence of those judges so to be employed, because it must be considered that quitting the bar, at which each had attained to the rank of King's Counsel, they were promoted to an office of higher rank, and could not be required, without their own voluntary assent, to take upon themselves duties scarcely consistent with their former stations.

"Assuming, however, that this point is well understood between the judges and my hon- orable and learned friend, there remains an- other consideration in relation to the judges of the Bankruptcy Court, upon which I am anx- ious to see that justice is done, and I feel equally sure that my honorable and learned friend, and the house, will participate in that desire.



The Judges, including the Chief Judge, are to have duties cast upon them, under this act, of a judicial character, and probably to a very serious extent; and I am sure it will be conceded to me, that the salaries, attached to the offices of the judges, were assigned without the contemplation of duties other than those pointed out by the Bankruptcy Court Act; and looking at their rank at the bar, and the extent of the practice they abandoned to accept the judicial office, it will not be suggested that the salaries assigned were too large. I can, therefore, have no hesitation in asserting on behalf of those learned persons, that the duties to be cast upon them under the law now in progress, must in common justice, carry with them a claim to commensurate additional remuneration.

"If the view I take be right, and I trust that no doubt will occur to any one, then I think, I shall not be considered unreasonable in asking that before the bill proceeds another stage, my honorable and learned friend should at once declare his intention to see that justice be done to the learned Judges, and that the necessary forms should be adopted to entitle him to make provision in the bill for the additional remuneration; and I am the more desirous that he should now declare his intentions, because it appears to me that it is the duty of this House to take care that such provision be made, and that it is the duty of any member, having the conduct of such a bill, to shew, beyond all question, to those upon whom judicial duties are to fall, that justice will be done, and that they are not to be placed in a situation inconsistent with their station, and be required to petition this house for that to which in strict justice they are entitled; and it is because I feel that it would be indelicate to render an application from the Judges necessary, that I have without their sanction or knowledge, felt it my duty to bring the subject under the consideration of the House.

"I feel it unnecessary to say more in reference to the Judges of the Bankruptcy Court; and I now proceed to observe, very shortly, upon an equally, if not more, important consideration, affecting the Judges of the Insolvent Debtors' Court. It may not be known to honorable members generally, that the Insolvent Debtors' Court is not strictly a permanent Court: it has existed for a period approaching to twenty years: it was intended to be permanent. Gentlemen of eminence at the bar gave up their practice to accept the appointment of Judges; and the manner in which they have discharged their duties has given universal satisfaction: but, in point of fact, the Court has been continued from time to time, and would, according to its present constitution, cease to exist after the commencement of the next session of parliament, unless continued as heretofore, by another act. Still, however, the usefulness of the Court, the interest possessed by probably 100,000 creditors in funds in possession of the Court, or prospective, would secure its continuance, but for the fact that the proposed law of my honorable and learned friend, if it should pass, would

transfer from the Court all that business which it was erected to transact, and there would, in fact, be no motive for its continuance. The House will see, then, the necessity for its interference to protect the interests of the Judges of that Court. If it were necessary to abolish the Court for any cause, it would be matter of course to provide retiring pensions for the Judges; but in the present case the Court may be left to expire by effluxion of time; and the present bill, if passed into a law, would lead to that consequence. But it is impossible that so great an injustice should be practised, as to place the Judges in a worse situation than if the Court was simply and directly abolished. I therefore appeal to my honorable and learned friend distinctly to declare his intentions upon that subject; and I must be allowed to repeat the same motive for pressing for a declaration upon this point, as that urged in the case of the Judges of the Bankruptcy Court—namely, that I cannot feel it right or delicate to require that the Judges of the Insolvent Debtors' Court should be left to petition this House for a protection which the justice of the House must dictate, and especially when we reflect that at present it is problematical whether the case will arise, as we are but in the course of deliberating whether the measure shall or shall not be adopted; and it is only in the event of its adoption that the Insolvent Debtors' Court would cease to exercise its useful functions."

The Attorney-General replied to Mr. Freshfield's remarks; but it does not appear that he removed the force of them, except that in regard to the Insolvent Debtors' Court, he thought the Judges might be employed under the new act; and we observe by the amendments in the Bill, that the Lords of the Treasury may allow compensation to officers, &c.; but this can scarcely be the proper way of arranging the remuneration of the Judges.

#### LORDS COMMISSIONERS OF THE GREAT SEAL.

##### To the Editor of the Legal Observer.

Sir,—The case of *Rees v. Bullock*, (1 Taunt.) to which you refer in your note to my letter, respecting "the Lords Commissioners of the Great Seal," had escaped my notice when I wrote on the subject to you: had I read the arguments in that case I should not perhaps have written so strongly as I did; but you and your readers will I hope consider the fact of the legislature continuing to the present day, the style, erroneous if such it be, of Great Seal of Great Britain, \* when in fact it appears there is no such seal,—a sufficient vindication of the error into which I seem to have fallen. I really think a bill ought to be passed to remedy this misnomer, and to remove any doubt that may arise, of the validity of proceedings taken under the erroneous style. S. T. B.

\* See 3 & 4 W. 4, c. 84, s. 1.

## DISPUTED DECISIONS.

## AUCTION.—TOWN CRIER.

SIR,

ALLOW me to draw your attention to a recent decision of the Court of Exchequer, which, if followed up, may be of more consequence, perhaps, than the Court imagined. The case to which I allude is *Jones v. Waters*, 1 Crompt. Mees. & Rosc. 713. It was there decided that a custom that the town-crier of Brecon should have the *exclusive* privilege of proclaiming, by the sound of the bell, the sale of all goods brought into the borough to be sold by auction, is a *good* custom. I have no doubt whatever, but that a similar custom does now, or did formerly exist in every corporate town in the kingdom. Every one must have observed, that in country places, the bellman goes round to announce sales by auction.

It is certain, that in the city of London, a custom of a similar nature, but more extensive, may, if a *good* custom, though long since disused, be enforced at this day; and it is easily supported by much better evidence than that given in *Jones v. Waters*. Charles I., in his first charter to the city, grants to the mayor, commonalty, &c., the office of out-roper, or common crier, with liberty to exercise the same by themselves or deputy. The said deputy to be chosen by the mayor, commonalty, and citizens in Common Council, with power to take the fees expressed in a schedule annexed to his said charter; and that no other person *presume* to sell any goods by *outeries*, within the City and Liberties of London, under the pain of the royal displeasure. The fees to be taken by "the common out-roper," are stated in the schedule to be:

For selling of all goods, one farthing in every shilling.

For writing and keeping the books, one penny per £.

To the crier for crying the goods, one shilling; altogether very nearly 2½ per cent.

In London, at all events, it is no answer to say that the custom has been laid aside for years; for in the 1st charter of Edward 4th, the 2d charter of James 1st, and I imagine in other charters granted to the city, their customs are preserved to them, "although they have *not used*, or have abused them."

As goods are in these days so continually sold by "outeries," (of going! going! gone!) that is by auction, the foregoing observations may, perhaps, not prove unacceptable to the public, the profession, the auctioneers, or to the gentleman who, on state occasions, holds a great mace out at the Lord Mayor's coach window; to wit, "The Outroper or Common Crier" of the City of London. J. C.

## REQUEST OVER.

THE decision of Lord Brougham, in the case of *Horne v. Pillan*, 2 M. & K. 15, appears to me to be incorrect. You will oblige me by inserting the following observations.

In that case, a testator bequeathed to his two nieces the sum of 2000*l.* each, when and if they should attain their ages of twenty-one years, to their separate use; "And in case of the death of his said nieces, or either of them, *leaving children or a child*, he gave and bequeathed the share or shares of such of his said nieces or niece so dying unto their or her respective children or child." The *Master of the Rolls* held, that the interest of the testator's nieces did not become absolute on their attaining twenty-one, but continued subject to an executory bequest over, in the event of their leaving children living at their death; and on an appeal from this decision, Lord Brougham reversed it, treating it as if it were a bequest over "in case of death" merely.

Now the principle on which a bequest over "in case of death," is considered as creating a bequest in the event of the death of the first legatee, *under particular circumstances*, rather than as creating a bequest in the event of the death of a legatee *under any circumstances*, is, that the testator cannot be supposed to use expressions which imply a *contingency*, in allusion to a circumstance which he must know to be *certain*. Therefore as the testator must know that the death of the prior legatee is *certain* to happen at some time, the expression "in case of death," which implies a *contingency*, is construed as *referring to some circumstance as to which it is contingent*. But where this expression is accompanied by others which render it *contingent*, the reason for this construction is wanting, and the expression must be construed as referring to the event of the legatee's death *whenever it may happen*. In the present case, the bequest over is in case the first legatee shall die *leaving children*. This renders it *contingent*, for it is not *certain* that she will die leaving children; and the principle on which the cases cited in the judgment were decided, is not applicable.

I am therefore inclined to think that (notwithstanding its reversal by Lord Brougham) the judgment of the *Master of the Rolls* was correct. It is clear that the decision of Sir John Leach may be supported, and yet full effect given to the will. The testator might have intended to give his nieces absolute interests, if they died after attaining twenty-one and left no children, but if they left children, to restrict their interests to a life estate, and bequeath the absolute interest to those children, after their decease, whether that event took place before or after the attainment to their majority. Lord Brougham hardly refers to the words *without leaving children*. He argues the case as if the expression in the will had merely been, "and in case of her death," omitting the subsequent words; and certainly he lays no stress upon those words, which, in my opinion, are very material.

W. Y. C.

## SUPERIOR COURTS.

## Lord Chancellor's Court.

## LEGACY DUTY.

*Circumstances in which it was held that a sum for legacies paid into the Accountant General's Office, before the 48 G. 3, c. 149 (an act for imposing legacy duties), but payable afterwards, was discharged from the duties imposed by that act.*

This was a petition for the payment out of a sum of 5000*l.*, now in the hands of the Accountant General, without any deduction on account of legacy duty. This sum had been bequeathed to a lady for her life, with remainder to certain persons named in the will, and a power of appointment in case of their death before her. The bequest took effect before the passing of the act which imposed a duty on legacies,<sup>a</sup> and it became a question whether the duty became payable, now that the legacy over had vested, or whether the payment into Court by the executor of the whole sum before the passing of that act, was such a payment and discharge as the legislature contemplated when it fixed the time after which all legacies were to be charged with duty.

Mr. Jacob and Mr. Girdlestone, for the petitioner, contended, on the authority of the case of *Hill v. Atkinson*,<sup>b</sup> that a payment by an executor into Court of the whole of the monies in his hands after the settlement of all demands, was such a payment and discharge as the Court considered to be sufficient to relieve the estate from any future demand for legacy duty; the Court, in that instance, taking on itself that appropriation which belonged to the executor. This view of the case was confirmed by the decision in the case of *The Attorney General v. Lady Manners*,<sup>c</sup> although the Court there held that the payment by an executor, as trustee, was not such a payment and discharge as would relieve the parties from paying the duty.

The *Attorney General*, Mr. Wigram, and Mr. Romilly, on the other side, insisted, that the act referred to did not contemplate such a payment as this to be a discharge, and that it was impossible it could be so, because the interests which were to vest could not be ascertained at the time of such payment, and it might happen that very different sums would be payable on particular legacies, according to the degree of affinity.

The *Lord Chancellor*, without hearing Mr. Jacob in reply, said the question was this—had there been a payment within the time required by the act?<sup>d</sup> He was of opinion that the decision of Lord Eldon, in *Hill v. Atkinson*, governed this case, and that the payment into Court by the executor must be taken as a full and complete discharge of the executor,

the Court having taken on itself the appropriation which belonged to the executor.<sup>e</sup>

*Coombe v. Triest*, Sittings at Lincoln's Inn, March 26th, 1835.

## Rolls.

## TRUSTS OF STOCK.—FELONY, NO FORFEITURE.

*Cases in which the escheat of land, and forfeiture of stock and chattels, in trust, by the attainder or conviction for felony of the trustee, are saved by the 4 & 5 W. 4, c. 23, which acts retrospectively, and enables the Courts of Chancery to appoint new trustees, as under the act 11 G. 4, and 1 W. 4, c. 60.*

Mr. Turner, in support of the petition of Mr. J. J. Fauntleroy and Mr. J. Watson, stated, that in the year 1816, the petitioners purchased from the late Lord Blessington an annuity of 500*l.* for ninety-nine years, if they and Mr. W. Watson should so long live. The annuity was granted, in trust for the petitioners, in certain proportions, to the late Henry Fauntleroy, the banker, and by his conviction for felony it became forfeited to the Crown. The Crown never appropriated to itself forfeitures of this sort, but the Treasury always accounted to the persons beneficially interested. There being both delay and trouble to all parties in making applications periodically to the officers of the Treasury, an act was passed in the last Session of Parliament (4 & 5 W. 4, c. 23) for the amendment of the law relative to escheat and forfeiture of real and personal property holden in trust. By the third section, no lands, chattels, or stock, vested in any person in trust, shall escheat or be forfeited to the King by reason of the attainder or conviction for any offence of such trustee, but shall vest in his representatives. By the sixth section, when any such trustee shall have died without heirs, or have been convicted before the passing of this act, the lands, chattels, or stock, of which he was trustee, shall be under the control of the Court of Chancery, to be dealt with according to the provisions of the act 11 G. 4, and 1 W. 4, c. 60, by which, when the trustees of land are infants or lunatics, are out of the jurisdiction, or not known, the Courts of Chancery are empowered to give effect to their decrees by appointing other trustees to convey, &c. By the tenth section of the 4 & 5 W. 4, c. 23, the Courts of Chancery are empowered to deal with stock in trust as they were before empowered to deal with land in trust, as if the trustee whose death without an heir, or whose conviction for felony, caused the escheat or forfeiture, were out of the jurisdiction. The petition prayed that the Court, in this case, would appoint a trustee of this annuity for the benefit of the petitioners.

<sup>e</sup> Most of the cases on this subject are examined in the late cases in the House of Lords, *Attorney General v. Forbes*, and *Attorney General v. Hope*, 2 Clarke & Finl. 48, 84.

<sup>a</sup> See 48 G. 3, c. 149.

<sup>b</sup> 2 Meriv. 45.

<sup>c</sup> 1 Price, 411.

<sup>d</sup> 48 G. 3, c. 149.

The *Master of the Rolls*, after looking at the act referred to, and observing upon its great utility, ordered a reference to the Master, preparatory to the appointment of a trustee.

Similar applications were made to this and the Vice Chancellor's Court on the following day, and granted.

*Ex parte Fauntleroy and another*, in the matter of *Fauntleroy*, Sittings before Easter Term, 1835.

#### PRACTICE.—PRAYING PROCESS.

*A bill stating that a party defendant was out of the jurisdiction, and not praying process against him, may be demurred to ore tenus, but the plaintiff may have leave to amend.*

The question in this case was, whether a demurrer, *ore tenus*, for want of a necessary party, was good, the bill alleging that the party was out of the jurisdiction of the Court, without praying *subpoena* against him if he should come within the jurisdiction.

The case having been argued, stood over for consideration.

The *Master of the Rolls*, in giving judgment, after stating the circumstances, said, the authorities were contradictory upon this subject; but he had been furnished with a manuscript case<sup>a</sup> decided by the late Master of the Rolls when he was Vice Chancellor, which was, he thought, directly in point. That case, which was similar to the present, had been fully argued, and Sir John Leach, in giving his judgment, said, "that it was not enough to state that persons who in respect of interest were necessary parties, were out of the jurisdiction; the bill must go on to pray process against them, that they may have an opportunity of appearing to the suit, and of adopting that course which they might deem most to their advantage." In that case, which came before the Court in the shape of a plea, leave was given to amend the record. There were two reported cases—*Windsor v. Windsor*,<sup>b</sup> and *Handcock v. Tomlinson*—on this subject. In the first, it was held that the naming a party in a bill as a defendant and not praying process against him, was not to be considered as making him a party. The learned Judge who decided the latter, said "that it was usual and convenient that parties charged to be out of the jurisdiction should be named in the prayer of the process, because if they came within the jurisdiction process might issue against them without amending the bill; but this omission in the prayer of the process did not render the record defective." In this state of the authorities he had stopped to inquire what was the practice, and he was of opinion that the principle of the MS. case he cited ought to be followed. It had been said that the only circumstance that made a party to a suit was the prayer of process against him. The absence of a party out of the jurisdiction certainly

afforded a good reason for not bringing him before the Court at the hearing, but did not of necessity render the record imperfect. In these circumstances he should adopt that course which he thought most convenient and consistent with the practice of the Court, and allow the demurrer, without costs, as it was *ore tenus*, and give the plaintiff liberty to amend.

*Taylor v. Fisher*, Sittings at the Rolls, after Hilary Term, 1835.

#### King's Bench Practice Court.

##### CHANGE OF VENUE.—SPECIALTY.—ISSUE JOINED.—PLEA PLEADED.

*If a defendant, in an action on a specialty, seeks to change the venue, he must allow issue to be joined before he comes to the Court for that purpose.*

This was an action on an annuity bond, in which a rule had been obtained to change the venue from Middlesex to Deubigh. The defendant in the case had pleaded several pleas, and it was now contended, in opposition to the rule, that the application was premature, inasmuch as it could not be ascertained upon what points the parties would go to the assizes for trial, until issue was joined, the real matter of dispute depending upon the replication. Cases were cited where it had been held that before issue joined such an application could not be entertained, as it could not be ascertained whether the defendant intended to set up any defence to the action; and unless it was his intention to call witnesses the venue could not be changed.

In support of the rule it was contended, that the cases cited did not bear upon the point. The present application was not premature, as it was not made until pleas had been pleaded from the nature of which the course intended to be pursued might be readily discovered.

Coleridge, J., thought that the application for the rule for changing the venue should not have been made until issue joined. It was true, the ultimate issue between the parties might be sometimes ascertained after plea pleaded; but in laying down a general rule the better course would be to adopt one which might admit of general application. It would be better therefore to wait until issue was joined before such an application was made. The rule must be discharged, but without costs, as it might be considered fair grounds existed for making the motion.

Rule discharged, without costs.—*Youde v. Youde*, T. T. 1835. K. B. P. C.

##### CORONER.—SERVICE OF RULE.—ATTACHMENT.—PERSONAL SERVICE.

*Service of a rule to return a writ on a clerk of the agent of the coroner at his office, is not sufficient to obtain an attachment.*

On moving for an attachment against the coroner of Essex for not returning a writ, the

<sup>a</sup> *Munoz v. De Tastet*.

<sup>b</sup> *Dickens*, 707.      <sup>c</sup> 2 Sim. & Stu. 219.

only question was, whether a service of the rule to return the writ was sufficient to authorize the Court in issuing an attachment for not obeying it. The service was on the clerk of the agent of the coroner at his office.

*Coleridge, J.*—I think that service is not sufficient. It ought to be personal.

*Rule refused.*—*Rex v. The Coroner of Essex*, T. T. 1835. K. B. P. C.

### Common Pleas.

ATTORNEY AND AGENT.—MASTER'S ALLOCATUR.—DEMAND OF COSTS.—ATTACHMENT.

*The attorney in the country, and not the agent in town, may be considered as the attorney in the cause; therefore a demand by him under an allocatur requiring payment to the attorney, is sufficient.*

Cause was in this case shewn against a rule obtained to set aside an attachment issued for the nonpayment of costs in pursuance of the prothonotary's allocatur. The rule of court ordered that the costs should be paid to the party, or his attorney; and the ground on which the present rule was obtained was, that the costs had not been demanded by the attorney residing in London, who had managed the cause, but by a country attorney, whose cause it was admitted it really was. The former had merely acted as an agent, but the country attorney had been looked upon as the attorney in the cause by the opposite party. No doubt could exist, therefore, that the demand of the country attorney was sufficient to support the attachment.

It was contended, on the other hand, that the demand should have been made by the London attorney, whose name was on the record.

*Tindal, C. J.* said, that as the rule authorized the demand to be made by the party, or his attorney, the Court had to determine who was that attorney. It must be well-known that in country suits the London attorney was considered the agent only to the country attorney, while the latter was looked upon as the real person acting in the cause. The object in not allowing a demand to be made by the clerk was obvious, as he might be changed. The attorney, however, could not, without all parties being made aware of the fact.

*Rule discharged.*—*Dennett v. Pass*, E. T. 1835. C. P.

SLANDER.—INSOLVENT.—INFANT.—ASSIGNMENT.—SUMMARY DISCHARGE.

*An infant, against whom a verdict in an action of slander had been given, will not be relieved by the Court from execution for damages and costs, notwithstanding the Insolvent Court shall have refused to discharge him in consequence of his inability to assign his goods as required by the Insolvent Act.*

In this case an action for slander had been brought against the defendant, who was only

fifteen years of age, and a verdict for the plaintiff, with 40*l.* damages and 70*l.* costs, was found. The defendant being unable to pay was taken in execution, and a short time since applied to the Insolvent Court for his discharge. That Court, however, declined discharging him, on the ground of his being a minor and unable to assign under the act 7 G. 4, c. 57, s. 11.

A rule to shew cause why the defendant should not be discharged out of custody having been obtained, cause was now shewn, and—

*Tindal, C. J., Park, J., Gaselee, J., and Bosanquet, J.*, thought that the case must be decided as if the Insolvent Act were not in being. The application was in point of fact to relieve a person from the consequences of a judgment obtained against him by discharging him from imprisonment, which was the only means he had in his power of satisfying that judgment. Such a course, however, would open a field for unlimited abuses, where an infant might be guilty of trespass or slander, with a certainty of his escaping without making any satisfaction either in his person or his purse. Cases had occurred where a husband and wife had been taken in execution together, and where the wife having separate property was willing to give it up. The Court, in such a case, would be willing to relieve her, seeing that something like the satisfaction required would be given.

*Rule refused.*—*Defries v. Davies*, E. T. 1835. C. P.

### Exchequer of Pleas.

WELSH JURISDICTION.—SCIRE FACIAS.—SIGNING JUDGMENT.—LACHES.

*A scire facias may be obtained on a judgment which may be irregular, so long as the judgment is in force.*

Cause was shewn against a rule *nisi* which had been obtained in this case on the part of the plaintiff, for issuing a *sci. fa.* for the purpose of reviving a judgment obtained in Wales. The affidavits on which cause was shewn disclosed the following facts.—The action was commenced in the year 1816, and a declaration delivered. No appearance was then entered; but in the year 1834, the plaintiff, by his attorney, entered an appearance for the defendant, and thereupon signed judgment. This, it was submitted, he was unauthorised to do; for by 11 G. 4. and 1 W. 4, c. 70, all power was taken from the Court of Great Sessions in Wales, and there was virtually no judgment in existence.

The Court said, that the proper course for the defendant to pursue was to move to set aside the judgment; and until that is done it must be looked upon as a regular judgment.

*Rule absolute.*—*Thomas v. Williams*, E. T. 1835. Excheq.

WRIT OF INQUIRY.—JUDGMENT BY DEFAULT.  
—COSTS.—MASTER'S TAXATION.

*Where a defendant who has suffered judgment by default, is not liable to the costs of executing a writ of inquiry.*

A rule nisi had in this case been obtained for reviewing the Master's taxation. The facts of the case appeared to be these: The action was for work and labour done, and the defendant suffered judgment by default. A writ of inquiry was then executed. Subsequently the Court granted a new inquiry, upon the ground of there not being sufficient evidence to warrant the finding of the jury as to 18*l.* of the amount which they found to be due from the defendant to the plaintiff. The plaintiff, it had appeared, had been employed upon two occasions, and the defendant did not dispute his liability as to one; but as to the remaining 18*l.*, he did not admit his liability. The defendant, however, being desirous of saving the expense of a second inquiry, paid the plaintiff the whole amount found by the jury upon the first inquiry. The Master, upon taxation, ordered the plaintiff to pay the costs of the first inquiry.

Cause was shewn against this rule.

The Court said that the defendant was not liable to be called on to pay the costs of the inquiry. The present rule, therefore, must be absolute.

Rule absolute.—*Porter v. Cooper*, E. T. 1835. Excheq.

KING'S BENCH SITTINGS,  
*After Trinity Term, 1835.*

MIDDLESEX.	LONDON.
<i>Common Juries.</i>	<i>Common Juries.</i>
Thursday . June 18	Thursday . July 2
Friday . . . . 19	(the Adjournment-day)
and daily to	and daily to
Wednesday . . 24	Wednesday . July 8
inclusive.	inclusive.
<i>Special Juries.</i>	<i>Special Juries.</i>
Thursday . June 25	Thursday . . July 9
and daily to	and daily to
Wednesday . July 1	Wednesday . July 15
inclusive.	inclusive.

EXCHEQUER SITTINGS,  
*After Trinity Term, 1835.*

MIDDLESEX.
Thursday June 18, Common Juries.
Saturday, 20th, Revenue and Common Juries.
Monday, 22d, Common Juries.
Tuesday, 23
Wednesday 24
Thursday 25
Friday 26
Saturday 27

Common Juries.

Mond. June 29	} Special Juries.
Tuesday 30	
Wednes. July 1	
Thursday 2	} Common Juries.
Friday 3	
Saturday 4	
Monday 6	
Tuesday 7	

LONDON.

Friday, June 19,	Common Juries.
Wednes. July 8	} Common Juries.
(Adj't day)	
Thursday 9	} Special Juries.
Friday 10	
Saturday 11	
Monday 13	} Common Juries.
Tuesday 14	
Wednesday 15	

*Chattock v. Shaw*, is appointed for Friday, July 10.

The Court will sit at half-past nine o'clock.

NOTES OF THE WEEK.

*Royal Assents.*  
*Oaths abolition.*

HOUSE OF LORDS.

*Bills for second Reading.*

<i>Title of the Bill.</i>	<i>Proposer.</i>
Residence of Clergy.	Lord Brougham.
PluralitiesPrevention.	Lord Brougham.
EcclesiasticalJurisdic- tions.	Lord Brougham.
Illegal Securities.	
Wills Execution.	
Executors.	
Highways.	

*In Select Committee.*

Law of Patents.	Lord Brougham.
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*Third Reading.*

Legitimacy of Children.	Lord Lyndhurst.
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HOUSE OF COMMONS.

*Bills to be brought in.*

Law of Tenure.	Attorney General.
Law of Escheat.	Attorney General.
Poor Law Amendment.	Mr. Trevor.
Registration of Births, &c.	Mr. Wilks.
Tithes Commutation.	Sir R. Peel, Bart.

*Second Reading.*

Law of Libel.	Mr. O'Connell.
Bankruptcy Funds.	Master of the Rolls
Ecclesiastical Courts.	Sir F. Pollock.
Clergy Discipline.	Sir F. Pollock.
Infants' Property (Ireland).	
Contempts in Equity (Ireland).	
Parish Vestries.	

*In Committee.*

Municipal Corporations. Lord J. Russell.  
Loan Societies.  
Copyholds Enfranchisement. Attorney General.  
Registration of Voters. Lord J. Russell.  
Dissenters' Marriages. Sir R. Peel, Bart.  
County Coroners. Mr. Cripps.  
Prisoners' Defence. Mr. Ewart.  
Durham Court of Pleas.  
Offences against Person.

*Consideration of Report.*

Abolishing Imprisonment for Debt, &c. Attorney General.  
24th June.  
Limitation of Polls.

*Third Reading.*

Capital Punishments.  
*Passed.*  
Annual Indemnity.

ANSWERS TO QUERIES.

*Law of Attorneys.*

ADMISSION.—CERTIFICATE. P. 32.

There is no fixed period at which it is obligatory upon an attorney to take out his certificate after admission. *Ex parte Jones*, 2 Dowl. Prac. Cas. 451. SPES.

ARTICLED CLERK.—INSTRUCTION. P. 15.

I had perused the query of C. S., and should not have given any answer to it myself, but have left it for some one more competent, if it had not been for the answer of "Common Sense," p. 79. Now I would beg to ask "Common Sense," whether, in the case put by C. S., it would be common sense in any articulated case, to *only copy* papers in an attorney's office, when the attorney has received a handsome premium, and covenanted (as I presume he has done in the articles of C. S.) that he will "*by the best ways and means he may or can, teach and instruct, or cause to be taught and instructed, the said C. S. in the practice or profession of an attorney, &c.*," for common sense will tell a man, that when an attorney covenants as above, and afterwards makes his articulated clerk *copy only*, that it is quite impossible for him to obtain anything like such requisite information as is needful in the case of an attorney, to enable him to practise afterwards for himself. As far as can be collected from C. S.'s query (for I am entirely unknown to C. S.), C. S. appears to me to have acted right in *copying* for the first year only—but not in leaving his master's office; for he could not then *conscientiously* swear, &c. as stated by Common Sense. I have not the least doubt myself but that a Court of Equity, if not a Common Law Court, upon a summary application, would discharge C. S. from his present en-

gagement; but I would advise C. S., if he has not already done so, to take the opinion of some eminent barrister. EQUITY.

*Law of Property and Conveyancing.*

GAVELKIND.—HEIR. P. 80.

1. It appears to me that the word "heirs" being in the plural, has caused A. H. D. to ask this query. He seems to think that it necessarily implies that more than one should take; but such supposition is obviously grounded in error. In 1 Rep. 102, where a lease for life was made of gavelkind, (which is a stronger case than A. H. D. puts,) remainder to the right heirs of A. B., who had issue four sons, the eldest son inherited the remainder; and the reason was, that in case of purchase, (as in this case, where the interest is by limitation,) there can be but one right heir.

GRADUS.

2. The right heirs of S. D. take by purchase. I do not see what gavelkind has to do with the question. SPES.

QUERIES.

*Law of Property and Conveyancing.*

TITHES.

A. was rector of the parish of B. A. died when there were seven months tithes owing to him. To whom do they belong—the representatives of A., or the succeeding incumbent? Are tithes apportionable? A. A. C.

*Common Law.*

BILL.—LIABILITY OF INDORSER.

D., the indorsee of a bill of exchange, brings an action against A., the acceptor, to recover the amount; he afterwards (without the consent of B. and C., the drawer and indorser,) takes a cognovit from A. for payment of debt and costs in a given time, by instalments. The acceptor being unable to pay the instalments as they become due, judgment is entered up against him, and then the indorsee takes a composition, and gives a receipt in discharge of the acceptor's liability. Can the indorsee now bring his action against the indorser (C.) for the balance, having in the first instance given time? ZETA.

THE EDITOR'S LETTER BOX.

We are unable to find the letter required by "Aspiro;" but will reserve the next for his edification.

The letter of "Vindex;" is under consideration.

We thank T. S. for his communication, and shall probably use it next week.

The Queries and Answers of S. D.; "A Subscriber;" C. M. W.; E.; T. C.; T. A.; M. U.; "Gradus;" T. D. T; and "Lector," have been received.

# The Legal Observer.

Vol. X.

SATURDAY, JUNE 27, 1835.

No. CCLXXVI.

— “Quod magis ad nos  
Pertinet, et nescire malum est, agitamus.

HORAT.

## CHANGES MADE IN THE LAW DURING THE PRESENT SESSION OF PARLIAMENT.

No. I.

### THE ACT FOR THE MORE EFFECTUAL ABOLITION OF OATHS.

This is the first act effecting any alteration in the law, which has passed in the present session of parliament.

By the 1 & 2 W. 4, c. 4, the number of oaths and affirmations required to be taken were greatly diminished, and the object of the present act is still further to reduce them. For this purpose it is enacted,

That in any case where, by any act relating to the revenues of customs or excise, the post office, the office of stamps and taxes, the office of woods and forests, land revenues, works and buildings, the army pay office, the office of the treasurer of the navy or of the treasurer of the ordnance, his Majesty's treasury, Chelsea hospital, Greenwich hospital, the board of trade, or any of the offices of his Majesty's principal secretaries of state, the office for auditing the public accounts, or any office under the control, direction, or superintendence of the lords commissioners of his Majesty's treasury, any oath, solemn affirmation, or affidavit might, but for the passing of this act, be required to be taken or made by any person on the doing of any act, matter, or thing, or for the purpose of verifying any book, entry, or return, or for any other purpose whatsoever, the lords, commissioners of his Majesty's treasury or any three of them, if they shall so think fit, by writing under their hands and seals, may substitute a declaration to the same effect as the oath, solemn affirmation, or affidavit which might but for the passing of this act be required to be taken or made. (s. 1.)

The substitution of a declaration to be published in the Gazette, and after twenty-one days from the date thereof, the provisions of this act are to apply. (s. 2.)

After said twenty-one days, no oaths to be administered, in lieu of which a declaration has been directed. (s. 3.)

NO. CCLXXVI.

If any person shall make and subscribe any such declaration as herein-before mentioned in lieu of any oath, solemn affirmation, or affidavit by any act or acts relating to the revenues of customs or excise, stamps and taxes, or post office, required to be made on the doing of any act, matter, or thing, or for verifying any book, account, entry, or return, or for any purpose whatsoever, and such declaration shall be untrue in any particular, the person making the same shall, over and above every other penalty to which such person might under such act or acts or otherwise become subject, forfeit and pay 100*l.*, which shall be sued for, recovered, and applied in the same manner and under the same provisions as any penalty imposed by any act or acts relating to the revenues of customs, excise, stamps and taxes, or post office respectively, may by law be sued for, recovered, and applied. (s. 4.)

Nothing in the act contained shall extend or apply to the oath of allegiance in any case in which the same now is or may be required to be taken by any person who may be appointed to any office, but such oath of allegiance shall continue to be required, and shall be administered and taken, in the same manner as if this act had not been passed. (s. 5.)

That nothing in this act contained shall extend or apply to any oath, solemn affirmation, or affidavit which now is or hereafter may be made or taken, or be required to be made or taken, in any judicial proceeding in any court of justice, or in any proceeding for or by way of summary conviction before any justice or justices of the peace, but all such oaths, affirmations, and affidavits shall continue to be required, and to be administered, taken, and made, as well and in the same manner as if this act had not been passed. (s. 6.)

The universities of Oxford and Cambridge, and all other corporate bodies, may substitute a declaration in lieu of an oath. (s. 7.)

The oaths of churchwardens and sidesmen are abolished, and a declaration to be made in lieu thereof. (s. 8.)

Declaration substituted for oath by persons acting in turnpike trusts. (s. 9.)

Declaration substituted for affidavit heretofore required on taking out a patent. (s. 10.)

Declaration substituted for oaths and affidavits required by acts as to pawnbrokers.

L



Penalties as to such oaths, &c. to apply to declarations. (s. 11.)

And after reciting that a practice wholly contrary to the policy of the law had been permitted to prevail, of administering and receiving oaths and affidavits voluntarily taken and made in matters *not the subject of any judicial inquiry*, nor in anywise pending or at issue before the justice of the peace or other person by whom such oaths or affidavits have been administered or received; and that doubts had arisen whether or not such proceeding was illegal; for the more effectual suppression of such practice and removing such doubts, it was enacted, that from and after the first day of June next ensuing<sup>a</sup>, it shall not be lawful for any justice of the peace or other person to administer, or cause or allow to be administered, or to receive or cause or allow to be received, any oath, affidavit, or solemn affirmation, touching any matter or thing whereof such justice or other person hath not jurisdiction or cognizance by some statute in force at the time being: provided always, that nothing herein contained shall be construed to extend to any oath, affidavit, or solemn affirmation before any justice in any matter or thing touching the preservation of the peace, or the prosecution, trial, or punishment of offences. (s. 12.)

Whenever any declaration shall be made and subscribed by any person or persons under or in pursuance of the provisions of this act, or any of them, in lieu of any oath, solemn affirmation, or affidavit, all and every such fees or fee as would have been due and payable on the taking or making such oath, solemn affirmation or affidavit, shall be in like manner due and payable upon making and subscribing such declaration in lieu thereof. (s. 13.)

In any case where a declaration in lieu of an oath shall have been substituted by this act, or by virtue of any power or authority hereby given, any person who shall wilfully and corruptly make and subscribe any such declaration, knowing the same to be untrue in any particular, shall in all cases in which the punishment of perjury would now attach, be guilty of a misdemeanor, and on being duly convicted thereof shall incur the pains and penalties to which persons are or may be liable for wilful and corrupt perjury; and it shall be sufficient in any indictment for such offence, to allege generally that the declaration therein charged to have been falsely made, was a declaration duly substituted in lieu of an oath, and it shall not be necessary to state by what authority or in what manner the same shall have been so substituted. (s. 14.)

The act commenced from and after the 15th day of the present month of June.

## THE PROPERTY LAWYER.

No. XLV.

### ON THE RIGHT OF A CLERGYMAN TO CHARGE HIS BENEFICE.

We have repeatedly stated the law on this subject. See 2 L.O. 193; 4 L.O. 308; 5 L.O. 119; and 7 L. O. 410. The following is the judgment of the Court, in the last case relating to it.

Lord Denman, C. J.—This was a rule calling upon the plaintiff to shew cause why the warrant of attorney, judgment, and writ of sequestration, should not be set aside; and the question to be decided is, whether that warrant of attorney is void, as being contrary to the statute of 13 Eliz. c. 20. The warrant of attorney is to confess judgment in an action of debt for 3,600*l.*; and the defeazance thereto, upon which the question turns, is in the following form (his lordship here read the defeazance). It is therefore expressly provided, that "in case the said annuity, or any part thereof, shall be in arrear for a certain time therein specified, *then and so often as it shall so happen*, it shall be lawful for Saltmarsh, &c., to sue out such execution or executions, upon the judgment, as he or they shall think fit, and also to *sequester* the rectory of Rotherhithe, and all and singular any of the glebe lands, buildings, &c. thereto belonging;" so that, if we had been called upon now (for the first time) to put a construction upon the act of parliament, it seems hardly to admit of a doubt but that the rectory of Rotherhithe is charged with the payment of the annuity in the event of its being in arrear, or, in other words, that the said "benefice is charged with a profit out of the same to be yielded and taken." Cases however have been brought under our notice, bearing (as they certainly do) upon the point in question. In support of the rule, reliance was placed upon the case of *Flight v. Salter*, 1 B. & Ad. 673; and against it, upon the recent case of *Colebrook v. Layton*, 1 N. & M. 374; 4 B. & Ad. 578. In the former case the warrant of attorney *directly* referred to the annuity deed, and was declared to be "for the purpose of securing the said annuity, and to the end and intent that a sequestration might be obtained or procured, and continued by *Flight*, his executors, &c., pursuant to the therein before recited indenture." In the latter case it was averred by *affidavit*, "that the warrant of attorney was given for the express purpose of charging the said vicarage and curacy with the payment of the annuity, and for the purpose of enabling the plaintiffs to sue out the before-mentioned executions." Upon the discussion of *Colebrook v. Layton*, the authorities were brought under the consideration of the Court; and particularly the case of *Flight v. Salter*, upon which then, as now, reliance was placed, in support of the

<sup>a</sup> A doubt has arisen, whether this applies to the 1st of the present month, or the 1st of June 1836. As the act only came into operation on the 15th inst., it appears to us to apply to the 1st of June 1836.

application to set aside the judgment entered upon the warrant of attorney. The Court, however, distinguished (and we think rightly) between the impeachment of the warrant of attorney depending upon *affidavit*, and an objection which is presented to the notice of the Court upon the face of the instrument itself. And accordingly, the Court then thought (and we are now of opinion), that there was not sufficient relation or connexion between the warrant of attorney and the annuity deed, to shew that the benefice was to be charged to pay the annuity, in the event of its being in arrear; the rule to set aside the judgment was discharged. In the present case, however, from the language of the defeazance, we are of opinion that enough appears to shew that the warrant of attorney was given "to charge the benefice," and is, therefore, void by the statute. In adopting this distinction, we think that we are not only deciding in conformity to the authorities and within the meaning of the statute, but are, possibly, laying down as intelligible a rule as can easily be suggested, for preventing the recurrence of those questions which have been so frequently raised, in a very short time, upon the construction of these instruments. It seems proper to add, that the authorities cited to us (with the exception of *Colebrook v. Layton*, which is of a more recent date), namely *Shaw v. Pritchard*, 5 M. & Ry. 180; 10 B. & C. 241. *Flight v. Salter*, 1 B. & Ad. 673. *Gibbons v. Hooper*, 2 B. & Ad. 734; and *Doe v. Carter*, 8 T. R. 87, 300, were brought under the consideration of the Court of Common Pleas, in *Newland v. Watkin*, 9 Bing. 113; 2 Moo. & S. 174. There the rule had been obtained to set aside the plaintiff's warrant of attorney, judgment, and sequestration. The warrant of attorney is not set out, but the report states that it was given "to enter up judgment for the arrears of the annuity," and "expressly authorized him to issue sequestration." The Court having taken time to consider, made the rule absolute, deciding that the plaintiff should no further enforce his writ of sequestration, but should not be subject to an action of trespass. The reasons of the Court are not given. Upon the whole, we are of opinion that this security cannot be supported, and that the rule must be made absolute.

Rule absolute.—*Salmarsh v. Hewitt*, 3 N. & M. 656.

## THE LAW STUDENT.

### ARTICLED CLERKS.

WE propose giving a short series of articles on this head; and cannot do better on the present occasion than make some selections from the 13th Chapter of Mr. Warren's "Popular and Practical Introduction to Law Studies," containing Hints on the Education of Attorneys and Solicitors.

"If a youth be desirous of passing through the period of his clerkship with pleasure and advantage to himself and his tutor, let him *begin well*, by bestowing great attention upon all that goes on in the office, however small and apparently unimportant. Let him learn early how to go about business calmly, thoroughly, and methodically; doing nothing *without inquiring and reflecting upon the reasons of it*. If he have the good fortune to be articled to a kind and intelligent master, nothing will give the latter so much satisfaction as to see his clerk manifest such an inquiring spirit. He will readily refer him to the books of practice, and give him all the *visû voce* information that is requisite. If he will go on thus but for six months, he will soon find that he has entered an interesting profession, and be conscious of making a rapid progress in it. He must not be reluctant to do the common drudgery, as it is called, of the office. There are some sublime young gentlemen who cannot bear the idea of 'tramping' day after day to the courts, public offices, judges' and counsels' chambers, &c. &c., or of copying out and engrossing drafts of bonds, agreements, leases, &c.; which is exactly the reason why they turn out such sublime dunces. More information as to the practical course of business is to be learnt from a day or two spent in serving notices, process, &c., signing judgment, obtaining and opposing the various rules, orders, summonses, &c., making up issues, attending the master, getting instruments executed and stamped, &c. &c. &c., than is to be obtained in many months by the most careful perusal of books of practice. Let the young clerk have his wits about him, wherever he is; whatever he is doing, let him never *hurry*, in however great *haste* he may be; let him not do anything superficially, in a slovenly inattentive manner. Bad habits of this—indeed of any kind—are easily formed, though not easily got rid of; their tendency is to increase and multiply, and they very soon incapacitate him who has contracted them for the proper transaction of any kind of business. Then it is, indeed, that an attorney's office becomes odious, and that a relief from its monotony is sought in the theatre, the tavern, the parks, and parties!

"The pupil should make constant efforts to acquire early a knowledge of the structure and uses of the ordinary instruments upon which he is employed—as bonds, leases, assignments, mortgages, &c., making a point of reading every evening some practical work upon the subjects that have chiefly occupied his attention during the day. Take a common money bond, for instance: nothing can be shorter and simpler in form than this instrument, and yet a vast deal of interesting and important information concerning it may be acquired by an industrious pupil in a very short time. Has he any idea of the origin of the *penalty* of a bond? Is he aware that it was originally contrived 'to evade the absurdity of those monkish constitutions which prohibited taking interest for money?' (3 Bla. Comm. 434-5.) What will be the consequence of a party's taking a

bond, with reference to other previous securities? Will it abridge or extend his former rights? What effect will the death or bankruptcy of either party have upon it? What are the general advantages of taking a bond? &c. &c. &c. Information on these and similar questions can always be easily obtained by the pupil; and when obtained will very much enhance the interest of business, and the facility with which he can despatch it. The practice of the Courts should also constantly command a prominent share of his attention; he should endeavour to acquaint himself with the *reason* of the various rules upon which he is perpetually acting, or he will never become a really skilful and enlightened practitioner. This is, at the present time—when practice is in such an unsettled state—an observation that should never be lost sight of by the pupil, in order that he may be able from time to time fully to comprehend the *grounds* for the alterations that are taking place, and the precise effects of them.

"If it be settled before-hand whether the young attorney is to practise in town or in the country, that should be a leading consideration in determining to what branch of legal studies he should devote his chief attention. If, for instance, he intend to settle in London he must bend his best energies to the acquisition of the practice of the various courts of common law, equity, and bankruptcy, and to the leading branches of commercial law. If he intend to practise out of London, he should be guided by the circumstance of his residing in one of the great manufacturing towns, or in the *country*, properly so called. In the former instance, he will direct his chief attention to learning the laws regulating manufactures and commerce,—patents, machinery, bills, notes, bankruptcy, and insolvency; in the latter, to what may perhaps be termed *agricultural law*,—that of real property, copyholds, landlord and tenant, farming leases, distresses, notices to quit, &c. &c., and to justice of the peace and criminal law generally. Here also it is of special importance that the practitioner should be well acquainted with the law of wills, executors, &c., called on as he often is to frame the former and advise the latter on the spur of the moment, before he can himself obtain assistance from town or elsewhere. In fact, one of this last class of practitioners is thrown more upon his own resources than the other two put together; and it is therefore incumbent upon him to devote his best energies during his clerkship to the acquisition of a thorough knowledge of his profession. When he comes to London to spend half a year with his master's agent, or with a conveyancer, he should pay almost undivided attention to real property law. This will be a most important period of his life, and very much of his future happiness and success will depend upon the manner in which he employs it. Always considering how short is his time, and how much to be done in it, he must avoid forming a numerous acquaintance, and squandering away his days or nights in visiting scenes of amusement. If he

be not wise ~~in time~~, in this respect, he will assuredly find out his folly, and bitterly regret it hereafter."

Mr. Warren refers to various works of a practical kind, to be consulted by the articled clerk in the course of his studies, and which are usually found in a solicitor's office. He then proceeds as follows:

"He should by all means, during some—perhaps the latter—period of his clerkship, attend a course of lectures, and attend it regularly and thoughtfully. He must not be too anxious about taking copious notes; his main object should be to follow the lecturer closely *in his mind*, and note down only a few memoranda, to aid his recollection on returning home; when he should make a point of writing out what he has heard, but not too fully, and consulting the *authorities cited*.

"He is also earnestly recommended to lose no opportunity of studying carefully the opinions and drafts of pleaders, conveyancers, and barristers; and, where they are of more than usual interest or importance, of copying them out: he cannot hit upon any readier method than this of improving himself in legal knowledge.

"Whenever he has occasion to go to the Courts he should attend to what is going on, and make a note of anything that strikes him as new, or of importance. It is astonishing how much valuable information he may collect in this way, and how advantageous such efforts will prove to his mind.

"The clerk must also, equally with the student for the bar, lose no opportunity of acquiring polite and general knowledge—unless he mean to settle down into a mere drudge.

"It would be well, also, for the clerk to bear in mind the necessity of acquiring a *good style of composition*, for which purpose he should familiarise himself with the writings of the best English authors, and frequently exercise himself in original composition. He should constantly aim at the attainment of a plain, nervous, perspicuous style; which, added to a methodical arrangement of his thoughts, will enable him to acquit himself creditably in correspondence, and drawing up cases and briefs—matters which soon evidence, even to non-professional persons, whether their author is a man of general ability—a competent member of a liberal and learned profession. The author has frequently seen briefs, both in Chancery and common law causes, drawn up in a most lucid and masterly style,—calculated to leave counsel little else to do than present them to the Court.

"A clerkship thus well spent will entitle the young lawyer to look for early success in his profession. If, instead of entering into business on his own account, he should prefer engaging with an attorney for a while, as managing clerk, his abilities and good conduct will speedily attract the notice of his employers, and induce them not only to give him a handsome salary, but possibly to take him

into partnership on very advantageous terms. If, on the other hand, he enter into business on his own account, he will discharge all the duties of it with comfort to himself and advantage to his clients—who will not fail to give him substantial evidence of their increasing confidence in his skill and integrity.

"What, on the contrary, is to become of the idle, ignorant, and dissolute attorney's clerk? Who will employ him, either as master or client? His expensive education has been utterly thrown away upon him; and he rapidly sinks from the sphere of respectable society, amid the grief and indignation of his friends, into roguery and ruin."

## SELECTIONS FROM CORRESPONDENCE.

### No. CII.

#### DETENTION OF LETTERS AT THE POST OFFICE.

Sir,

A case of considerable hardship has just occurred to me, in consequence of the time which is allowed to elapse between a letter's being *refused* by the party to whom it is addressed, and the time when it is returned through the Dead Letter Office; and I am therefore desirous of drawing the public attention to the subject. There may be very good reasons why, when the address of a party is unknown, a letter should lie some time at the office to be claimed; but when a letter is *refused*, I can see no reason for delay, and it ought to be returned immediately to the writer.

R. L. S.

#### JURISDICTION OF MAGISTRATES.—SERVANTS.

Sir,

I attended a petty sessions and laid a charge against a servant of mine for leaving my service without notice, after having agreed to give me a month's notice. This servant was employed in my house as a domestic servant; and the magistrates refused to hear the case, saying they had no jurisdiction over domestic servants, and could not convict for any misdemeanor or ill behaviour committed by them in their service. I contended that under the 4 G. 4, c. 34, they were empowered to punish *any person* contracting to serve for any time whatsoever (if the person had entered into the service) for any misdemeanor or misconduct in the execution of the service; but the magistrates being of a different opinion, dismissed the case. You will oblige me by giving your opinion on this case in your next publication.

A SUBSCRIBER.

#### INHERITANCE ACT, 3 & 4 W. 4, c. 106.

In answer to your correspondent at page 31 of the present volume, relative to the new Act for the Amendment of the Law of Inheritance, I am inclined to think that the case he proposes has been overlooked by the framers of the act. The 2d sec. of the statute enacts, "That in every case descent shall be traced from the purchaser; and to the intent that the pedigree may never be carried further back than the circumstances of the case and the

nature of the title shall require, the person last entitled to the land shall be considered to have been the purchaser thereof, unless it shall be proved that he inherited the same, in which case the person from whom he inherited the same shall be considered to have been the purchaser," &c. Now, *W.* being the first purchaser, the effect of this section (if strictly interpreted) is, to give to *B.*, the aunt of the deceased, the right of dividing with *C.*, the surviving sister, the property which her deceased niece may have left,—a consequence which could not possibly have been intended. The omission, indeed, is so obvious, that in all probability, should the case ever come before the Court, it would consider itself bound to allow the general policy of the law to prevail, and not put that construction upon the section, which would manifestly work so great an injustice. M. U.

#### ATTORNEY.—USURY.

Sir,

*B.* having occasion for money, goes to an attorney to borrow it. He gives a bill of sale of all his effects, and the attorney advances a small sum of money, and becomes answerable to some of *B.*'s creditors for debts due to them. The effects of *B.* are to be sold by auction, and six months credit given, in order to reimburse and secure the attorney the money he has so advanced and become answerable for; but the attorney is to take the risk of the sale upon himself, and by the conditions of sale the money is to be payable to him. The attorney charges 3s. 6d. or 4s. in the pound upon all the money advanced *B.*, and on all the money for which he becomes answerable. The attorney, in addition to his commission of 3s. 6d. or 4s. in the pound, charges for drawing bill of sale, journeys, attendances, &c. making altogether near 30 or 40 per cent. Many of the sums for which the attorney becomes responsible are not paid till after the sale is due.

Will any of your correspondents inform me whether such a transaction is lawful, or whether it does not come under the Statute of Usury? and whether the Courts would not summarily punish such conduct in an attorney, and order him to reimburse the amount so charged? He certainly runs a risk of having had purchasers at the sale; but he may buy all at the sale himself. A man cashing a draft for another runs the chance of being repaid, but he is limited to 5 per cent. The system is carried on to a most pernicious extent by some disreputable attorneys, auctioneers, and others, and if a stop is not put to it, every farmer in the country, who at a moment of distress is driven to these pests of society, will be totally ruined. I therefore, Mr. Editor, beg seriously to call your attention to this matter; and trust you will aid the cause of the distressed farmer, by advocating some measure for the summary punishment of the usurious money lender, who not only destroys the borrower, but robs him of the means of paying his creditors; as what would otherwise be divided amongst the latter, goes into the pocket of the lender.

L 3

VINDY.

## LIABILITY OF A HUSBAND AFTER SEPARATION.

### JURISDICTION IN EQUITY FOR ALIMONY.

Sir,

I have read the remarks of your Correspondent M., on the above subjects, (8 vol. 312, 9 vol. 501). I cannot, however, reconcile the view he takes, as to the nature of alimony, stating—"it appears alimony places a woman in the situation in which a woman is when living apart from her husband without his assent, in which case he would not be liable for necessities, but for the interference of the Ecclesiastical Court, which on due enquiry, finding that she has just cause for her absence, makes a decree, justifying such absence, and at the same time imposing upon him the condition of supplying her with necessaries to the amount of alimony decreed." This I conceive to be far from a true description of the nature of alimony; for I think, before I conclude I shall be able to show, that the wife is of ability to dispose of the *savings* of her alimony. I shall endeavour to show that alimony has rather more of the qualities of separate property. In support of which, the following opinion of *Rooslyn, J.*, 2 Ves. Jun. 195, may be mentioned:—"I take it now to be the established law, that no Court, not even the Ecclesiastical Court, has any original jurisdiction to give a wife *separate* maintenance. It is always as incidental to some other matter, that she becomes entitled to a *separate* provision. If she applies in this Court upon a supplicavit for security of the peace against her husband, and it is necessary she should live apart, as incidental to that the Chancellor will allow her *separate* maintenance—so, in the Ecclesiastical Court, if it is necessary for a divorce *a mensu et thoro propter savitiam*."

Again, per Lord Holt, 1 Salk. 115. "If a feme covert sue another in the Spiritual Court for incontinence with her husband, and recover £10. costs, and the husband release them, she is by this barred. So it is, if husband and wife be divorced *a mensu et thoro*, and a legacy is left to the wife and the husband release it, she is thereby barred, for the marriage continues, and the husband has all her right; but if the husband and wife be divorced *a mensu et thoro*, and the wife has her alimony and sues for defamation or other injury, and then has costs, and the husband releases them, this shall not bar the wife, for these costs come in lieu of what she has spent out of her alimony, which is a *separate* maintenance and not in the power of her husband."

How far, I ask, do these opinions accord with the supposition of the husband paying for the wife? It appears plain from the latter, that the wife must have had the alimony in her own hand, otherwise she could not have been in the situation described, of having spent money out of her alimony, in lieu of which the costs recovered shall be taken by her. In addition to these cases, may be mentioned those in which application has been made by the wife for the writ of *ne exeat regno* against the hus-

band, for the purpose of obtaining equitable bail, to prevent his leaving the country without paying the arrears of alimony then due; see *Huffey v. Huffey*, 14 Ves. 261, and cases there referred to. These show that alimony is money paid into the wife's hands, and not merely necessities supplied at the husband's direction, otherwise a different mode would be adopted, the application being rather made by the creditors than the wife.

These are instances of what the Courts of Law and Equity think about the nature of alimony; let us now try and show what view the Ecclesiastical Courts take.

In *Wilson v. Wilson*, 3 Hagg. Eccl. Rep. 329. n, upon an application by the wife, to enforce a monition for the payment of alimony, six years in arrear, the Court said—"Unless the husband is absent from the country, or some particular reasons are set forth, it would be productive of great inconvenience and injustice, if, after a lapse of so many years, the Court should enforce such a monition. If the wife is aggrieved, she should make her application within a reasonable time, otherwise the Court will infer she has made some more beneficial arrangement. As a general rule, therefore, the Court is not inclined to enforce arrears of many years standing. Alimony is allotted for the maintenance of a wife, from year to year. However, as in this case there had been no application to reduce the alimony, but the parties have gone on satisfied with some private arrangement of their own, I think I shall best consult the interests of both, by decreeing alimony from one year prior to the monition, the husband being allowed all payments on account of the wife during that year; and from the date of the present monition, I shall continue the alimony according to the original decree."

From this it would appear that the husband would only be entitled to deduct so much as he may have paid for the wife; and subject to that, he would be obliged to pay over the residue to her.

Without, for one moment, disputing the decision of Lord Lyndhurst, before cited, (9 Vol. 501,) the only extent to which that decision goes, is this, viz.—that any arrears of alimony which the husband may not have paid in his wife's life time, belong to himself, in preference to the legatee of the wife; but such decision does not decide that, if the husband had paid up the arrears to the wife in her life time, he would be entitled to receive them back, as against the legatee. The above does not prove that the husband is entitled to the wife's *savings* of alimony, as against her legatee. I think it will be admitted that the case of *Cooke and Stones* never raised the question, as that only related to *arrears* of alimony. The only remaining portion of the argument to be disposed of, is that relating to the cases in which equity interferes between husband and wife; and if those can be disposed of, no part of the argument will be left in support of the husband's claim to the *savings*, in preference to the legatee.

I do not intend, for a moment, to question those cases which deny the wife the right of enforcing her rights against her husband, in equity or at law, without the interference of a third person between them. The case, however, goes no further than this, viz.—If a husband agrees to allow his wife a separate maintenance, without the interference of a third party, and the husband subsequently refuses to make such allowance, equity says—We cannot interfere; but, supposing the husband not to refuse, but, instead of taking advantage of this ground of refusal, he pays such stipulated maintenance to the wife; does this *actual payment* alter the case? In this, I conceive, lies all the difference, *payment or no payment*. Between husband and wife there is, I conceive, a distinction between agreements *executed and executory*. In illustration of this position, the case of *Slanning v. Style*, 3 P. W. 337, may be mentioned, in which the husband allowed his first wife to dispose and make profit of all such butter, eggs, poultry, &c., which arose from his farm, for her own separate use, and which allowance he called her pin money. From her death until he married the defendant *Style*, his sister kept his house, and had the same allowance, which was continued to the second wife. It was no proof that, whenever any person came to buy fowls, &c., the husband said he had nothing to do with those things, which were his wife's; and it further appeared in evidence, that he confessed that he, having been making a purchase of about £1,000. value, and being in want of money, had been obliged to borrow £100. from his wife, to make up the purchase money. The husband being dead, the widow claimed the £100. out of his estate.

Lord *Talbot* decreed that she should be a creditor for such sum, observing, that the money being the wife's savings, and the husband's agreement having been proved, it was but a reasonable encouragement to her frugality, and that such agreement would be of little avail, if it were to determine with his death: that it was the strongest proof of the husband's consent, that the wife should have a separate property in the money arising by the *savings*, in that he had applied to and prevailed with her to lend him the £100., for he did not claim it as his own, but submitted to borrow it as her own money. Therefore, and especially as there was no creditor of the husband, to contend with, his Lordship decreed, as above.

Here is a case going the length required, without denying the position that, if the matter had rested *in fieri*, the husband might have resisted a performance; but not having done so, and on the contrary, having allowed the money to come into the wife's hands, it was open to proof that he intended to allow her a separate maintenance. Nor is this a case by itself, as in the above case one of *Calmady v. Calmady* was referred to, in which the husband agreed with the wife that, upon every renewal of a lease by him, she should receive from the tenant two guineas, and that sum was allowed to be her separate money. So also in *Mangly v. Hungerford*, 2 Eq. Ca. Ab. 156, the wife, as

it appeared, had saved a considerable sum of money out of housekeeping, and in a suit instituted against her for a discovery of what she had saved, she insisted, by answer, that she was not bound to make such discovery: and upon exceptions to the answer, it was held sufficient by Lord *King*.

These cases, I conceive, prove that, as regards money once paid into the wife's hands, there is no need of the interference of a trustee, to enable the wife to dispose of such savings. If such was not the case, how would it happen with a married woman to whom trustees were ordered to pay money to her, on her own receipt, to her own separate use? when paid it would belong to her husband, without, incidentally, she had a separate power to will such savings. In a similar case, Lord *Thurlow* thus expresses himself, (1 Ves. Jun. 48):—"I have always thought it settled that, from the moment in which a woman takes personal property to her sole and separate use, from the same moment she has the sole and separate right to dispose of it. It is incident to dispose of the *savings*, out of her personal estate; she certainly might enjoy it: and as to the produce, that is all merely personal property. If no disposition, the husband succeeds as next of kin, not in consequence of the marital rights. Upon the cases I have always taken this ground: that personal property, the moment it can be enjoyed, must be enjoyed, with all its incidents." See also *Rich v. Cockell*, 9 Ves. 369.

In all the above noticed cases, the property claimed as the wife's separate estate, had been actually paid into the wife's hands, and did not rest merely in agreement.

From what is above quoted from the remarks of Lord *Rosslyn*, 2 Ves. Jun. 195, and Lord *Holt*, 1 Salk. 115, as to alimony being *separate property*, and from what appears from the remarks of Lord *Thurlow*, 1 Ves. Jun., as to a power of disposal being incidental, where a separate interest exists, it does not appear too much to say, that alimony has, at least, the same qualities about it, as payments made to the wife, and allowed by the husband to be retained, as separate property, in her hands; in which cases it has already been shewn, that equity will interfere in favour of the wife, where no creditors intervene. That such payments would, however, be subject to the claims of creditors, seems admitted by Lord *Talbot*, in the above noticed case of *Slanning v. Styles*, and in *Fitser v. Fitser*, 2 Atk. 513. Lord *Hardwicke*, in speaking of the Ecclesiastical Courts, says—"their decrees for alimony and maintenance are only against the person of the husband, and do not affect any part of the estate, so as to take it from the husband's creditors." It is unnecessary, on the present occasion, to follow out the powers of the husband over the wife's alimony, by analogy to settlements wanting a valuable consideration to support them; the present question only being as between the husband and the wife's legatee, without the interposition of creditors, which might, of course, alter the case.

It has already being shewn, on the dictum

of Lord *Lyndhurst*, that the Ecclesiastical Courts refuse to execute their decrees after the death of either of the parties, and this may possibly be on the supposition, that they look upon their right of interfering as only extending to personal wrongs between parties; and such wrongs ceasing, by the death of either, the cause of enquiry ceases at the same time, like any other personal wrong, at common law, the remedy for which has not been extended by statute. Nor will this course, adopted by the Ecclesiastical Courts, appear to be so great a hardship, when we come to consider the principles which govern the relation between man and wife; for, on reference to a portion of the Judgment of the Court, before cited, in *Wilson v. Wilson*, it will be found that "alimony is allotted for maintenance of a wife from year to year." On this principle will the Courts, in favour of the wife, enforce the payment during her life; but if, at the time of her death, there be no debts owing for her maintenance, then does the principle fail, unless it can be held that the husband is bound to maintain the legatee of the wife.

By marriage the husband becomes entitled to the wife's personality, in return for which he is bound to support his wife; and having so done, I think his claim must be held to be much stronger than a mere volunteer.

Again, consider the effect of a separation, at common law:—If a wife live separate from her husband, with his assent, the obligation to maintain the wife lies upon the husband, unless she forfeits her right to that maintenance, by her own misconduct, per *Chambre, J.*, 2 N. R. 152. But if a provision is made and regularly paid, he is not liable. If a provision is made by the agreement, and not paid, then, according to the opinion of three Judges, in *Nurse v. Craig*, 2 N. R. 148, the husband is liable for the wife's debts; and see also per *Littledale, J.*, 6 B. & C. 215. This would seem to prove that, though the husband might, as against the legatee of the wife, retain the arrears, still, as against creditors, he would fail, without he showed that the maintenance was regularly paid. When a person deals with a married woman, living with her husband, *prima facie* the husband is liable; but if she be not so living, it is the party's place, who deals with her, to ascertain who is to pay him, because the marriage takes away any personal claim against her; and if, on enquiry, it turns out that the maintenance has been regularly paid, he has trusted her at his own peril; if, however, the contrary be the case, then, as far as the goods supplied be necessaries, the husband would be liable, unless he could show that she had left him, without his assent, in which latter case, (speaking independently of a maintenance being allowed), a husband would seem not to be liable for necessaries, to any amount, per *Bailey, J.*, 6 B. & C. 213; see, on the other portion of the section, *Clifford v. Layton*, 1 M. & M. 101, and 3 C. & P. 15. If, therefore, alimony be like any other payment made by the husband, for the benefit of the wife, no great injury will ensue, since a mere volunteer would

be the only party disappointed; for, as between the husband and creditors for necessaries, his common law liability would not have ceased, without a regular payment of the allowance was proved.

There is one more argument in favour of the husband: even in the life time of both parties, where there has been no obstacle to the wife recovering her alimony, and yet the wife has allowed it to run in arrear for five or six years, as in the above noticed case, of *Wilson v. Wilson*, the Court will not assist her in the recovery of more than one year's arrears. It would be too much then, I think, after death, to give a greater favour to a volunteer, claiming under her.

The result, therefore, seems to be this, that arrears, in the hands of the husband, at the wife's decease, he paying for her necessaries, belong to the husband; but that where payments have been made to the wife, and thereout she has saved money, such savings are disposable of by the wife.

T. O. B.

#### ON THE IMPRISONMENT FOR DEBT BILL.

To the Editor of the Legal Observer,  
Sir,

Perceiving from a perusal of your valuable work that you take some interest in the above Bill, which, in importance to all merchants, tradesmen, and shopkeepers, (not only in this metropolis, but throughout the kingdom) is not exceeded by any measure which has been brought before Parliament during the present session, I think I need not apologize for troubling you with a few observations on the subject. It seeks, with one blow, to destroy the existing Laws of Debtor and Creditor, and to establish, at a great expence to the country, an entirely new Code of Law, on a mere speculation—it seeks immediately to discharge all prisoners for debts, notwithstanding they were contracted on the faith of the existing laws, and thereby deprives the shopkeeper, the tradesman, the merchant, and the banker, of the only check which at present exists to unlimited fraud without punishment, and will thus instantly increase, to an alarming extent, the number and amount of frauds upon honest tradesmen: for notwithstanding the bill has been committed and re-committed, and upwards of 60 new clauses added since it was first printed—it is still, in its main object, namely, the prevention of imprisonment for debt, as objectionable as ever, and the various amendments are only with the view of rendering greater facilities to creditors in recovering judgment against the Goods or Effects of Debtors (*when they can be found*); and the Bill, in its present shape, forms so complete a mixture of incomprehensible and various matters, that every unprejudiced Lawyer will declare it to be most unintelligible, and its execution attended with endless litigation.

And all this serious injury to trade, for what? why truly, because his Majesty's Attorney-General, and a few of his friends, who have (to say

the least of it) got a completely mistaken view of the subject, as it will affect trade,—say, *it shall pass*—and that *he* knows much better than the thousands of merchants, tradesmen, and shopkeepers who have petitioned against it, what is for *their* interest, and for the support of trade and credit. But how he has attained this wonderful knowledge I cannot tell: certainly not from experience—for he (very properly) will give no credit himself, consequently he feels nothing of the necessity of every protection being given for the support of credit, without which trade cannot possibly be carried on to any extent. If you want his valuable professional services, you must pay his Fees before he will act; consequently you must give him credit.

Much misrepresentation is put forth by the promoters of this Bill, as to the cruelty of imprisonment for debt, and the hard-heartedness of creditors: but I will venture to assert, without fear of contradiction, that of the great number of persons imprisoned for debt for short periods, very few, if any, will be found who are *really honest* and deserving individuals; and indeed under the existing laws no man, with any moderate share of honesty, *need* remain in prison longer than about a month.

Much is said (and properly so) as to the necessity of yielding to *Public Opinion*, when expressed in a temperate and proper manner, and especially by persons competent to judge. How then stands this subject when tried by the foregoing test? why, there is not one petition to Parliament from any merchant, trader, or shopkeeper, or any body of persons except prisoners, in *favour* of the Bill; whilst there are 40 different petitions signed by thousands of the most influential merchants, tradesmen, and shopkeepers, *against* the Bill—the summary of which is as follows:—

*Petitions against the Bill from—*

The Merchants, Bankers, Tradesmen, or Shopkeepers of Ashton, Bermondsey, Beverley, Bolton, Brighton, Broseley, Christchurch, Coal-Exchange, Dawley, Farringdon (Ward), Exeter, Hereford, Huddersfield, Hull, London, Liverpool, Madeley, Manchester, Needham, Neilson, Oxford, Reading, Salford, Sheffield, Southwark, Stratford, St. Albans, Westminster, Whitechapel, Wigan, Worcester, and the Society for the Protection of Trade, established in London in 1776.

*Petitions in favour of the Bill from—*

The Prisoners in the Gaols of Dover, Dublin, Exeter, King's Bench, Kilmainham, Lancaster, Lincoln, London, and Middlesex.

I. G. M.

OBSERVATIONS  
ON CRUISE'S DIGEST,

*The Third Edition, revised and enlarged by  
H. H. White, Esq., Barrister.*

THE present year has brought forth a new edition of the above work, *revised and enlarged* by Mr. H. White; and in order to judge how far this gentleman's labours are likely to

be of use to the profession, it may be as well to consider what was the former repute of this work, and how far the present editor has contributed to raise it in the estimation of the profession.

The work has been held in high estimation by the profession to this extent: viz. as an excellent compilation of the cases upon the various heads treated of; but the conclusions drawn by Mr. Cruise have not generally met with the same approbation.

No work offered a better opportunity than the present one to any editor of raising his name, by a strict application to the correction of such errors as were admitted to exist in this work, as to some of the positions laid down by Mr. Cruise. While such remain in the work, it will never be looked upon as a work of authority.

A good deal of merit is due to the present editor for additional matter which he has introduced into the work; but at the same time a good deal of blame attaches to him for leaving uncorrected several of Mr. Cruise's erroneous positions.

The work is one which has a very free circulation among solicitors in the country, as containing a compilation of the cases; and of course where a party has not the reports by him, he would no doubt trust to the positions there laid down. With the higher branches of the profession it is used more as an analysis of the cases.

I shall confine my present notice of the errors to the first chapter of the work.

In vol. 1, p. 50, s. 26, it is laid down,—“Where lands are let on leases for lives, the freehold is in the lessees; consequently the heir has no immediate right of entry on the death of his ancestor. *He is however entitled to the rent reserved on the lease, by the receipt of which he becomes seized of the rent, AND ALSO of the reversion on the determination of the lease.*” On reference to the authority quoted, Co. Lit. 15b, it appears that the position there laid down is, “if a rent or an advowson do descend to the eldest son, and he dieth before he hath seisin of the rent, or present to the church, the rent or advowson shall descend to the youngest son, for that he must make himself heir to his father, as hath been oftentimes said before. The like law is of offices, courts liberties, franchised commons of inheritance, and such like. And this case differeth from the case of the tenant by the curtesy; for there if the wife dieth before the rent-day, or that the church become void, because there was no laches or default in him, nor possibility to get seisin, the law, in respect of the issue begotten by him, will give him an estate by the curtesy of England. But the case of the descent to the youngest son standeth upon another reason, viz. to make himself heir to him that was last actually seized, as hath been said.” Admitting this last position to the utmost extent it can be carried by the exception, it only proves that in the case of incorporeal hereditaments, the receipt of rent is requisite to give a seisin; whereas in the case of a corporeal hereditament, the



mere possession of a leasehold tenant, without a payment of rent, is sufficient to give seisin. Mr. Cruise, however, in defiance of the doctrine laid down by Coke in the preceding page, would make no distinction between the interest of the tenant being freehold or only leasehold for years.

In 15 a, Lord Coke, after laying down the position, that the possession of tenant for years was the possession of the heir, adds, "But in the case aforesaid, if the father make a lease for life, or a gift in tail, and dyeth, and the eldest son dyeth in the life of tenant for life or tenant in tail, the younger brother of the half blood shall inherit; because the tenant for life or tenant in tail is seised of the freehold, and the eldest son has nothing but a reversion expectant upon that freehold or estate tail, and therefore the youngest son shall inherit the land as heir to the father, who was last seised of the actual freehold; and albeit a rent had been reserved upon the lease for life, and the eldest son had received the rent and died, yet it is holden by some that the younger brother shall inherit, because the seisin of the rent is no actual seisin of the freehold of the land."—besides several cases cited in the note to 15 a. It is well established at the present day, that such receipt of rent would not be sufficient. The only authority to the contrary is a *dictum* of Lord Kenyon, which will be found in 8 T. R. 213. After stating that the rule of *possessio fratris* did not apply to estates tail, he adds, "Nor does that rule hold even with respect to inheritances in fee-simple, unless there be an actual possession of the brother, or that which has been deemed equivalent; for in that respect there is a difference between freehold and chattel leases outstanding. In the former case, unless the elder brother afterwards obtain possession, by the receipt of rent or other acknowledgment, the descent will be to the younger brother of the half blood in preference to the sister of the whole blood: but in the case of a chattel lease outstanding, the possession of the tenant is the possession of the landlord; and there the rule of *possessio fratris* attaches." Taking, however, this *dictum* in connection with what fell from the same learned lord at a previous time, it may be collected that by *afterwards* he meant, after the determination of the freehold lease. Thus, in 7 T. R. 390, "This distinction was taken by Lord Coke (Co. Litt. 15 a), and has since been frequently adopted, that if the father die, his estate being out on a freehold lease, that is not such a possession as to induce the *possessio fratris*, unless the eldest son live to receive rent after the expiration of such lease: but it has always been the settled rule, that if the father die, leaving his estate out on a lease for years only, the possession of the tenant is so far the possession of the elder son, as to constitute the *possessio fratris*." This I conceive to be a complete explanation of the *dictum* of Lord Kenyon, which has generally been considered as supporting the view taken by Mr. Cruise in the above quoted section, but which certainly cannot be supported at the present day. Many may think

the present discussion of little importance, since the inheritance act has made a right descendible in the same way as a seisin; but this relates only to descents subsequent to the act, and therefore, as the effect of descents previous to the act, have constantly to be considered in examining titles, it is as well to have the text books correct on this head.

The next section to be noticed, as being erroneous, is in vol. 1, p. 63, s. 74, "Estates in fee simple are forfeited to the Crown by attainder of treason; and the lands whereof a person so attainted dies seised in fee-simple become vested in the Crown without any office; because they cannot descend on account of the corruption of blood of the person last seised: and the freehold shall not be in abeyance." Any person reading this, would naturally suppose that in any case other than the attainted person dying seised, it was requisite to have office found to entitle the King to the lands. The difficulty, however, is this—how a person attainted of treason can die seised of lands—since the 33 H. 8, c. 20, which declares that upon attainder for treason, "the King, his heirs and successors, shall have as much benefit and advantage by such attainder, as well of uses, rights, entries, conditions, as possessions, reversions, remainders, and all other things, as if it had been done and declared by authority of parliament, and shall be deemed and adjudged in actual and real possession of the lands, tenements, hereditaments, uses, goods, chattels, and all other things of the offenders so attainted, which his highness ought lawfully to have, and which they, being so attainted, ought or might lawfully lose or forfeit, if the attainder had been done by authority of parliament, without any office or inquiry to be found of the same: any law, statute, or use of the realm to the contrary thereof in anywise notwithstanding." As far, therefore, as regards attainder on high treason, (to which alone the section in Cruise alludes) immediately on attainder the land, without office, is in the king; and therefore a party cannot die seised. Mr. Cruise only gives what the law was previous to the 33 H. 8, c. 20.

I have entered fully into these matters, or given such references that parties may satisfy themselves how far these positions are right or wrong. Should time afford an opportunity, I may possibly offer further remarks upon the subsequent chapters of this work.

M.

#### THE REVISING BARRISTERS.

A BILL, which is intended to regulate and improve the registering of Electors for Members of Parliament, is now before a select Committee; and we have understood that one of the proposed alterations is to confine the Barristers eligible to be appointed to revise the List of Voters under the Reform Act, to gentlemen who attend the Circuits, and that they are to be appointed to the

places on the Circuits to which they belong. Now we are decidedly friendly to any plan which may free the appointments to those situations from any suspicion of undue influence; but we cannot think that the proposed change will have this effect. We do not think that gentlemen should be appointed to revise the voters of places in which, from going the circuit to which they are attached, they probably have more or less local connection. A Revising Barrister sits in a judicial capacity; and it has been as well the strong wish of the legislature as the practice of the profession, to discountenance, as far as may be, any system which can render a judge liable to local feeling; and if this applies to any one subject more than another, it is surely in the registration of voters. We confess, therefore, we see no reason for restricting these appointments to any one portion of the profession. We think, on the contrary, they should be open to all who have attained a certain standing. If any change be made, we are inclined to think that it would tend to the public service, and diminish expense, to appoint a less number of Barristers than at present, at a fixed salary, and not, as at present, to remunerate them by the day.

### COUNTER-CLAIMS FOR SLAVE COMPENSATION.

*Office of Commissioners of Compensation,  
25, Great George Street, Westminster,  
25th May, 1835.*

WHEREAS the Returns of the Classified Valuations of Slaves, and the Claims for Compensation connected therewith, have not yet been received from several of the West India colonies, and only in part from others, so that sufficient time can not be afforded for the due examination thereof, to enable parties interested to put in counter-claims previous to the 1st of July;—

NOTICE IS HEREBY GIVEN, that Counter-Claims for Compensation in respect of Slaves in all the West India Colonies, will be received at this Office up to the 1st day of September next.

By Order of the Board,  
HENRY HILL, *Secretary.*

*Office of Commissioners of Compensation,  
25, Great George Street, Westminster,*

#### RULE 15.—POWERS OF ATTORNEY.

Some doubts having arisen respecting the construction of No. 15, of the General Rule, the Commissioners think it advisable to mention, that persons duly represented by attorney for all general purposes in the colonies, need not send out any special power, stamped or unstamped, for the purpose of enabling such

attorney to act for his constituents in the proceedings under the General Rule, which have been framed by the Commissioners. The object of the Rule respecting powers of attorney was to prevent persons acting for others without any authority, not to make new powers necessary where persons are already duly represented.

By order of the Board,  
HENRY HILL, *Secretary.*  
30th May, 1834.

### SUPERIOR COURTS.

#### Lord Chancellor's Court.

##### LEGACY DUTY.

*Monies bequeathed in India, for charitable purposes there, and directed to be invested in Indian securities, but brought to this country and paid into Court with the residue, which was to be administered here, are subject to the legacy duties.*

This was a petition praying that certain sums of money in the hands of the Accountant General might be paid out of Court without any deduction on account of legacy duty. The facts stated were, that an Armenian merchant, who died at Madras, had by his will left a considerable sum of money, with directions that it should be laid out in Indian securities for certain charitable purposes therein specified, not prohibited by law: the residue of his property he directed to be transmitted to England, and invested in English securities, in order to meet demands on account of legacies bequeathed to persons there. The executors at Madras, instead of investing the charity money according to the directions of the testator, remitted the whole produce of the estate to England; and a question now arose whether there had been such an appropriation of the money intended for charitable purposes, as would justify the Crown in foregoing its claim to the duty chargeable on legacies.

Sir William Horne and Mr. Koe contended, that there had been such distinct appropriation by the testator himself before the money left Madras, and that it made no difference whether the money came to England in one or separate sums.<sup>a</sup>

The *Attorney General* appeared for the Crown.

The *Lord Chancellor*, without hearing him, said, this was a case which, relating to the revenue, should be decided by the Court of Exchequer—a Court peculiarly adapted to such questions—and not by the Court of Chancery. His Lordship's opinion, however, was, that the money had become a mere legacy, and that there was no appropriation; but he recommended that the opinion of the Judges of the Court of Exchequer should be taken on the question, for the greater certainty.

*Cockburn v. Raphael*, Lincoln's Inn Sittings before Easter Term, 1835.

<sup>a</sup> See *Attorney General v. Forbes*, 2 Clark & Fin. 48, and the cases there cited.

## King's Bench Practice Court.

**EJECTMENT—JUDGMENT AGAINST THE CASUAL EJECTOR.—TENANT IN POSSESSION.—ADMINISTRATION.**

*The service of the declaration in ejectment, must be on the tenant in possession.*

Motion for judgment against the casual ejector. The affidavit on which the motion was founded, stated the service to have been on the administratrix of the late tenant, who did not reside on the premises.

The Court was of opinion, that the affidavit must either shew that the interest taken in the premises by the tenant was a chattel interest, or that the administratrix of the last tenant was the tenant in possession.

Rule refused.—*Doe d. Grant v. Roe*, T. T. 1835. K. B. P. C.

**JUDGMENT AS IN CASE OF A NONSUIT.—NOTICE OF TRIAL.—COUNTERMAND OF NOTICE.**

*By countermanding notice of trial in due time, the plaintiff cannot deprive the defendant of his right to judgment as in case of a nonsuit.*

A rule nisi had in this case been obtained for judgment as in case of a nonsuit.

On shewing cause against this rule, the affidavit stated that notice of trial had been duly countermanded.

The Court said, that the only advantage accruing to the plaintiff in countermanding the notice of trial was, that of saving himself the payment of the costs of the day. The defendant, therefore, is entitled to judgment as in case of a nonsuit.

This rule was subsequently discharged on the plaintiff giving a peremptory undertaking.—*Wilkinson v. Fry*, T. T. 1835. K. B. P. C.

**INSOLVENT PLAINTIFF.—JUDGMENT AS IN CASE OF A NONSUIT.—PEREMPTORY UNDERTAKING.**

*If a plaintiff becomes insolvent after commencing an action, he will still be liable to judgment as in case of a nonsuit being obtained against him.*

In this case a rule nisi had been obtained for judgment as in case of a nonsuit.

On shewing cause against this rule, it was submitted, that the plaintiff having become insolvent since the commencement of the action, was a sufficient answer to the application.

The Court was of opinion, that the defendant ought to have the present rule made absolute, or a peremptory undertaking from the plaintiff.

The plaintiff gave a peremptory undertaking, and the rule was accordingly discharged.—*Frodsham v. Rust*, T. T. 1835. K. B. P. C.

**MANDAMUS.—CHURCHWARDEN.—DEAN.—RULE ABSOLUTE IN THE FIRST INSTANCE.**

*If a mandamus to swear in a churchwarden, determines no question of title, the rule for it is absolute in the first instance.*

This was an application for a rule for a mandamus to compel the dean of the parish of Topsham to swear in the applicant as churchwarden, he having been duly appointed. The question was, whether the rule should be absolute or nisi in the first instance.

The Court granted a rule absolute in the first instance.

Rule absolute.—*Ex parte Lowe*, T. T. 1835. K. B. P. C.

## Exchequer of Pleas.

**ENTERING AFFIDAVITS.—STET PROCESSUS.—JUDGMENT AS IN CASE OF A NONSUIT.**

*What is an insufficient entitling of an affidavit.*

A rule nisi had in this case been obtained for entering a *stet processus*, or for discharging the peremptory undertaking which the plaintiff had given, on the ground of the debt and costs having been paid to the plaintiff.

Cause was shewn against this rule.

It was then submitted on the part of the attorney, that he was at liberty to proceed with the action for the recovery of his costs, the suit having been settled between the plaintiff and defendant without his knowledge.

The Court thought, that it had no authority to compel the plaintiff to enter a *stet processus*. The plaintiff was justified in accepting the debt and costs. That being the case the peremptory undertaking must be discharged.

The affidavit was then objected to on which it was intended to shew cause. The name of the cause was *George Shrimpton v. William Carter*, but the affidavit was entitled *G. Shrimpton v. Wm. Carter*.

The Court said, this affidavit was clearly insufficient.

Rule absolute for the discharge of the peremptory undertaking.—*Shrimpton v. Carter*, E. T. 1835. Exchequer.

**PROMISSORY NOTE.—CONSIDERATION.—PLEADING.—ONUS OF PROOF.**

*On whom the onus of proof of consideration lies, where there is a plea of no consideration.*

This was an application to the Court for a new trial. The action, which was on a promissory note for 10l., was tried before the secondary. Plea that no consideration had passed. Replication that consideration had been given. A verdict had been given for the plaintiff. The only evidence, at the trial, for the plaintiff was, the production of the note. On the part of the defendant a witness was called. The secondary told the jury, if they

believed the testimony of the witness so called, that it amounted to a defence. This, it was submitted, was not sufficient to entitle the plaintiff to a verdict, as nothing whatever had been elicited tending to impeach the testimony of the witness called on behalf of the defendant, and the *onus* of proving a consideration was on the plaintiff.

The Court thought, that the burthen of proving the want of consideration was on the defendant, and that with respect to the defendant's witness, it was impossible for it to judge in what manner he gave his evidence. The secondary acted quite right in leaving the jury to decide upon his testimony. Besides, the defendant's plea is not sufficiently precise. The rule now prayed therefore cannot be granted.

Rule refused. — *Lacey v. Forrester*, 1835. E. T. Exchequer.

ATTORNEY AND CLIENT.—SETTLEMENT OF ACTION.—PROCEEDING FOR COSTS.

*Under certain circumstances the parties may settle the action without reference to their attorney.*

Cause was shown against a rule *nisi* which had been obtained in this case, for staying all further proceedings and for compelling the attorney to pay all costs incurred since the 24th March, he having on that day been served with notice of the settlement of the action, and the plaintiff agreeing to pay his own costs. It appeared from the affidavits that the action had been brought for the recovery of 14*l.* 15*s.* 2*d.* The plaintiff's attorney had made a proposal to the defendant's attorney to settle the action by deducting 6*l.* off his claim, provided the defendant would pay the balance then remaining and costs incurred. This proposal however was rejected by the defendant's attorney. Subsequently the parties had settled the action unknown to the plaintiff's attorney, who now proceeded for the purpose of recovering his costs. This, it was submitted, he was justified in doing for his own security.

The Court was of opinion that parties had a right to settle actions if they thought proper, without consulting their attorneys, or even making them acquainted with their intention of so doing. In order to obtain such a rule as the one now sought, it should be shewn beyond a doubt that there was an intention of the parties to defraud the attorney of his costs. In the absence of such proof the present rule must be made absolute.

Rule absolute. — *Jordan v. Hunt*, E. T. 1835. Excheq.

ARBITRATOR.—AWARD.—EXAMINING WITNESSES.—REVOKING ARBITRATION.—SETTING ASIDE AWARD.

*An arbitrator's award may be set aside if he refuses to examine the plaintiff's witnesses.*

This was an action brought to recover the

value of a certain carriage, which had been built under a written agreement by the defendant for the plaintiff. When the case came on for trial it was referred by an order of *nisi prius* to a coachmaker. The defence was, that the carriage was not built according to agreement. At the meeting of the parties, the arbitrator had refused to examine the plaintiff's witnesses, although the plaintiff had requested him so to do, but after examining the carriage and hearing the witnesses for the defence, published his award in favour of the defendant.

An application was now made to the Court for a rule *nisi*, under the 3 & 4 W. 4, c. 42, s. 39, for revoking the authority of the arbitrator.

The Court said it could not grant such a rule as the one prayed, but granted a rule *nisi* to set aside the award.

Cause was accordingly shewn, when

The Court said that the arbitrator ought to have examined the plaintiff's witnesses. The present rule must therefore be absolute.

Rule absolute. — *Phipps v. Ingram*, E. T. 1835. Excheq.

TAXATION OF COSTS.—ATTACHMENT.—COSTS OF TAXATION.—LACHES.

*Applications with respect to a Judge's order for giving the client the costs of taxation, should be made early.*

Cause was shewn against a rule *nisi*, which had in this case been obtained for setting aside a Judge's order directing the payment of the plaintiff's attorney's costs of taxation, although more than one-sixth had been taxed off. It was submitted that an application in the present term was too late, the order having been made on the 6th April. Besides, it had since been made a rule of court, and an attachment had issued on it for disobedience.

The Court said that the application should have been made earlier, in order to prevent the parties incurring expences, which it appeared had been the case in the present instance. The present rule must therefore be discharged, and with costs.

Rule discharged, with costs. — *Thompson v. Carter*, E. T. 1835. Excheq.

JUDGMENT AS IN CASE OF A NONSUIT.—SERVICE OF RULE.—PLAINTIFF'S RESIDENCE.

*What efforts are necessary before a rule can be served by sticking it up in the office.*

This was an application to the Court to enlarge a rule for judgment as in case of a nonsuit, and that sticking up the rule in the office might be considered good service. The affidavit on which the motion was founded stated, that the defendant had been unable to serve it, and that the plaintiff's attorney had left his late place of abode, and that it was not known where he was gone.

The Court said that the affidavit was insufficient, as it must also shew that the plaintiff's residence is unknown.

Rule refused. — *Wright v. Gardiner*, E. T. 1835. Excheq.

**DECLARATION.—JOINT DEFENDANTS.—IRREGULARITY.—JOINT WRIT.—SEPERATE DECLARATION.**

*If a defendant seek to set aside a separate declaration on the ground of the writ being joint, he must wait until the plaintiff has declared against all the defendants.*

In this case an application was made under the rule 1 of M. T. 3 W. 4, to set aside a declaration against the defendant, for irregularity. The writ had been issued against the defendant and another person jointly. It was therefore contended that it was irregular to declare against the defendant separately.

The Court thought the objection premature, and said that the plaintiff's proceedings could not be considered irregular until he had declared against the other defendant.

Rule refused.—*Coldwell v. Blake*, E. T. 1835. Excheq.

**JUDGMENT AS IN CASE OF A NONSUIT.—PREMATURE APPLICATION.**

*When an application for judgment as in case of nonsuit is too early.*

In this case a rule nisi had been obtained for judgment as in case of a nonsuit. The facts, as they appeared by the affidavit on which the rule was obtained, were these. Issue was joined on the 10th April. A judge's order had been obtained to try the cause before the under-sheriff, and the plaintiff had given notice for the 23rd April.

On shewing cause against this rule, it was contended that a motion for judgment as in case of a nonsuit in the same term in which the default had been made, as was the case in the present instance, was premature.

In support of the rule it was submitted that the defendant was not too early; for although notice of trial had been given in term, issue was joined before the term. The present rule must therefore be made absolute.

The Court said, that by the established practice of the Court, this motion could not be entertained until next term. The defendant suffers no hardship, for he gets his costs by the default. The present rule must therefore be discharged.

Rule discharged.—*Lenney v. Poulter*, E. T. 1835. Exchequer.

**SMALL DEBTOR.—ATTACHMENT.—JUDGMENT.—EXECUTION.—DEFENDANT'S DISCHARGE.**

*An attachment is not within the Small Debtor's act.*

This was an application to the Court by the plaintiff in person, to be discharged out of custody under the 48 Geo. 3. c. 123, on the ground of his having been in custody more than twelve months, on an attachment which issued for disobedience to an order of the Court of Chancery, which directed the payment of costs under 20*l*. An attachment for payment of costs was, he submitted, the same

as a judgment, and consequently within the meaning of the above act.

The Court said, that an application like the present ought to be made to the Court out of which the attachment issued. It has however been decided, that that act does not apply to the case of an attachment.

Rule refused.—*Pitt v. Evans*, E. T. 1835. Excheq.

## SITTINGS IN CHANCERY, After Trinity Term, 1835.

### BEFORE THE LORDS COMMISSIONERS.

		<i>Ex parte Chambers.—</i>
Monday .	June 22	2 bankrupt petitions,
Tuesday .	23	by order. <i>Bodenham</i>
Wednesday .	24	<i>v. Ricketts</i> , motion
Thursday .	25	by order. <i>Richards</i>
		<i>v. Wood</i> , appl. by order.
Saturday .	27	Appeal Motions by
Monday .	29	Date, and Appeals.
Saturday .	July 4	Appeal Motions by
Monday .	6	Date, and Appeals.
Saturday .	11	Appeal Motions by
Monday .	13	Date, and Appeals.
Saturday .	18	Appeal Motions by
Monday .	20	Date, and Appeals.
		Appeal Motions, Lunatic
		Petitions, Bankrupt
		Petitions, Appeal Cause
		Petitions, and Appeals. On
Saturday .	25	these three days the
Monday .	27	Vice Chancellor will
Tuesday .	28	sit as Lord Commissioner;
		after those three days the
		Master of the Rolls will
		sit as Lord Commissioner.

The Court will not sit after the 13th of August.

### BEFORE THE VICE CHANCELLOR.

Friday .	June 26	The First Seal.
Saturday .	27	
Monday .	29	Pleas, Demurrers, Ex-
Tuesday .	30	ceptions, Causes, and
Wednesday .	July 1	Further Directions.
Thursday .	2	
Friday .	3	The Second Seal.
Saturday .	4	
Monday .	6	Pleas, Demurrers, Ex-
Tuesday .	7	ceptions, Causes, and
Wednesday .	8	Further Directions.
Thursday .	9	
Friday .	10	The Third Seal.
Saturday .	11	
Monday .	13	Pleas, Demurrers, Ex-
Tuesday .	14	ceptions, Causes, and
Wednesday .	15	Further Directions.
Thursday .	16	

Friday	July 17	The Fourth Seal.
Saturday	18	
Monday	20	Pleas, Demurrers, Exceptions, Causes, and Further Directions.
Tuesday	21	
Wednesday	22	
Thursday	23	
Friday	24	The Fifth Seal.
Saturday	25	Petition-day.

Such days as his Honor the Vice Chancellor sits as Lord Commissioner, are excepted.

The Court will not sit after the 13th of August.

THE MASTER OF THE ROLLS.

Friday	June 26	Motions.
Saturday	27	
Monday	29	Pleas, Demurrers, Causes, Further Directions, and Exceptions.
Tuesday	30	
Wednesday	July 1	
Thursday	2	
Friday	3	Motions.
Saturday	4	
Monday	6	Pleas, Demurrers, Causes, Further Directions, and Exceptions.
Tuesday	7	
Wednesday	8	
Thursday	9	
Friday	10	Motions.
		Pleas, Demurrers, and Further Directions, until the Further Directions set down on or before the 11th of July are disposed of, and then Causes and Exceptions.
Saturday	11	
Monday	13	
Tuesday	14	
Wednesday	15	
Thursday	16	
Friday	17	Motions.
		Pleas, Demurrers, and Further Directions, until the Further Directions set down on or before the 11th of July are disposed of, and then Causes and Exceptions.
Saturday	18	
Monday	20	
Tuesday	21	
Wednesday	22	
Thursday	23	
Friday	24	Motions.
Saturday	25	Petitions.
Monday	27	Short Causes.

Causes, Further Directions, and Petitions by Consent, every Friday, at the Sitting of the Court.

Friday	July 31	His Honor will sit on each of these days at 9 o'clock to hear Causes, Further Directions, & Petitions by Consent.
Friday	August 7	
Thursday	13	

EQUITY EXCHEQUER SITTINGS,

After Trinity Term, 1835.

Friday	June 19	Petitions and Motions.—Lord Abinger.
Friday	26	Further Directions, Exceptions, Pleas, and Demurrers.—Lord Abinger.

Saturday	27	Petitions and Motions.—Lord Abinger.
Monday	29	Causes.—Mr. B. Alderson.
Tuesday	30	
Wednesday	July 1	Becher v. Clay.—Mr. B. Alderson.
Thursday	2	
Friday	3	Further Directions, Exceptions, Pleas, and Demurrers.—Lord Abinger.
Saturday	4	Petitions and Motions.—Lord Abinger.
Friday	10	Attorney General v. Sitwell, appointed for 11th July.—Mr. B. Alderson.
Saturday	11	
Monday	13	Causes.—Mr. B. Alderson.
Tuesday	14	
Wednesday	15	Further Directions, Exceptions, Pleas, and Demurrers.—Lord Abinger.
Thursday	16	Petitions and Motions.—Lord Abinger.

COMMON PLEAS.

Adjournment Day, in London, Wednes. July 1.

NOTES OF THE WEEK.

HOUSE OF LORDS.

Bills for second Reading.

Title of the Bill. Proposer.

Residence of Clergy. Lord Brougham.

Pluralities Prevention. Lord Brougham.

Ecclesiastical Jurisdiction. Lord Brougham.

Illegal Securities.

In Select Committee.

Highways.

Law of Patents. Lord Brougham.

Wills Execution.

Executors.

Third Reading.

Legitimacy of Children. Lord Lyndhurst.

Annual Indemnity.

Passed.

Dissenters' Marriages.

HOUSE OF COMMONS.

Bills to be brought in.

Law of Tenure. Attorney General.

Law of Escheat. Attorney General.

Poor Law Amendment. Mr. Trevor.

Registration of Births, &c. Mr. Wilks.

Tithes Commutation. Sir R. Peel, Bart.

Second Reading.

Law of Libel. Mr. O'Connell.

Bankruptcy Funds. Master of the Rolls.

Ecclesiastical Courts. Sir F. Pollock.

Clergy Discipline. Sir F. Pollock.

Infants' Property (Ireland).  
 Contempts in Equity (Ireland).  
 Parish Vestries.  
 Marriage Act Amendment.  
 Expenses at Elections.

*In Committee.*

Municipal Corporations. Lord J. Russell.  
 Copyholds Enfranchisement. Attorney General.  
 Registration of Voters. Lord J. Russell.  
 County Coroners. Mr. Cripps.  
 Durham Court of Pleas.  
 Offences against Person.

*Consideration of Report.*

Abolishing Imprisonment for Debt, &c. Attorney General.  
 8th July.  
 Limitation of Polls.

*Third Reading.*

Loan Societies.  
 Prisoners' Defence. Mr. Ewart.

*Passed.*

Capital Punishments.

**ELECTION EXPENSES.**

The 21st section of this Bill imposes a penalty of 50*l.* on any counsel, agent, or attorney, who having accepted any fee in consideration of his employment, shall vote at the election.

**CONTESTED ELECTIONS.**

The amendments in this Bill are as follow:—

The number of polling places increased.  
 Not more than four hundred voters to poll at one booth.

**MARRIAGES LEGALLIZING.**

The following are the amendments in this Bill:—

The marriages of persons within the prohibited degrees, which have been celebrated more than *two years*, are not to be annulled, provided the parties are within ecclesiastical jurisdiction, and if not, the time is extended to one year from their coming within the jurisdiction.

**PRESERVATION OF THE PUBLIC RECORDS.**

We are quite sure that whoever takes the trouble to read the unquestionable state of facts regarding the public records of this kingdom, as given at p. 183, will be of opinion that any longer delay of a remedy for the flagrant evil there set forth, will be the most disgraceful thing to any government that can be conceived, in the performance of its most ordinary domestic duties in a civilized state of society.

**CIRCUITS OF THE JUDGES.**

*England and Wales.*

SUMMER CIRCUITS. 1886.	OXFORD.	NORTHERN.	HOME.	MIDLAND.	NORFOLK.	N. WALES.	S. WALES.	WESTERN.
	LCJ. Denman J. Williams.	LCJ. Tindal L.C. B. Abinger	J. Park. J. Littledale	J. Gaselee. J. Vaughan.	B. Parke. B. Bolland.	J. Bonanquet	J. Paterson.	B. Gurney. J. Coleridge
Tues. July 14	-	-	-	Northamp- [ten]	Bucking- ham	-	Cardiff	Winchester
Wednesday 15	-	-	Hertford	-	-	-	-	-
Thursday 16	Abingdon	-	-	Oakham	-	-	-	-
Friday 17	-	-	-	Lincoln and [city]	Bedford	-	-	-
Saturday 18	Oxford	York & city	Chelmsford	-	-	-	Carmarthen [& borough]	Dorchester
Monday 20	-	-	-	-	Huntingdon	Welch Pool	-	-
Tuesday 21	-	-	-	-	-	-	-	-
Wednesday 22	-	-	-	-	-	-	-	-
Thursday 23	Worcester & [city]	-	-	Nottingham [and town]	Cambridge	-	-	-
Friday 24	-	-	-	-	-	-	-	-
Saturday 25	-	-	-	-	-	-	-	-
Monday 27	-	-	Maldstone	Derby	-	-	Haverford- [west & town]	Exeter & [city]
Tuesday 28	Stafford	-	-	-	Bury St. Ed.	Dolgelly	-	-
Wednesday 29	-	Durham	-	-	-	-	-	-
Thursday 30	-	-	-	Leicester & [B.]	Carnarvon	-	-	-
Satur. Aug. 1	-	Newcastle	Lewes	Coyentry & [Warwick]	Norwich & [city]	Beaumaris	Cardigan	Bodmain
Monday Aug. 3	Shrewsbury	- [ & town	-	-	-	-	-	-
Wednesday 5	-	Carlisle	-	-	-	-	-	-
Thursday 6	-	-	Croydon	-	-	-	-	-
Friday 7	-	-	-	-	-	Ruthin	-	-
Saturday 8	Hereford	Appleby	-	-	-	-	Brecon	Bridgewater
Wednesday 12	Monmouth	Lancaster	-	-	-	-	Presteign	-
Thursday 13	-	-	-	-	-	Mold	-	-
Saturday 15	Gloucester	Liverpool	-	-	-	Chester	Chester	Devizes
Thursday 20	- [ & city	-	-	-	-	-	-	Bristol

# The Legal Observer.

Vol. X.

**SUPPLEMENT  
FOR JUNE, 1835.**

No. CCLXXVII.

—“Quod magis ad nos  
Pertinet, et nescire malum est, agitamus.”  
HORAT.

## LEGAL BIOGRAPHY.

### No. IX.

#### LORD ERSKINE.

In collecting the materials for this department of our work, from the long line of eminent lawyers of past times, we must unavoidably select many names that are well known to our readers. It is our object, however, to give a complete series of Biographical Sketches—to collect all the important incidents, facts, and material dates connected with each distinguished individual—to select such particulars as cannot fail to be interesting, and especially to dwell on whatever is honorable to the profession, or calculated to benefit our brethren.

In proceeding to narrate the leading events in the life of the celebrated individual whose name stands at the head of this paper, we shall be as brief as possible, and select such passages only as come within the limits to which we have adverted.

The Honorable Thomas Erskine was born in Scotland in 1750. He was the third son of the Earl of Buchan. He entered the navy at an early age. At eighteen he left that service for the army, and went with his regiment to Minorca, where he continued till 1772, when he returned to England, and resided in London. He soon became acquainted with most of the eminent literary men of the time.

A few years afterwards, Mr. Erskine entered as a student at Lincoln's Inn. He became also a fellow commoner of Trinity College, Cambridge, where, as the son of a nobleman, he was enabled to take a degree, and thus save two years of probation at

NO. CCLXXVII.

Lincoln's Inn. It appears that he did not seek the usual honors of the University, but immediately commenced his study of the law in the chambers of Mr. Buller, then an eminent special pleader, afterwards a judge. He also was a pupil of Mr. Wood; and was called to the Bar in Trinity term, 1778, being then in his 28th year. It appears, that during the period of keeping terms for the bar, he applied with much diligence to the study of the law, without which no genius, however splendid, can have the most remote chance of eminent success at the bar.

In the term next immediately after his call to the bar, Mr. Erskine was engaged as one of the counsel for Captain Baillie, late the Lieutenant-Governor of Greenwich Hospital, in shewing cause against a rule for a criminal information for a libel. On this occasion, from one of the back benches of the Court of King's Bench, Mr. Erskine made his maiden speech, by which he instantly acquired his reputation for the first order of forensic eloquence. From this celebrated harangue, we extract only the closing passage:

“I do most earnestly entreat the Court to mark the malignant object of this prosecution, and to defeat it:—I beseech you, my Lords, to consider, that even by discharging the rule, and with costs, the defendant is neither protected nor restored. I trust, therefore, your Lordships will not rest satisfied with fulfilling your JUDICIAL duty, but, as the strongest evidence of foul abuses has, by accident, come collaterally before you, that you will protect a brave and public spirited officer from the persecution this writing has brought upon him, and not suffer so dreadful an example to go abroad into the world, as the ruin of an upright man for having faithfully discharged his duty.

M



"My Lords, this matter is of the last importance. I speak not as an ADVOCATE alone, I speak to you AS A MAN—as a member of a state, whose very existence depends upon her NAVAL STRENGTH. If a misgovernment were to fall upon Chelsea Hospital, to the ruin and discouragement of our army, it would be no doubt to be lamented; yet I should not think it fatal: but if our fleets are to be crippled by the baneful influence of elections, WE ARE LOST INDEED! If the seaman, who, while he exposes his body to fatigues and dangers—looking forward to Greenwich as an asylum for infirmity and old age—sees the gates of it blocked up by corruption, and hears the riot and mirth of luxurious landmen, drowning the groans and complaints of the wounded, helpless companions of his glory,—he will tempt the seas no more. The Admiralty may press HIS BODY, indeed, at the expense of humanity and the constitution; but they cannot press *his mind*—they cannot press the heroic ardour of a British sailor; and, instead of a fleet to carry terror all round the globe, the Admiralty may not much longer be able to amuse us with even the peaceable unsubstantial pageant of a review.

"FINE AND IMPRISONMENT!—The man deserves a PALACE, instead of a PRISON, who prevents the palace, built by the public bounty of his country, from being converted into a dungeon, and who sacrifices his own security to the interests of humanity and virtue."

In 1779, Mr. Erskine was retained as one of the counsel for Admiral Keppel; and in the same year he was employed by Mr. Carnan, a bookseller, to resist, at the bar of the House of Commons, a bill for re-vesting the monopoly of printing almanacs by the Universities and the Stationers' Company, after the Court of Exchequer had decided against them. Although the measure was supported by the minister of the day, and by the university members and their friends, the bill was rejected by a majority of 45 votes.

These distinguished efforts of Mr. Erskine were, made before the higher order of tribunals—the Judges of Westminster Hall and the House of Commons. His next eminent display took place on the trial of Lord George Gordon for high treason, when he had an opportunity of addressing a jury. This occurred in Feb. 1781. We must limit ourselves to the following example of his peculiar powers:

"What, then, has produced this trial for high treason; or given it, when produced, the seriousness and solemnity it wears?—What, but the inversion of all justice, by judging from *consequences*, instead of from *causes* and *designs*?—What, but the artful manner in which the Crown has endeavoured to blend the petitioning in a body, and the zeal with which an animated disposition conducted it,

with the melancholy crimes that followed?—crimes, which the shameful indolence of our magistrates,—which the total extinction of all police and government suffered to be committed in broad day, and in the delirium of drunkenness, by an unarmed handitti—without a head—without plan or object—and without a refuge from the instant gripe of justice;—a banditti, with whom the associated Protestants and their president had no manner of connexion, and whose cause they overturned, dishonoured, and ruined.

"How unchristian then is it to attempt, without evidence, to infect the imaginations of men who are sworn dispassionately and disinterestedly to try the trivial offence of assembling a multitude with a petition to repeal a law (which has happened so often in all our memories), by blending it with the fatal catastrophe, on which every man's mind may be supposed to retain some degree of irritation?—*O fie! O fie!* Is the intellectual seat of justice to be thus impiously shaken? Are your benevolent propensities to be thus disappointed and abused? Do they wish you, while you are listening to the evidence, to connect it with unforeseen consequences, in spite of reason and truth? Is it their object to hang the millstone of prejudice around his innocent neck to sink him? If there be such men, may Heaven forgive them for the attempt, and inspire you with fortitude and wisdom to discharge your duty with calm, steady, and reflecting minds."

"Gentlemen, I have no manner of doubt that you will—I am sure you cannot but see, notwithstanding my great inability, increased by a perturbation of mind (arising, thank God! from no dishonest cause), that there has been not only no evidence on the part of the Crown to fix the guilt of the late commotions upon the prisoner, but that, on the contrary, we have been able to resist the *probability*—I might almost say the *possibility*—of the charge, not only by living witnesses, whom we only ceased to call, because the trial would never have ended, but by the evidence of all the blood that has paid the forfeit of that guilt already;—an evidence that, I will take upon me to say, is the strongest, and most unanswerable, which the combination of natural events ever brought together since the beginning of the world for the deliverance of the oppressed:—since, in the late numerous trials for acts of violence and depredation, though conducted by the ablest servants of the Crown, with a laudable eye to the investigation of the subject which now engages us, no one fact appeared which showed any plan, any object, any leader;—since, out of forty-four thousand persons who signed the petition of the Protestants, *not one* was to be found among those who were convicted, tried, or even apprehended on suspicion;—and since, out of all the felons who were let loose from prisons, and who assisted in the destruction of our property, not a single wretch was to be found, who could even attempt to save his own life by the plausible promise of giving evidence to-day.

"What can overturn such a proof as this? Surely a good man might, without superstition, believe that such an union of events was something more than natural, and that the Divine Providence was watchful for the protection of innocence and truth.

"I may now, therefore, relieve you from the pain of hearing me any longer, and be myself relieved from speaking on a subject which agitates and distresses me. Since Lord George Gordon stands clear of every hostile act or purpose against the legislature of his country, or the properties of his fellow-subjects,—since the whole tenour of his conduct repels the belief of the *traitorous intention* charged by the indictment,—my task is finished. I shall make no address to your passions—I will not remind you of the long and rigorous imprisonment he has suffered—I will not speak to you of his great youth, of his illustrious birth, and of his uniformly animated and generous zeal in parliament for the constitution of his country. Such topics might be useful in the balance of a doubtful case; yet, even then, I should have trusted to the honest hearts of Englishmen to have felt them without excitation. At present, the plain and rigid rules of justice and truth are sufficient to entitle me to your verdict."

After this period, his general practice as an advocate rapidly increased; and in 1783, when he had been only five years at the bar, he received a patent of precedence. In 1784, he defended the Bishop of St. Asaph, on an indictment for a libel.

We pass over, as beside our immediate purpose, the circumstances relating to Mr. Erskine's introduction to political life. He took his seat as member for Portsmouth. Prior to 1788, Mr. Erskine had been appointed Attorney General to the Prince of Wales; and during the King's illness, in that year, it was intended, if the Whigs had come into office, to promote Mr. Erskine to the rank of Attorney General for the King; but his Majesty's recovery put an end to the arrangement.

In 1789, he delivered his celebrated speech in defence of Stockdale, for libel, from which we extract the following:

"Gentlemen, before I venture to lay the book before you, it must be yet further remembered (for the fact is equally notorious), that, under these inauspicious circumstances, the trial of Mr. Hastings at the bar of the Lords had actually commenced long before its publication. There, the most august and striking spectacle was daily exhibited, which the world ever witnessed. A vast stage of justice was erected, awful from its high authority, splendid from its illustrious dignity, venerable from the learning and wisdom of its Judges, captivating and affecting from the mighty concourse of all ranks and conditions which daily flocked into it, as into a theatre of

pleasure;—there, when the whole public mind was at once awed and softened to the impression of every human affection, there appeared, day after day, one after another, men of the most powerful and exalted talents, eclipsing by their accusing eloquence the most boasted harangues of antiquity,—rousing the pride of national resentment by the boldest invectives against broken faith and violated treaties,—and shaking the bosom with alternate pity and horror by the most glowing pictures of insulted nature and humanity;—ever animated and energetic, from the love of fame, which is the inherent passion of genius;—firm and indefatigable, from a strong prepossession of the justice of their cause.

"Gentlemen, when the author sat down to write the book now before you, all this terrible, unceasing, exhaustless artillery of warm zeal, matchless vigour of understanding, consuming and devouring eloquence, united with the highest dignity, was daily, and without prospect of conclusion, pouring forth upon one private unprotected man, who was bound to hear it, in the face of the whole people of England, with reverential submission and silence. I do not complain of this, as I did of the publication of the Charges, because it is what the law allowed and sanctioned in the course of a public trial: but when it is remembered that we are not angels, but weak, fallible men, and that even the noble Judges of that high tribunal are clothed beneath their ermines with the common infirmities of man's nature; it will bring us all to a proper temper for considering the book itself, which will in a few moments be laid before you. But first, let me once more remind you, that it was under all these circumstances, and amidst the blaze of passion and prejudice, which the scene I have been endeavouring faintly to describe to you might be supposed likely to produce, that the author, whose name I will now give to you, sat down to compose the book which is prosecuted to-day as a libel.

"He felt for the situation of a fellow-citizen, exposed to a trial which, whether right or wrong, is undoubtedly a severe one;—a trial, certainly not confined to a few criminal acts like those we are accustomed to, but comprehending the transactions of a whole life, and the complicated policies of numerous and distant nations;—a trial, which had neither visible limits to its duration, bounds to its expense, nor circumscribed compass for the grasp of memory or understanding;—a trial, which had therefore broke loose from the common form of decision, and had become the universal topic of discussion in the world, superseding not only every other grave pursuit, but every fashionable dissipation.

"Gentlemen, the question you have therefore to try upon all this matter is extremely simple. It is neither more nor less than this: At a time when the charges against Mr. Hastings were, by the implied consent of the Commons, in every hand, and on every table;—when, by their managers, the lightning of eloquence was incessantly consuming him, and

flashing in the eyes of the public ;—when every man was with perfect impunity saying, and writing, and publishing just what he pleased of the supposed plunderer and devastator of nations—would it have been criminal in *Mr. Hastings himself* to have reminded the public that he was a native of this free land, entitled to the common protection of her justice, and that he had a defence in his turn to offer to them, the outlines of which he implored them in the mean time to receive, as an antidote to the unlimited and unpunished poison in circulation against him ?—THIS IS, without colour or exaggeration, the true question you are to decide. Because I assert, without the hazard of contradiction, that if *Mr. Hastings himself* could have stood justified or excused in your eyes for publishing this volume in his own defence, the author, if he wrote it *bona fide* to defend him, must stand equally excused and justified ; and if the author be justified, the publisher cannot be criminal, unless you had evidence that it was published by him with a different spirit and intention from those in which it was written. The question therefore is correctly what I just now stated it to be : Could *Mr. Hastings* have been condemned to infamy for writing this book ?

"Gentlemen, I tremble with indignation, to be driven to put such a question in England. Shall it be endured, that a subject of this country (instead of being arraigned and tried for some single act, in her ordinary courts, where the accusation, as soon at least as it is made public, is followed within a few hours by the decision) may be impeached by the Commons for the transactions of twenty years,—that the accusation shall spread as wide as the region of letters,—that the accused shall stand, day after day, and year after year, as a spectacle before the public, which shall be kept in a perpetual state of inflammation against him ; yet that he shall not, without the severest penalties, be permitted to submit any thing to the judgment of mankind in his defence ? If this be law (which it is for you to-day to decide), such a man has NO TRIAL ;—that great hall, built by our fathers for English justice, is no longer a court, but an altar ; and an Englishman, instead of being judged in it by GOD AND HIS COUNTRY, IS A VICTIM AND A SACRIFICE."

The result of this speech was the acquittal of the defendant. He also, with nearly equal eloquence, and with the same skill and success, defended Mr. Perry, the editor of the *Morning Chronicle*.

Subsequently to this period (1789), Mr. Erskine spoke on several important questions in Parliament,—particularly on the Abatement of Impeachments by a Dissolution—the Appointment of a Minister to treat with the Executive Government of France—the Traitorous Correspondence Bill—and Parliamentary Reform. In 1792, Mr. Erskine was retained to defend Thomas Paine

for publishing his *Rights of Man*. It was attempted to deter him from the performance of his duty, and he was severely censured for undertaking the defence. He repelled the attack in the following memorable manner : "I will," said he, "for ever, at all hazards, assert the dignity, independence, and integrity of the English Bar—without which, impartial justice, the most valuable part of the British Constitution, can have no existence. From the moment that any advocate can be permitted to say that he will or will not stand between the Crown and the subject, arraigned in the Court where he daily sits to practise, from that moment the liberties of England are at an end. If the advocate refuses to defend, from what he may think of the charge or of the defence, he assumes the character of the Judge ; nay he assumes it before the hour of judgment, and in proportion to his rank and reputation puts the heavy influence of perhaps a mistaken opinion into the scale against the accused, in whose favor the benevolent principle of the English Law makes all favorable presumptions, and which commands the very Judge to be his counsel."

Mr. Erskine rested the defence of his client on the nature and extent of the liberty of the press.

"The proposition which I mean to maintain as the basis of the liberty of the press, and without which it is an empty sound, is this :—that every man not intending to mislead, but seeking to enlighten others with what his own reason and conscience, however erroneously, have dictated to him as truth, may address himself to the universal reason of a whole nation, either upon the subject of governments in general, or upon that of our own particular country ; that he may analyse the principles of its constitution, point out its errors and defects, examine and publish its corruptions, and warn his fellow-citizens against their ruinous consequences, and exert his whole faculties in pointing out the most advantageous changes in establishments which he considers to be radically defective, or aliding from their object by abuse. All this every subject of this country has a right to do, if he contemplates only what he thinks would be for its advantage, and but seeks to change the public mind by the conviction that flows from reasonings dictated by conscience.

"If, indeed, he writes what he does not think ; if, contemplating the misery of others, he wickedly condemns what his own understanding approves ; or, even admitting his real disgust against the government or its corruptions, if he calumniates living magistrates, or holds out to individuals that they have a right to run before the public mind in their conduct ; that they may oppose by contumacy or force

what private reason only disapproves; that they may disobey the law because their judgment only condemns it; or resist the public will, because they honestly wish to change it,—he is then a criminal upon every principle of rational policy, as well as upon the immemorial precedents of English justice; because such a person seeks to disunite individuals from their duty to the whole, and excites to overt acts of misconduct in a part of the community, instead of endeavouring to change, by the impulse of reason, that universal assent, which in this and every country constitutes the law for all.”

It appears that for advocating the cause of his client, although a verdict of guilty was found against him, Mr. Erskine was removed from his office of Attorney General to the Prince. The particulars of the transaction are related in a letter to Mr. Howell, the editor of the *State Trials*.

“When Attorney General to the Prince of Wales, I was retained by Thomas Paine in person to defend him on his approaching trial for publishing the second part of his ‘Rights of Man;’ but it was soon intimated to me by high authority, that it was considered to be incompatible with my situation, and the Prince himself in the most friendly manner acquainted me that it was highly displeasing to the King, and that I ought to endeavour to explain my conduct, which I immediately did in a letter to his Majesty himself, in which, after expressing my sincere attachment to his person and to the constitution of the kingdom, attacked in the work which was to be defended, I took the liberty to claim, as an invaluable part of that very constitution, the unquestionable right of the subject to make his defence by any counsel of his own free choice, if not previously retained, or engaged by office from the Crown; and that there was no other way of deciding whether that was or was not my own situation as Attorney General to the Prince, than by referring, according to custom, that question to the bar, which I was perfectly willing and even desirous to do. In a few days afterwards I received, through my friend the late Admiral Paine, a most gracious message from the Prince, expressing his deep regret in feeling himself obliged to receive my resignation, which was accordingly sent.”<sup>a</sup>

<sup>a</sup> Subsequently to this period we are informed by Mr. (then Lord) Erskine, “that his Royal Highness, of his own mere motion, sent for me to Carlton House, whilst he was still in bed under a severe illness, and, taking me most graciously by the hand, said to me, that though he was not at all qualified to judge of retainers, nor to appreciate the correctness or incorrectness of my conduct in the instance that had separated us, yet that, being convinced I had acted from the purest motives, he wished most publicly to manifest that opinion, and therefore directed me to go immediately to Somerset House, and to bring with me,

In 1793, Mr. Erskine defended Mr. John Frost, an attorney, against an indictment for seditious words uttered in a coffee-house in the excitement of an argument after dinner. This was an admirable, but unsuccessful speech. In October 1794, he made his famous and triumphant defence for Hardy, on a charge of High Treason; and subsequently, with the same result, for Horne Tooke.

In the years 1795, 1796, and 1797, he occasionally spoke in Parliament—principally on the Seditious Meetings Bill—on Mr. Reeves’ Libel on the British Constitution—the rupture of the Negotiation for Peace—and Parliamentary Reform. In the latter year, 1797, he was retained to prosecute Williams, the publisher of Paine’s *Age of Reason*. He performed his difficult task with his accustomed skill. The man was convicted, but before he was brought up for judgment Mr. Erskine returned his retainer, on the grounds stated in the following interesting letter to the editor of the *State Trials*:

“Having convicted Williams, as will appear by your report of his trial, and before he had notice to attend the Court to receive judgment, I happened to pass one day through the Old Turnstile, from Holborn, in my way to Lincoln’s Inn Fields, when in the narrowest part of it I felt something pulling me by the coat, when on turning round I saw a woman at my feet bathed in tears, and emaciated with disease and sorrow, who continued almost to drag me into a miserable hovel in the passage, where I found she was attending upon two or three unhappy children in the confluent small-pox, and in the same apartment, not above ten or twelve feet square, the wretched man whom I had convicted was sewing up little religious tracts, which had been his principal employment in his trade; and I was fully convinced that his poverty and not his will had led to the publication of this infamous book, as, without any kind of stipulation for mercy on my part, he voluntarily and eagerly engaged

for his execution, the patent of Chancellor to his Royal Highness, which he said he had always designed for me; adding, that owing to my being too young when his establishment was first fixed, he had declined having a Chancellor at that time; that during our separation he had been more than once asked to revive it, which he had refused to do, looking forward to this occasion; and I according held the revived office of Chancellor to the Prince of Wales until I was appointed Chancellor to the King, when I resigned it, in conformity with the only precedent in the records of the duchy of Cornwall, viz. that of Lord Bacon, who was Chancellor to Henry Prince of Wales, and whose resignation is there recorded, because of his acceptance of the Great Seal in the reign of King James the First.”

to find out all the copies in circulation, and to bring them to me to be destroyed.

"I was most deeply affected with what I had seen, and feeling the strongest impression that he offered a happy opportunity to the prosecutors of vindicating, and rendering universally popular, the cause in which they had succeeded, I wrote my opinion to that effect, observing (if I well remember), that mercy being the grand characteristic of the Christian religion, which had been defamed and insulted, it might be here exercised not only safely, but more usefully to the objects of the prosecution, than by the most severe judgment, which must be attended with the ruin of this helpless family.

"My advice was most respectfully received by the society, and I have no doubt honestly rejected, because that most excellent prelate Bishop Porteus, and many other honourable persons, concurred in rejecting it; but I had still a duty of my own to perform, considering myself not as counsel for the society, but for the Crown. If I had been engaged for all or any of the individuals composing it, prosecuting by indictment for any personal injury punishable by indictment, and had convicted a defendant, I must have implicitly followed my instructions, however inconsistent with my own ideas of humanity or moderation; because every man who is injured has a clear right to demand the highest penalty which the law will inflict; but in the present instance I was in fact not retained at all, but responsible to the Crown for my conduct. Such a voluntary society, however respectable or useful, having received no injury, could not erect itself into a *custos morum*, and claim a right to dictate to counsel who had consented to be employed on the part of the King for the ends of justice only."

We pass from the last date to the year 1800, when Mr. Erskine was appointed counsel for Hadfield, on his trial for shooting at the King in Drury Lane Theatre. On that occasion Mr. Erskine's exordium is well worthy of notice.

"The scene which we are engaged in, and the duty which I am not merely *privileged*, but *appointed* by the authority of the Court to perform, exhibits to the whole civilized world a perpetual monument of our national justice.

"The transaction, indeed, in every part of it, as it stands recorded in the evidence already before us, places our country, and its government, and its inhabitants, upon the highest pinnacle of human elevation. It appears, that upon the 15th day of May last, his Majesty, after a reign of forty years, not merely in sovereign *power*, but spontaneously in the very hearts of his people, was openly shot at (or to all appearance shot at) in a public theatre in the centre of his capital, and amidst the loyal plaudits of his subjects, YET NOT A HAIR OF THE HEAD OF THE SUPPOSED ASSASSIN WAS TOUCHED. In this unparalleled scene of calm forbearance, the King himself, though he stood first in personal interest and feeling, as well as in command, was a singular and fortunate

example.—The least appearance of emotion on the part of that august personage, must unavoidably have produced a scene quite different, and far less honourable than the Court is now witnessing; but his Majesty remained unmoved, and the person *apparently* offending was only secured, without injury or reproach, for the business of this day."

His remarks on the peculiar character of the prisoner's insanity, which constituted the only strong ground of defence, are admirable:

"*Delusion*, therefore, where there is no frenzy or raving madness, is the true character of insanity; and where it cannot be predicated of a man standing for life or death for a crime, he ought not, in my opinion, to be acquitted; and if courts of law were to be governed by any other principle, every departure from sober, rational conduct, would be an emancipation from criminal justice. I shall place my claim to your verdict upon no such dangerous foundation. I must convince you, not only that the unhappy prisoner was a lunatic, within my own definition of lunacy, but that the act in question was the IMMEDIATE, UNQUALIFIED OFFSPRING OF THE DISEASE. In civil cases as I have already said, the law avoids every act, of the lunatic during the period of the lunacy; although the delusion may be extremely circumscribed; although the mind may be quite sound in all that is not within the shades of the very partial eclipse; and although the act to be avoided can in no way be connected with the influence of the insanity:—But, to deliver a lunatic from responsibility to criminal justice,—above all, in a case of such atrocity as the present, the relation between the disease and the act should be apparent. Where the connexion is doubtful, the judgment should certainly be most indulgent, from the great difficulty of diving into the secret sources of a disordered mind;—but still, I think that, as a doctrine of law, the delusion and the act should be connected. I cannot allow the protection of insanity to a man who only exhibits violent passions and malignant resentments, acting upon *real circumstances*; who is impelled to evil from no morbid delusions; but who proceeds upon the ordinary perceptions of the mind.—I cannot consider such a man as falling within the protection which the law gives, and is bound to give, to those whom it has pleased God, for mysterious causes, to visit with this most afflicting calamity. He alone can be so emancipated, whose disease (call it what you will) consists, not merely in seeing with a prejudiced eye, or with odd and absurd particularities, differing, in many respects, from the contemplations of sober sense, upon the actual existences of things; but, *he only* whose whole reasoning and corresponding conduct, though governed by the ordinary dictates of reason, proceed upon something which has no foundation or existence.

"Gentlemen, it has pleased God so to visit the unhappy man before you;—to shake his reason in its citadel;—to cause him to build

up, as realities, the most impossible phantoms of the mind, and to be impelled by them as motives *irresistible*: the whole fabric being nothing but the unhappy vision of his disease—existing no where else—having no foundation whatsoever in the very nature of things.”

From the preceding date we find nothing of professional interest until 1806, when Mr. Erskine was appointed Lord Chancellor, and raised to the dignity of the Peerage. He held the Great Seal, however, scarcely twelve months, and on the change of Administration resigned office along with the other members of his party. From this period until his decease, although Lord Erskine spoke occasionally in the House, we do not find any very memorable instances in which his eminent powers were called into action.

In 1823, he was attacked with an inflammation on the chest, and died on the 17th of November in that year, at Almondale, near Edinburgh.

On the skill of Lord Erskine as an advocate, and his eloquence as an orator, it is needless to dwell; and in judging of his character, we shall bear in mind the excellence of his sentiments, and endeavour to practise the wisdom, as well as the charity, which is exhibited in the following passage from the Trial of Stockdale:

“ Every human tribunal ought to take care to administer justice, as we look hereafter to have justice administered to ourselves. Upon the principle on which the Attorney General prays sentence upon my client,—God have mercy upon us!—instead of standing before him in judgment with the hopes and consolations of Christians, we must call upon the mountains to cover us; for which of us can present, for omniscient examination, a pure, unspotted, and faultless course? But I humbly expect that the benevolent Author of our being will judge us as I have been pointing out for your example. Holding up the great volume of our lives in his hands, and regarding the general scope of them;—if he discovers benevolence, charity, and good-will to man beating in the heart, where he alone can look;—if he finds that our conduct, though often forced out of the path by our infirmities, has been in general well directed; his all searching eye will assuredly never pursue us into those little corners of our lives, much less will his justice select them for punishment, without the general context of our existence, by which faults may be sometimes found to have grown out of virtues, and very many of our heaviest offences to have been grafted by human imperfection upon the best and kindest of our affections. No, gentlemen; believe me, this is not the course of divine justice, or there is no truth in the Gospels of Heaven. If the general tenor of a man’s conduct be such as I have repre-

sented it, he may walk through the shadow of death, with all his faults about him, with as much cheerfulness as in the common paths of life; because he knows, that instead of a stern accuser to expose before the Author of his nature those frail passages, which, like the scored matter in the book before you, chequers the volume of the brightest and best spent life, his mercy will obscure them from the eye of his purity, and our repentance blot them out for ever.”

## PROCEEDINGS FOR ERECTING A GENERAL RECORD OFFICE.

We have repeatedly noticed the plan for erecting a General Record Office, in which the profession is materially interested; and have endeavoured to promote the object of associating therewith Judges’ Chambers, and other offices for the despatch of professional business. We avail ourselves of the collection of papers lately printed by Mr. Purton Cooper, the Secretary of the Record Commission, to bring before our readers the latest information of the proceedings connected with the project.

The following extracts from a summary by Mr. Cooper of the contents of these papers, will shew the steps which have been taken down to a very recent period.

“ Memorial of the Right Honorable Sir John Leach, Master of the Rolls, to the Lords Commissioners of His Majesty’s Treasury, stating that the Rolls Chapel is too limited in point of space for the important records there deposited, and that the want of sufficient air and light, and other causes, are gradually tending to the destruction of the records—that the separation of the public records in different and distant places occasions much inconvenience and expense—that the Rolls House and Chapel, being in the centre of legal business, are peculiarly adapted, by their situation, to be the repository of records—that the part of the Rolls’ House, not used for the Court, was well adapted to become an additional repository—that the Judges had applied to him to give up part of the Rolls Garden, adjoining the wall of Serjeants’ Inn, for the purpose of building chambers for their use—that were the Rolls House converted into a Record Repository, he should not object to this application of the Judges—that certain valuable records are most inconveniently placed in the vaults of Somerset House, which have been rendered dark by the building erected for the use of King’s College—that it would be a great public convenience if all the records were deposited in one situation; and the part of the Rolls Garden, not applied to the use of the Judges, would afford ample space for all convenient buildings which would be necessary for that purpose, as well as for the accommo-

dation of the several keepers of records, and that he was quite ready that the Rolls House and Garden, except such part of the house as is used for the Court, should be applied to the purposes aforesaid.

"Extract from the minutes of the proceedings of the Board of the 20th May, 1831, at which, it being represented that the records of the Lord Treasurer's Remembrancer's Office and the Pipe Office, deposited in the vaults on the eastern side of Somerset House, were in danger of perishing from damp, and other causes—that certain records, kept in the roof of the Rolls Chapel, have suffered considerable injury from being alternately exposed to excessive heat and damp; and other records under the organ loft have suffered much from dust—that the records in the Chapter House were exposed to the danger of fire, and that the records of the Courts of Exchequer and Common Pleas, deposited in the wooden shed in Westminster Hall, were in a very insecure state, and suffering from damp—a Committee was appointed to consider of the expediency of removing any of the public records from their repositories, and for other purposes.

"Extract from the Minutes of the Proceedings of the Board of the 10th June, 1831, at which the Right Honorable C. W. W. Wynn read notes of the proceedings of the said Committee; also extracts from the Minutes of the Proceedings of the same Board, shewing that the Master of the Rolls on that day stated to the Commissioners, in detail, a plan for the removal of the records of the Court of King's Bench in the Treasury of that Court at Westminster, in order that such Treasury might be fitted up as a Court for his sittings during term; and that he proposed that the Rolls House in Chancery Lane should be fitted up as a temporary repository for records, with the exception of the Court and the room adjoining, &c.

"Further extract from the Minutes of the Proceedings of the same Board. Resolution, that the Lord Chancellor should communicate with the Chancellor of the Exchequer, and request that the Surveyor General might be instructed to survey the King's Bench Record Office, Westminster, and the Rolls House, and report upon the practicability of the contemplated removals, with reference, however, to the plan for the erection of a General Record Office, and of Chambers for the Judges, on the site of the Rolls Garden or Estate.

"Correspondence with the Treasury, the Board of Works, Lords Tenterden, Kenyon, &c. upon the removal of the records of the Court of King's Bench, from the King's Bench Treasury, Westminster, and the conversion of such Treasury into a Court for the sittings of the Master of the Rolls during term.

"The King's Bench records were removed from Westminster to Chancery Lane early in 1832; and the Master of the Rolls sat for the first time in the room that had been occupied by them in Michaelmas term of that year.

"Letter from the Right Honorable Lord Dover, one of the Commissioners, to the Chair-

man of the Board of the 26th November, 1832, dated the 24th of that month, respecting the project of building a General Record Office on the site of the Rolls Estate, and requesting the attention of the Commissioners to certain plans prepared by Mr. Deering, the architect.

"Letter from H. B. Ker, Esq., one of the Commissioners, to the Secretary, [dated the 26th November, 1832,] stating that he had seen Mr. Deering and examined his plans,—and inquiring whether there was any intention of removing the Rolls Chapel.

"Second letter from H. B. Ker, Esq. to the Secretary, dated March, 1833, stating, that at Lord Dover's request he had again seen Mr. Deering—that he had suggested to Mr. Deering to make a rough estimate of the space which would be requisite for all the records, which it was proposed should be placed in the new building, &c.—that the object proposed had, as he believed, the sanction of the Chancellor—that the money requisite might be taken from the Suitors' Fund—and that he had seen Lord Althorp on the subject, who saw no objection on the part of Government to the scheme, if it came recommended by the Commissioners, in which case he desired a Report to be made to the Treasury.

"Estimate and Explanation (January, 1833,) that accompanied Mr. Deering's plans, referred to by the letters of Lord Dover and Mr. Bellenden Ker.

"Report (March, 1833,) of Sir Robert Harry Inglis, Bart. and Henry Hallam, Esq., made in pursuance of the following Order and Resolution passed at the Board of the 26th November, 1832:—It was ordered, upon the motion of the Right Honorable the Master of the Rolls, 'that the Secretary be instructed to write to one of the Secretaries of his Majesty's Treasury, stating that this Board consider it to be their duty to recommend that the several repositories of the public records be forthwith surveyed and examined, for the purpose of ascertaining whether, in their present state, they are sufficient for the commodious reception of the records appropriated to them, having regard to security from fire and damp, and to a convenient disposition of the records for the public access; and if it shall appear that in their present state they are not sufficient, whether by any, and what means, they can be rendered sufficient. And further, that this Board take the liberty to suggest to the Lords Commissioners of his Majesty's Treasury, the propriety of directing some one of the architects now employed under the Commissioners of the Woods and Forests, to make the survey and examination here recommended, and that for the purpose of promoting the efficacy of this examination, this Board will nominate two of their members to be in communication with him.' And it was resolved, 'that Sir Robert Inglis and Mr. Hallam be requested to take the trouble to attend the architect who shall be so appointed, at the several repositories of records, for the purposes stated in the foregoing Order.'

"Representation (April, 1833,) to the Lords

of the Treasury, drawn up in the name of the Board by Edward Protheroe, Esq., one of the Commissioners, stating the inexpediency of an immediate demolition of the King's Mews, both with respect to the preservation of the records and the expense—that the recent removal of records from the wooden shed in Westminster Hall to the King's Mews had cost 1500*l.*—that the money since spent in arranging these records would be in great part thrown away—that the expenses of removals of the records to temporary places of deposit during the last fourteen years amounted to 10,000*l.*—that that sum would have gone far towards providing a permanent place of deposit—that the records suffered grievous injury by such removals—that any further removal at that moment must put a stop to the operation of examining and sorting, in the course of which, documents affording curious and important illustrations of our history and constitution were daily discovered—that the removal of the records must also necessarily for a long time put a stop to all searches—that the Mews ought to be left standing, and devoted to the accommodation of such records as might require immediate removal from other offices—that although the Mews were not, for several reasons, adapted as a permanent repository, yet the same offered advantages and accommodation for a short period not to be found in any other building—that the other wing of the building would afford most acceptable accommodation for the records which were threatened with removal from Somerset House—that to this building might also be removed the records in the lower cellars of the Towers of Westminster Hall—and that the Board had under its consideration a project of erecting a General Depository of Records on the Rolls Estate, with money derived from the Suitsors' Fund.

"This Representation was produced at the Board of the 27th April, 1833, and ordered to be transmitted to the Treasury. The Secretary, on the 1st May, 1833, inclosed it in a letter to the Honorable J. Stewart.

"Letter from the Honorable J. Stewart to the Board, dated the 4th September, 1833, stating that in consequence of the above Representation the Lords of the Treasury had consented to suspend for that year the removal of the records; and further, that in reference to the last paragraph in such Representation, on the subject of the Rolls Estate, that any feasible plan which the Board could suggest for erecting a General Depository of Records, without expense to the public, must meet with their Lordships' entire concurrence: and urging the adoption of such measures, without delay, as might bring the plans of the Board to maturity; as although a temporary arrangement had been made, by which sufficient space would be preserved in the Mews for the preservation of the records there, the entire removal of that building could not be deferred to any distant period.

"Extract from the Minutes of the Proceed-

ings of the Board of the 25th January, 1834, at which the last mentioned letter of the Honorable J. Stewart being read, it was resolved, that it was expedient, for the due preservation of the records kept in one wing of the King's Mews, Charing Cross, and in the vaults under the east side of Somerset House, that a proper building should be forthwith erected for their reception; and—his Honor, the Master of the Rolls, consenting that the Rolls Garden, Chancery Lane, should be applied for the purpose, after appropriating space on the south end thereof for new Chambers for the Judges—the Secretary was directed to make a communication to that effect to the Lords Commissioners of the Treasury, and to suggest that it was the opinion of the Board, that the money requisite for the new building to contain such records, should be taken from the Suitsors' Fund in Chancery; and the Secretary was to request that the Treasury would appoint some person to communicate with the Master of the Rolls as to the site of such building, and to make a plan and estimate of the proposed building, with an instruction that it might be so constructed as to be capable of enlargement as occasion might require.

"This Board was summoned by the desire of Sir John Leach, for the sole purpose of considering the project for building a General Record Office on the Rolls Estate. The Resolution was penned by his Honor.

"Letter from the Right Honorable Sir John Leach, Master of the Rolls, to the Secretary, dated the 15th May, 1834, stating that the proper course to be pursued with the intended Record Office in the Rolls Garden, was to appoint a Committee to settle Mr. Deering's plans,\* and offering to act as one of that number—approving, with respect to the bill to be brought into parliament, of the Secretary's suggestion, that fixed salaries should be given to the officers of records, and that it should be left to the Record Commissioners to make such regulations as they should think expedient to facilitate the access of the public to the records; and intimating that power should be given to the Commissioners to negotiate for the purchase of Mr. Kipling's Indexes at the Rolls.

"Copy of a bill intituled 'An Act for em-

\* "Sir John Leach, after the Resolution of the Board of the 26th January, 1834, communicated directly upon the subject, both with the Treasury and the Office of Woods; and some short time prior to the date of this letter, he informed the Secretary that Lord Duncannon, as Chief Commissioner of Land Revenue, had upon his recommendation agreed to appoint Mr. Deering to communicate with him as to the spot in the Rolls Garden to be selected for the contemplated building, as well as to make a plan and estimate. The Secretary believes, however, that no new plan or estimate was ever made; and his Honor, in the above letter, refers to the plans of January, 1833."



powering the Commissioners of his Majesty's Woods, Forests, Land Revenues, Works, and Buildings, to erect a General Record Office; and to empower the Society of Judges and Serjeants at Law to build new Chambers for the Judges, and for other purposes.'

"This bill was approved of and settled by his Honor the late Master of the Rolls, and Lord Duncannon gave notice, in the House of Commons, that he should, on the 14th July, 1834, move for leave to bring it in; but his Lordship being about the same time appointed Secretary of State for the Home Department, it was resolved, that all further proceedings in the matter should be postponed to the ensuing session of parliament.

"Letter from W. G. Adam, Esq., Accountant-General of the Court of Chancery, to the Secretary, dated the 18th March, 1835, inclosing a statement of the present amount of the Suits' Fund, its income, and the charges upon it, and protesting against any part of the Suits' Fund being made applicable to the expense of erecting a General Record Office."

## LAW OF ATTORNEYS.

### NOTICE OF RE-ADMISSION.

THIS was an application calling on William Hallett to shew cause, on an enlarged rule of last term, why the rule made on Saturday, the 31st day of January, in Hilary term last passed, for the re-admission of the said William Hallett, should not be discharged, and why the said William Hallett should not be struck off the roll of attorneys of this Court.

Mr. Harrison shewed cause against the rule. The notice was sworn to have been given previous to a particular Easter term. I will read the affidavit on which the rule was obtained: it states, that by a rule of this Honorable Court made on Saturday the 31st day of January, 1835, it was ordered that William Hallett should be re-admitted an attorney of the said Court. That in order to obtain the said rule an affidavit was made by the said William Hallett, on the 11th day of February last, in which it was sworn that he the said William Hallett did, previous to Easter term, 1833, affix a notice of his intended application to be re-admitted an attorney of this Honorable Court, on the outside of the Court of King's Bench at Westminster Hall and proper offices, and also duly enter the like notice in all the books kept for such purpose at each of the chambers of the Judges of this Honorable Court. That the deponents have carefully searched the books kept at the chambers of the Judges in which are entered the names and places of abode of the persons intending to apply for re-admission as attorneys, and that no notice of the intention of the said William Hallett to apply for re-admission in Easter term, 1833, is or has been entered therein, and these deponents have searched back in such books

from the 3d day of December, 1832, to the 8th day of May, 1833. With this affidavit there is a notice given that on moving to make the rule absolute an office copy of the sentence of the Court of King's Bench will be read. That refers to some previous proceedings, with respect to which I am somewhat at a loss to know what course Sir William Follett will take; whether he means to go into the old prosecution or not, it is not mentioned in the affidavit, but in the notice.

Sir William Follett.—So far as it may be necessary that your Lordships should know the circumstances under which he was first removed from the rolls of the Court: he was indicted for a misdemeanor, and received a sentence of eighteen months imprisonment. Your Lordships thought he was not fit to remain on the rolls of the Court, and he was struck off on that ground. He underwent eighteen months imprisonment.

Mr. Harrison read an affidavit made in answer to the rule, stating, amongst other things, that one of their Lordships then present on the Bench, was pleased to say that he thought the time had arrived when the deponent's re-admission might safely be granted. This application is on behalf of the Law Society, with, of course, no other feeling than that of rendering the profession of the law respectable.

Mr. Justice Patteson.—What is the language of the affidavit of Hallett—how did he swear with respect to the notices?

Mr. Harrison.—The language of that affidavit, in strict grammatical construction, would imply that the notice was not previously to Easter term; but then your Lordships will take it in connexion with this circumstance, that it was in addition to his former affidavit sworn in this matter, and which is brought before your Lordships for consideration. There is no imputation now upon my client of having deceived your Lordships in any way at the time of his re-admission, or that any one of the statements submitted to your Lordships were in the slightest degree untrue; therefore I shall content myself, on that part of the case, with saying that your Lordships took exceeding great pains, and were very anxious to arrive at a just conclusion on that subject; therefore all I need or could with propriety say, would be, that having determined it, after anxious and careful pains, it cannot now be gone into. Then it stands, with that observation, merely on the language of this subsequent affidavit. Your Lordships will see that the rule for the re-admission was made before this affidavit was required. This affidavit was not required by the learned Judge, Mr. Justice Patteson, who heard the case, nor was it thought of until the Clerk of the Rules, in the exercise of his duty, thought it necessary to have an affidavit of that sort: it might very properly be contended that there was no necessity for any affidavit of the sort at all; the re-admission was not an ordinary re-admission.

Mr. Justice Patteson.—I don't think I heard

the case; I don't recollect its being argued. I heard the case by communicating with the party himself. He called at my chambers, I spoke to him, but I have no recollection of hearing it argued in Court.

Sir William Follett.—It clearly was not argued.

Mr. Harrison.—There was no opposition—there was no argument in the case, for the facts of the case were then before your Lordships in the petition, and the affidavits supporting that petition. A motion was made in open Court merely, it being considered that the facts were then within your Lordships' knowledge, and from the care your Lordship took to come to a just conclusion on the subject, I am quite certain they were so at that time. And then this affidavit, which I have just read to the Court, shews that there was also no unwillingness on the part of my client to prevent publicity; a motion was made in public Court, and one of the deponents on whose affidavit the rule is granted had notice of our intention to apply. There had been many previous notices, but in this case there was none nearer to Easter term 1833, than January 1831.

But, my Lords, I submit to your Lordships, that no notice was necessary at all in this case, for it was only required by the officer of the Court in drawing up the rule: it was consistent with his duty to require it, if necessary. Then your Lordship sees the language of this affidavit is in addition to his former affidavit sworn in this matter,—he says, "that *previously* to Easter term he affixed the notice;" it does not necessarily follow that previously to Easter term means *immediately* previous: the deponent knew at that time that notice had been previously put up several times, and thinking that the whole circumstances were then before your Lordships, and that this affidavit would not be required when the rule was moved for, he uses that which is an inaccurate expression, I cannot deny it.

Then, my Lords, with regard to the proceedings which led to Mr. Hallett being struck off the roll, I think it right to go somewhat into that part of the case before your Lordships, to shew how it was, and to explain in some manner that part of the rule which calls upon your Lordships not only to rescind the order for re-admission, but to strike him off the roll.

It appears that Mr. Hallett was admitted in the year 1824. In the year 1825, he entered into partnership with a gentleman of the name of Henderson; that some short time afterwards disputes arose between those two partners, and it appears that on former occasions there were many circumstances of annoyance by both parties to one side or the other. Mr. Hallett, unfortunately, was a party to what might be called a contrivance between himself and others to make himself a bankrupt, to put an end to the partnership. That was the offence with which he was charged: he was indicted for a conspiracy in concerting this bankruptcy, and, unfortunately for him, it was not a separate commission against himself, which, un-

der the new law, would be legally good, and at that time was no moral offence, but it was a joint commission against both; the consequence was that he was indicted by his partner, and convicted of this offence. There can be no doubt that it is impossible to justify that course taken by any person. But then your Lordships will also see, and I am sure you will feel, that it is not an offence of so grave a moral character as many others for which a man might be indicted. That was the feeling at the time when you allowed him re-admission, because, having a perfect knowledge of all the circumstances, had your Lordships thought that a conviction for a criminal offence, for so bad a crime as that, he was not fit to be on the roll of attorneys, your Lordships would not have re-admitted him. In 1827 the conviction took place. Sir William Follett said that he had eighteen months imprisonment, and from the expiration of that imprisonment until Hilary term of this year, applications were made for re-admission to the Court. Your Lordships for a long time presumed it necessary to see how the man went on afterwards. Having convinced the Court that he was a proper person to be re-admitted, in Hilary term he was so. So that I think, having explained to your Lordships the situation under which the case comes before you, I have thus disposed of the whole of it, except the language of this affidavit; and on that part of the case, I think, when your Lordships look again to the language of the affidavit, in which it is shewn to be something *additional* to what was already submitted to the Court (something not considered necessary at the time the rule for re-admission was made), that your Lordships will not put too strict a construction on the language of the affidavit—that he had put up the usual notices. Suppose the language had been, that he had put up the *usual* notices; that would equally as well have satisfied the officer of the Court in drawing up the rule, and would have been perfectly unobjectionable. The only objection taken to this is, that he swears that he did it "previously to Easter term of that year, 1833." It is perfectly clear, that though the rule of Court requires a term's notice of the intention to apply for admission should be given, it need not be in the term *immediately preceding* the term in which the application is to be made: it means nothing more than that a term's notice must be given; and the man may give it for two terms, or three terms preceding. Then, if your Lordships again take into consideration the fact that there were affidavits shewing the whole of the circumstances before your Lordships at that time, and that this affidavit was made in addition, I am sure your Lordships will not put so strict a construction on those words, "previously to Easter term," which must lead to so heavy a consequence as striking an attorney off the roll. That is the object for which the rule is prayed. I am sure, that by no possibility of considering the intention, can it be shewn by my learned friend that there was any intention of deceiving the Court in any way. On that

part of the case I feel no difficulty. I have shewn throughout the whole proceedings that there can be no imputation or charge of fraud practised on the Court in any way whatever. Had it been so, it would have been open to my learned friend to have made a stronger application than this, shewing some instances of fraud in the statements that have been already made. No such thing appears; therefore I must assume that every statement is borne out by the fact. Then it stands merely upon the strict construction of this affidavit; and if it will bear any construction consistent with the fact, as it appears to do with regard to the notice, I am sure your Lordships will not go out of the way to visit my client with so severe a punishment as that of striking him off the rolls. To carry into effect the object of the rule Sir William Follett has obtained, your Lordships must put an extremely strict construction on the language of this affidavit. You must hold, that when he says he did, "previously to Easter term," he meant "*immediately previous*." If it does not mean *immediately previous* to the term, what can it mean? It must mean previously to the term, with reference to before and after.

Sir William Follett.—My Lords, I have the honour to appear before your Lordships on behalf of the Incorporated Law Society in this case; and my learned friend has done them no more than justice, in saying, they make this application on the single ground of its being their duty to bring under your Lordships' notice any objection to the admission or re-admission of a person who practises as an attorney of this Court, and I trust your Lordships will see they are only doing their duty in bringing the facts of this case before the Court. I do not mean to occupy your Lordships' time by going into the circumstances disclosed by this affidavit, under which this person was first of all removed from the rolls of the Court. My friend, Mr. Harrison, seems to think that there was no moral guilt. I don't quite understand that; for I see by the judgment of Mr. Justice Bayley, set out in the affidavit, it appears that the fabricated bill of exchange must not only have been a bill fabricated, but that an oath must have been taken by the person in whose favor that bill was supposed to have been, that the parties were indebted on that bill of exchange. First of all, there was that fabricated bill; and then he made a false oath, to sue out a fraudulent commission of bankrupt, and for that offence he was sentenced to receive eighteen months' imprisonment. And the question is, whether, under the circumstances now stated to your Lordships, this Court will think proper to keep him on the rolls of the Court, considering the way in which he has obtained re-admission. My Lords, it appears by the affidavit, that he made an application in Easter Term 1833, founded on an application of his, to which Mr. Harrison referred, praying this Court to re-admit him an attorney. It is quite true, no argument took place in Court, as nobody knew he intended to apply at that time; and then the learned Judge directs that he be

re-admitted an attorney; and in order to procure his re-admission, he is called on to make an affidavit that the proper notices were given.

Now my Lords, what is the usual and proper notice of an application to admit, or re-admit an attorney? The party is bound to give notice, that he intends to apply in such a term to be re-admitted; he is bound to give a term's notice in that form. It is very true, as my learned friend Mr. Harrison says, if he pleases to give more than a term's notice, he may; but if he does, he must appoint a term in which the application is to be made. If he gives a notice previous to Hilary term 1829, that he means to apply to be re-admitted an attorney, it won't do to make that application in 1833, and avail himself of that notice. The notice must be stuck up previously to each term, and such notice is stuck up, that the party means to apply in the succeeding term, so that any person seeing it put up, and thinking he ought not to be re-admitted, may come to resist that re-admission. It is quite evident, if it be couched in ambiguous terms, it is so done with an express purpose,—if it is so done, you will hardly say that person ought to be re-admitted an attorney of this Court, considering the circumstances under which he was struck off the rolls. Then he is required to make an affidavit that he gave the usual notices; and in order to succeed, he made an affidavit that he did, previously to Easter term, affix such notice of application. The form of his affidavit is, that in addition to the matter sworn in 1833, which is the affidavit for making the application in Easter term 1833, he says, "he did previous to Easter term that year affix a notice of his intended application to be re-admitted, outside of the Court of King's Bench, and he entered the like notice in all the books kept for that purpose at the chambers of each of the Judges of this honorable Court." If that affidavit is meant to convey anything by the party so required to put up the usual notice, the question is, what does it convey? It conveys this, that in addition to the affidavit I made in April 1833, to make an application to the Court, I did give previously to that term, notice of my intention. He clearly did not give any such notice. Your Lordships will see very good reason for not giving it any weight under the circumstances on which he had been previously struck off the rolls. And if he knew that he ought to give notice of his intention to apply in Easter term, and when the officer of the Court required the affidavit that he had given notice of his intention to apply in Easter term, he must have known, it meant the *usual* notice, in the *usual form*, which I have before mentioned, that he intended to apply *next* term. That he knew that, appears by the affidavit filed; for he says, he applied to the Judges of the Court in November 1829, and presented his petition to the Judges.

Then in the year following, November 1830, he presents an additional petition, praying that his case may be taken into consideration, and the matter stood over until November 1831

when he gave fresh notice, as he had done previously, of his intention to apply for re-admission. On applying to the Court they were not prepared to say whether that ought to be allowed; in consequence of which it stood over until the November following, when he gave fresh notice, and made a personal application to Mr. Justice Patteson; and he continued so to do from time to time until the beginning of 1833, when he presented an additional petition, referring to the former particulars of this case.

Mr. Justice *Patteson*.—That notice must have been a notice of application either in Hilary term 1832, or Michaelmas term 1831, I don't know which. The last notice of all, I think Mr. Harrison said, was the one previously to Hilary term 1832.

Sir *William Follett*.—No, my Lord. It is in the years 1829, 1830, and 1831.

Mr. Justice *Patteson*.—That will be November 1831, then?

Mr. *Harrison*.—Yes, my Lord, the 1st of November, 1831.

Mr. Justice *Patteson*.—That was for his admission in Hilary term 1832; it was appointed he should apply in the next term. That notice, which was suspended, could not lead any one to suppose that there would be an application in Easter term 1833, much less in Hilary term, 1835.

Sir *William Follett*.—Or even Easter term, 1832.

Mr. Justice *Patteson*.—This additional affidavit points to an affidavit in 1833. That last notice he gave did not point to that term. He said he did not recollect the precise term.

Sir *William Follett*.—Why, my Lord, he refers to Easter term, 1833.

Mr. Justice *Patteson*.—He considers it as an application made in that term, and hanging over. So that it might have done if there had been a notice of application in Easter term 1833. It points to such notice, whereas the last was in Easter 1832.

Mr. *Harrison*.—It stood over for private consideration.

Sir *William Follett*.—That is the reason the officer of the Court required the affidavit that he had given notice prior to 1833, because the petition or application was made in that term, and he swears that from that term it stood over for your Lordships' deliberation. What your Lordships would require, would be the notice prior to Easter 1833.

Mr. Justice *Patteson*.—I expressed no opinion. I was in the Court, and was considering what the petition should contain; but when it came to the last day of the term, while I was sitting in the other Court, some difficulty was mentioned about the affidavit: it was said, that can be supplied, the notice has been given. Then here is the affidavit of this notice, and there was time to inquire about it. It was not sworn till the 11th of February. There was time to search at the Judges' chambers to see what the notice really was. Eleven days elapsed. There was this application previous to Easter 1833, and it had been said, that is not sufficiently precise as applying to a notice given

for Easter term—of course that will be the meaning of it; and if he gave it in Easter term, he must have entered it in all the books.

[Their lordships conferred.]

If I understand his excuse, he says he did not precisely recollect; he knew it was some time before Easter Term 1833: now he could have ascertained, within eleven days, the precise date.

[Their Lordships again conferred,—when they stopped Sir William Follett, as follows]

Lord *Denman*.—We were considering, whether it was possible, in indulgence to the party, to consider the notice as having been given, and then to hear you, Sir William Follett, as to what you could say upon his re-admission; but as it appears to us, he has obtained his present situation on the roll, by deception, we think that notice ought not to avail him for any purpose.

Rule absolute.—*Ex parte Hallett*, K. B. 15th June, 1835.

## PROFESSIONAL MEETINGS.

### LAW ASSOCIATION FOR THE BENEFIT OF WIDOWS AND FAMILIES OF PROFESSIONAL MEN.

WE willingly make room for the following Annual Report of the Board of Directors of this Institution, to the general meeting held 14th May last. We earnestly recommend the subject to the attention of the members of the Profession, and hope the appeal of the Directors, to their opulent brethren, will not be made in vain.

"In the interval which has elapsed since the Directors presented to the Members at large the last report of their proceedings, the transactions of the Association have scarcely extended beyond its ordinary course, and they have few subjects of any moment to communicate to the annual general court in the present statement.

"During the past year three new cases of a legitimate character have come before the board, making, since the formation of the charity, a total of seventeen; eight of which have occurred within the last two years.

"Two young men, the sons of a late member, have been apprenticed during the year, with a premium of 50*l.* each, one to a surgeon, the other to a law-stationer; and the daughter of a deceased member has, through the bounty of the association, been enabled to join her brother in America, with every prospect of successfully establishing herself in business.

"The Directors have to record the receipt of a donation of five guineas from the Society

of Clements Inn, and of a similar donation from the Society of New Inn.

"It may be proper to state, that since the last general meeting, Mr. Charles Murray, who had filled the office of Secretary to the Institution from its first formation, has, in consequence of quitting London, resigned; upon which the Directors have unanimously appointed his son, Mr. John Murray, to the office.

"Since the year 1824, when by the established laws of the Institution the Directors were first enabled to grant relief, 65 widows and families of professional men, including cases of non-members, have received assistance varying in amount according to the wants and claims of the applicants. These families have comprehended 195 persons, who have received pecuniary aid, in 286 applications, to the amount of nearly 5000*l*.

"As it is to the Directors, so must it be to the members at large, a source of great satisfaction to know, that, within a period of little more than ten years, the benefits of the Institution have been so widely and efficiently diffused.

"There is one subject, which, in the opinion of the Directors, deserves the most attentive consideration of the members; namely, the large though gradual increase in the legitimate claims upon the fund. In the year 1825-6, the relief extended to this class of claimants amounted to 120*l*. only; since which the expenditure has progressively increased to the present time; and the account for the last year exhibits a disbursement of no less a sum than 660*l*. 10*s*. in this species of relief.

"This fact not only evinces the propriety of the course taken by the last general court, in reducing the usual annual grant for non-members' families, from 200*l*. to 100*l*.; but it will be an apology for the Directors having relieved cases of the latter description to the amount of 35*l*. only.

"Notwithstanding this increase in the claims upon the Society's funds, it is a fact still more important, that, although the dividends upon the capital stock have become gradually greater, the actual receipts of the Institution are for the current year less than they were ten years ago by upwards of 100*l*. This is attributable to the falling off in the annual subscriptions, by deaths and otherwise; and it should be borne in mind, that unless a proportionate addition to the income is made, it will not only be wholly absorbed, but the Directors will be under the necessity of resorting to the capital stock, or of curtailing the relief hitherto afforded.

"This statement must convince the friends of the Institution how important it is that some measures should be adopted for obtaining an accession of members. With this object, 2000 copies of the report of last year were circulated among the respectable Solicitors in the metropolis not already members; but it is clear that this plan has not fully answered the purpose, inasmuch as only twelve new members have been since added to the list.

"The Directors therefore beg leave to renew the appeal to their successful and liberal brethren of the profession, by directing the attention of the members to the very large number of respectable and opulent solicitors, who have hitherto withheld their names from this benevolent association; and the Board most earnestly request the present subscribers to unite in their exertions, and to devise every means for obtaining an addition to their numbers from among their professional friends; and thus contributing most effectually to the accomplishment of the useful and truly laudable objects of this society.

By order of the Board,  
JOHN MURRAY, *Secretary*."

## PERPETUAL COMMISSIONERS UNDER THE FINE AND RECOVERY ACT.

### GLAMORGANSHIRE.

Charles Redwood	.	.	Cowbridge.
Alexander Cuthbertson	.	.	Neath.
Edward Priest Richards	.	.	Cardiff.
Thomas Dalton	.	.	Same.
William Lewis	.	.	Bridgend.
David Powell	.	.	Neath.
William Llewellyn	.	.	Same.
John Jenkins	.	.	Swansea.
John Jackson Price	.	.	Same.
Charles Collins	.	.	Same.
William Meyrick	.	.	Merthyr.
William Perkins	.	.	Same.

## LIST OF NEW PUBLICATIONS.

The Practice of the Criminal Courts, including the Proceedings before Magistrates in Petty and Quarter Sessions, and at the Assizes. By George Bolton, gent. Price 9*s*. boards.

Term Reports. Easter Term, 1835, in the Court of K. B., Bail Court, C. P., and Exchequer. Part II. Price 10*s*.

Reports of Cases in the Court of King's Bench, Hilary and Easter Terms, 5 W. 4, Vol. IV, Part III. Price 10*s*. 6*d*. By S. Nevile and W. M. Manning, Esqrs.

Cases in Bankruptcy, decided by Lord Chancellor Lyndhurst, and the Court of Review and Subdivision Courts to Easter Term, 1835. Vol. II, Part I. Price 8*s*. 6*d*. By B. Montagu and Scrope Ayrton, Esqrs.

## INCORPORATED LAW SOCIETY.

### MEMBERS ADMITTED.

June, 1835.

Barney, John, Southampton.  
Price, Robert Alexander, Staple Inn.  
Bolton, John Henry, Lincoln's Inn New Sq.  
Forbes, William, Sleaford, Lincolnshire.

MASTERS EXTRAORDINARY IN  
CHANCERY.

*From May 22, to June 16, 1835, both inclusive,  
with Dates when gazetted.*

Armstrong, Francis, Preston, Lancaster, May 22.

Clarke, Joseph, Coventry, June 2.

D'Lara, Michael Cohen, Sheffield, York, May 29.

Edwards, Wm., Spalding, Lincoln. May 29.

Eyton, Kenric Edward, Whitchurch, Salop, May 26.

Tilley, Edwin, Chipping Norton, Oxford, June 16.

Wells, Robert, Kingston-upon-Hull. June 9.

DISSOLUTIONS OF PROFESSIONAL  
PARTNERSHIPS.

*From May 22, to June 16, 1835, both inclusive,  
with dates when Gazetted.*

Atcheson, Robert Sharp, and William Ridge, jun., Duke Street, Westminster, Attorneys and Solicitors, and Parliamentary Agents. May 29.

Capron, George, George William Rowley, Samuel Weld, John Dawson, and Francis Philip Hooper, Savile Place, Westminster, Solicitors and Attorneys at Law, so far as regards the said George William Rowley, and Francis Philip Hooper. June 5.

Carson, Thomas, and George William Crooke, Liverpool, Attorneys and Solicitors. May 29.

Dodd, Grantham Robert, and Edmund Taverner, New Broad Street, Solicitors. June 5.

Gregory, William, and John Smith, Bristol, Attorneys, Solicitors, and Conveyancers. May 29.

Howard, John Henry, and William Brokenbrow, Cheltenham, Gloucester, Attorneys, Solicitors, and Conveyancers. May 29.

Sambourne, James Wheat, Sheffield, York, Attorneys and Solicitors. June 9.

Vickers, Thomas Thwaites, and Joseph Skidmore, Sheffield, York, Attorneys, Solicitors, and Conveyancers. June 5.

Wood, Wm., and Robert Gladstone, jun., Liverpool, Attorneys at Law. June 12.

## BANKRUPTCIES SUPERSEDED.

*From May 22, to June 16, 1835, both inclusive,  
with Dates when gazetted.*

Boardman, Ralph, Bolton-le-Moors, Money Scrivener and Bill Broker. June 12.  
Boardman, Benjamin, Norwich, Tailor and Draper. June 16.  
Davies, Henry, Carmarthen, Cabinet Maker. June 12.  
Edmundson, Joseph, Blackburn, Lancaster, Cotton Manufacturer. June 2.  
Pollard, William, Manchester, Commission Agent. June 9.  
Westbrook, Charles, Beaulieu, Southampton, Tanner. May 26.

## BANKRUPTS.

*From May 22, to June 16, 1835, both inclusive,  
with Dates when gazetted.*

Beardmore, George, Burslem, Stafford, Builder and Carpenter. *Harding*, Burslem : *Smith*, Chancery Lane. May 26.  
Bullen, Hugh, Liverpool, Brewer and Rectifier of Spirits. *Kaye & Co.*, Liverpool : *Dean*, Palgrave Place, Temple Bar. May 22.  
Burrows, William, Leicester Street, Leicester Square, Plumber, Painter, Glazier and Tea Dealer. *Becher*, Off. Ass. : *Todd*, South Square, Gray's Inn. May 29.  
Buzhill, John, jun., Leamington Priory, Warwick, Bricklayer and Builder. *Burbury & Co.*, Warwick and Leamington : *Meyrick & Co.*, Red Lion Square. May 29.  
Bird, John Molyneux, Liverpool, Chemist and Druggist, and Oil and Colourman. *Kaye & Co.*, Liverpool : *Dean*, Palgrave Place, Temple Bar. May 29.  
Bishon, John, Langley Field, Dawley, Salop, Ironmaster. *Williamson & Co.*, Verulam Buildings, Gray's Inn : *Tarquant*, Off. Ass. June 2.  
Bradbury, James, Sheffield, York, Cutler. *Walten & Co.*, Synond's Inn : *Brown & Co.*, Sheffield. June 2.  
Brathwaite, William, Grafton Street, Fitzroy Square, Stationer and Bag Merchant. *Walter*, Caroline Street, Bedford Square : *Lackington*, Off. Ass. June 6.  
Begbie, John, Cartwright Street, Rosemary Lane, Victualler. *Gibson*, Off. Ass. : *Burford*, Great Tower Street. June 5.  
Bradbeer, Francis Henry, Salisbury, Draper and Tailor. *Housman*, Salisbury : *Cordale & Co.*, Bedford Row. June 5.  
Blenkin, George, Kingston-upon-Hull, Merchant and Seedman. *Wilkinson*, Hull : *Meredith & Co.*, Lincoln's Inn. June 5.  
Busby, Tho., Green Street, next Sittingbourne, Kent, Grocer. *Sole*, Aldermanbury : *Johnson*, Off. Ass. June 9.  
Brandon, Josiah, Fenchurch Street, Broker. *Groom*, Off. Ass. : *Allen*, Frederick Place, Old Jewry. June 12.  
Burton, William, Great Glenn, Leicester, Carrier & Leather Seller. *Taylor & Son*, John Street, Bedford Row : *Lawson & Co.*, Leicester. June 12.  
Barnes, Wm., Andover, Southampton, Ironmonger. *Garrard*, Suffolk Street, Pall Mall East : *Earle*, Andover. June 16.  
Carswell, Michael, and Thomas Russell French, Manchester, Linen Merchants. *Swaine & Co.*, London : *Harding*, Manchester. May 22.  
Cobb, John, St. Anne's Place, Commercial Road, Limehouse, Stage Coach Master. *Messrs. Baddeleys*, Leman Street, Goodman's Fields : *Clark*, Off. Ass. June 6.  
Clarke, George, Stonecutter Street, Farringdon Street, Shoemaker. *Becher*, Off. Ass. : *Parker*, Fish Street Hill. June 5.  
Couper, Samuel, Bath, Grocer. *White & Co.*, Bedford Row : *Bevan & Co.*, Bristol. June 16.  
Corthorn, John Murkin, March, Isle of Ely, Cambridge, Sheep Salesman. *Alexander & Co.*, Carey Street, Lincoln's Inn : *Fisher*, St. Ives, Huntingdon. June 16.  
Downs, George, Tickhill, York, Dealer. *Hawkins & Co.*, New Buswell Court, Carey Street : *Mee & Co.*, East Bedford. May 22.  
Day, William, Providence Buildings, New Kent Road, Plumber, Painter, & Glazier. *Richardson*, Ironmonger Lane : *Goldsmith*, Off. Ass. May 29.  
Dorman, John, Frederick's Place, Old Kent Road, Surrey, China and Glass Dealer. *Gibson*, Off. Ass. : *Whitlock*, Aldermanbury. June 9.  
Donkin, Wm., North Shields, Northumberland, Wine and Spirit Merchant. *Spencer & Co.*, Aldermanbury : *Wheldon*, North Shields. June 16.  
Eveleigh, Thomas, Lamb's Conduit Street, Furniture Dealer. *Groom*, Off. Ass. : *Taylor & Co.*, Great James Street, Bedford Row. June 2.  
Empson, Wm. Charles, Leamington Priory, Warwick, Money Scrivener. *Green*, Off. Ass. : *Parker*, St. Paul's Churchyard. June 2.  
Gillett, Richard, Duffield, Derby, Brickmaker. *Clester*, Staple Inn : *Kynnersley*, Uttoxeter. May 26.  
Goode, Henry, Birmingham, Wholesale Grocer and Factor. *Perkes*, South Square, Gray's Inn : *Harding*, Birmingham. June 12.

- Gribble, Samuel, Derby, Hatter and Hosier. *Adlington & Co., Bedford Row: Moss, Derby.* June 16.
- Hobson, Ephraim, Liverpool, Grocer. *Adlington & Co., Bedford Row. Messrs. Brown, Liverpool.* May 22.
- Henderson, Robert, Leicester, Wine Merchant. *Capes, Raymond Buildings, Gray's Inn: Shastleworth, Market Harborough.* May 22.
- Harvie, Thomas, Laureston in Van Dieman's Land, and Jerusalem Coffee House, London. Merchant, Ship Owner, and Master Mariner. *C. z. Bush Lane, Cannon Street: Johnson, Off. Ass.* May 22.
- Highfield, George Bentley, and John Highfield, Liverpool, and Samuel Highfield, Leighorn, Merchants. *Hadfield & Co., Manchester: Johnson & Co., Temple.* May 22.
- Harvey, James Pawssey, Bury St. Edmunds, Suffolk, Maltster. *Leech, Bury St. Edmunds. Bramley, South Square, Gray's Inn.* May 29.
- Hall, Joseph, jun., Kidderminster, Worcester, Victualler & Dealer in Spirits. *Smith, Chancery Lane: Hill, Worcester and Kidderminster.* June 2.
- Honychurch, John, jun., and Thomas Honychurch, Bovey Tracey, Devon, Pottery and General Shopkeepers. *Clowes & Co., Temple: Leidsma, Exeter.* June 2.
- Hall, George, Trowse Newton, Norfolk, Builder, Wheelwright, Carpenter, and Innkeeper. *Messrs. Steward, Norwich.* June 8.
- Hankinson, Thomas, Macclesfield, Chester, Grocer & Flour Dealer. *Williamson & Co., Verulam Buildings, Gray's Inn: Wormald, Macclesfield.* June 9.
- Hawkins, William, Warwick, Builder. *Burbury & Co., Warwick and Leamington: Meyrick & Co., Red Lion Square.* June 12.
- Jukes, Richard, Gornall, Stafford, Currier. *Clowes & Co., Temple: Collis, Stourbridge, Worcester.* June 2.
- Kemp, Thomas, Birmingham, Gold & Silver Beater. *Holme & Co., New Inn: Bartlett, or Harrison, Birmingham.* May 22.
- Kingsford, Sampson, Sturry, Kent, Miller. *Curtis & Co., Canterbury: Egan & Co., Essex Street.* June 2.
- Knox, Henry, jun., Park Street, Mary le-Bone, Merchant. *Edwards, Off. Ass: Fox, Finsbury Circus.* June 2.
- Kay, James, Liverpool, Coal Merchant. *Rowlinson & Co., Queen Street, Cheapside, London, or Liverpool.* June 5.
- Lovett, Charles, Chesterfield, Derby, Innkeeper & Victualler. *Bicknell & Co., Lincoln's Inn: Drabble & Co., Chesterfield.* June 5.
- Lacey, Edward, Loughborough, Leicester, Baker. *Allen, Wharton Street, Lloyd Square, Clerkenwell: Fostbrooke, Loughborough.* June 9.
- Levett, William, sen., and William Levett, jun., Kingston-upon-Hull, Merchants and Grocers. *Lightfoot & Co., Hull: Walsley & Co., Chancery Lane.* June 9.
- Lee, Richard, Richard John Brasse, Fuller Farr, and George Lee, Lombard Street, Bankers. *Beider, Off. Ass.: White & Co., Frederick's Place, Old Jewry.* June 16.
- Lillie, George, and John Patterson, Liverpool, Merchants. *Mawdsley, Liverpool: Adlington & Co., Bedford Row.* June 16.
- Mottram, Pryce, Oxford Street, Dealer in Lace. *Abbott, Off. Ass.: Martinale, Cecil Street, Strand.* May 22.
- Meyer, Johann Conrad Hermann, Brightelmston, Sussex, Watch Maker. *Brookbank, Brighton: Williams, South Square, Gray's Inn.* June 2.
- Mueller, Charles Henry, Norwich, Music Seller. *Green, Off. Ass.: Wood & Co., Dean Street, Soho.* June 5.
- Mason, Matthew, Preston, York, Farmer. *Shaw, Ely Place: Thorney, Hull.* May 28.
- Noble, Joseph, Westgate, Northumberland, Ship Owner. *Bell & Co., Bow Churchyard, Cheapside: Whitmore, Off. Ass.* June 5.
- North, William, Kingston-upon-Hull, Merchant. *Hicks & Co., Gray's Inn Square: Holden & Co., Hull.* June 9.
- Palmer, John, Worcester, Hop Merchant. *Saunders & Co., Worcester: Wimburn & Co., Chancery Lane.* May 22.
- Palmer, Thomas, Worcester, Cattle Dealer. *Piercy & Co., Three Crown Square, Southwark: Lackington, Off. Ass.* May 26.
- Parker, William, Steel Yard, Upper Thames Street, Lead Merchant. *Gibson, Off. Ass.: Hewitt, Tokenhouse Yard* May 26.
- Pratt, Charles William, (usually called and known by the name of William Pratt) West Smithfield, and of Plomer Green, Bucks, Sheep and Beast Salesman. *Abbott, Off. Ass.: Parker, St. Paul's Churchyard.* June 2.
- Pearson, Ralph, Blackburn, Lancaster, Muslin Manufacturer. *Hickock, Manchester: Johnson & Co., Temple.* June 9.
- Perkins, Edward, Northampton, Gardener and Victualler. *Yeates, Nelson Square: Yeates, Northampton.* June 9.
- Payne, John, and Edward Payne, Great Queen Street, Lincoln's Inn Fields, Coach Lace Manufacturers. *Shearman, Gray's Inn: Nias, Copthall Court, Throgmorton Street: Graham, Off. Ass.* June 12.
- Partington, Thomas, Oxford Street, and Hamptstead, Middlesex, Confectioner and Pastry Cook. *Clarke, Old Broad Street; Cawson, Off. Ass.* June 12.
- Reinagle, Ramsay Richard, Fitzroy Square, Agent. *Coppock, Fumival's Inn: Johnson, Off. Ass.* June 2.
- Swanson, John Timothy, Liverpool, Merchant. *Jones & Co., John Street, Bedford Row: Foster & Co., Liverpool.* May 22.
- Scott, Thomas, Liverpool, Linen and Check Manufacturer, *Adlington & Co., Bedford Row: Leigh, Wigan.* May 26.
- Stretch, John Cliffe, Worcester, Auctioneer and Appraiser. *Gwinnett & Co., Worcester: Becke & Co., Essex Street, Strand.* May 29.
- Stockwell, Francis, Uxbridge, Middlesex, Chemist & Druggist. *Nethercole & Co., Essex Street, Strand. Graham, Off. Ass.* June 2.
- Smethurst, Joseph, and John Wallwork, Coptroad within Spotland, Rochdale, Lancaster, Coal Merchants. *Harlewell, Middleton, near Manchester: Mayhew & Co., Carey Street, Lincoln's Inn.* June 2.
- Sutton, William, Birmingham, Brass Founder. *Norton, Gray's Inn: Harrison, Birmingham.* June 9.
- Slater, Samuel Standidge, Kingston-upon-Hull, Corn Merchant. *Rosser & Co., Gray's Inn Place: England & Co., Hull.* June 12.
- Squire, Philip, and Wm. Squire, Southmolton, Devon, Linen Drapers. *Sole, Aldermanbury: Tarquand, Off. Ass.* June 16.
- Shrapnel, Henry Squire, Oxford, and Mitchell Jousiff, Grocer & Dealer in Toys. *Parkes, South Square, Gray's Inn: Harding, Birmingham.* June 16.
- Syms, Jonathan, Trowbridge, Wilts, Clothier. *Fisher, Queen Street, Cheapside: Tindrell, Trowbridge.* June 16.
- Scott, James, Berwick-upon-Tweed, Currier and Leather Seller. *Knox, Hart Street, Bloom-bury: Marshall, Berwick-upon-Tweed.* June 16.
- Tilley, Robert, King Street, Holborn, Coachmaker. *Brady, Staple Inn: Goldmid, Off. Ass.* June 5.
- Turner, Thomas Smidley, Weymouth Terrace, Hackney, Builder. *Abbott, Off. Ass.: Evans & Co., Kennington Cross.* June 9.
- Taylor, Thomas, and John Taylor, jun., Hedon, Holderness, York, Merchants. *Dynely & Co., Gray's Inn: Isaac Hedon.* June 16.
- Taylor, William, Liverpool, Apothecary and Druggist. *Atkinson & Co., Liverpool: Adlington & Co., Bedford Row.* June 16.
- Willis, Henry, Blackman Street, Southwark, Carpet Warehouseman. *Green, Off. Ass.: Richardson, Ironmonger Lane.* May 22.
- Wright, George, Sheffield, York, Licensed Coach Proprietor. *Tattershall, Great James Street, Bedford Row: Thompson, Sheffield.* May 26.
- Ward, Joseph, jun., Little Sheffield, York, Victualler. *Fickers, Sheffield: Rodgers, Devonshire Street, Bishopgate.* June 5.
- Williams, Morgan, Neath, Glamorgan, Linen Draper. *Edwards, Off. Ass.: Sole, Aldermanbury.* June 6.
- Weatherley, John, North Shields, Northumberland, Brewer and Wine and Spirit Merchant. *Spencer & Co., Aldermanbury: Wheldon, North Shields.* June 16.

## THE EDITOR'S LETTER BOX.

We cannot adopt the suggestion of printing the Professional Lists on the cover, not only because some of our subscribers who take the work in Monthly Parts do not receive the weekly covers, but because the Lists are valuable for reference, and they are given at the request of a large portion of our readers.

The letter of L. M., is under consideration.

The Queries and Answers of J. M. C.;

"Spes;" W. J. B.; "A Subscriber;" N. G.; L. M.; "Justitia;" T. C.; R. B.; "Gradus;" and "Common Sense," have been received.

We beg our correspondents will not subject the publisher to the expense of postage.

We are informed, that on a special affidavit proving who were the agents of the Coroner of Essex, an attachment against him has been granted.

# The Legal Observer.

Vol. X.

SATURDAY, JULY 4, 1835.

No. CCLXXVIII.

— "Quod magis ad nos  
Pertinet, et nescire malum est, agitamus.

HORAT.

## THE PROGRESS OF LAW REFORM.

We have usually once or twice in each Session of Parliament directed the attention of our readers to the general state of Law Reform; and in pursuance of this course, we shall here briefly enquire what has been done up to the present time. The session is now drawing to a close; and we may fairly presume that no measure of any importance will be hereafter introduced with any prospect of being carried.

The two great measures which have engaged the attention of many preceding parliaments have not made their appearance in this session. The advocates of Local Courts and of a General Registry have not introduced any Bills for effecting their desires. Lord Brougham has not uttered a single word relating to either of them. We may fairly conclude, therefore, that for the present at least, they are disposed of.

The Imprisonment for Debt Bill has been reported on by the Select Committee, and their report is to be taken into consideration by the whole House on the 8th of the present month. We have no expectation that it will pass this Session. Its nature and probable effect are becoming daily more known; and we are well satisfied that, if time be allowed for calling the attention of the country to its provisions, there will not be a town that will not send up its petition against it. As it is, a Correspondent shewed in our last Number<sup>a</sup> the state in which this index of public feeling stands at present.

Of the other Bills introduced in the present Session, by far the most important is the Municipal Corporation Bill,—a measure to which we have already fully adverted. We observe there are some notices of amendments of the clauses more peculiarly relating to the administration of the Law.

We shall consider these in our next Number, when they will probably have been disposed of by the House.

We shall now mention some minor Bills before Parliament. The two Bills founded on the Ecclesiastical Report, relating to the Execution of Wills, and the Law of Executors, which we have already considered,<sup>b</sup> have met with considerable opposition in the House of Lords. We have always questioned the propriety of the alteration proposed by the former, in making two witnesses necessary to all wills; and we doubt whether this Bill will pass in its present shape. Several Bills have been brought in for the relief of Dissenters; but we believe that the only one which will pass this session is that relating to Dissenters' Marriages, which, at the time we write, waits only for the Royal Assent. Another Bill,<sup>c</sup> founded on the Report of the Ecclesiastical Commission, has been introduced, the great object of which is to consolidate the several Ecclesiastical Jurisdictions of England and Wales. This appears to us to be a measure much needed. Several Bills have been introduced relating to Elections for Parliament: one relates to the Registration of Voters<sup>d</sup>; another relates to the Limitation of Polls;<sup>e</sup> and a third to Bribery, and the Expenses at Elections.<sup>f</sup> The two former will probably pass. The third has been withdrawn.

Lord Lyndhurst has brought in a Bill,<sup>g</sup> which, we think, is founded on justice. Under the present rules of the Ecclesiastical Courts, the children of parents married within the prohibited degrees are by law legitimate, unless such marriage be declared

<sup>b</sup> See 9 L. O. pp. 391 & 402.

<sup>c</sup> See 9 L. O. 498.

<sup>d</sup> *Ante*, p. 9.

<sup>e</sup> *Ante*, p. 114.

<sup>f</sup> See *ante*, p. 147.

<sup>g</sup> See *ante*, p. 144.

<sup>a</sup> See *ante*, p. 168.



void by the sentence of the Ecclesiastical Court during the life time of their parents. It is proposed to enact that such children shall be legitimate, unless a suit be duly instituted for annulling the marriage of their parents within two years from the celebration thereof.

A Bill has also been introduced by Lord Brougham, for the amendment of the law relating to Letters Patent.<sup>h</sup> This Bill, the important clauses of which we have already printed, contains many useful alterations, and is intended to protect a very deserving class of persons, at present under very great disadvantages from the state of the existing law.

The advocates of the amelioration of the Criminal Code have made some further progress. The Bill for giving Counsel to Prisoners will probably pass the House of Commons. We have already given our opinion as to this measure.

We have now enumerated all the Bills relating to the Law before Parliament; and our readers will see there is much less alteration even contemplated than in the two preceding sessions. The Law Commissioners have now nearly finished their labours, and we trust that very soon we shall have a more settled state of things than we have had for some time past.

### CHANGE OF ASSIZES.

By an Order of Council, on the 24th June, 1835, reciting the act of 3 & 4 W. 4, c. 71, it is ordered, that the assizes and sessions held therewith under commissions of gaol delivery, and other commissions for the dispatch of civil and criminal business for the county of Wilts, heretofore holden at Salisbury, shall be hereafter holden alternately at *Salisbury* and *Devizes*; that is to say, on the summer circuit at Devizes, and on the spring circuit at Salisbury.

And by another Order of the same date, also reciting the 3 & 4 W. 4, c. 71, it is ordered, that the assizes and sessions held under commissions of gaol delivery, and other commissions for the dispatch of civil and criminal business for the county palatine of *LANCASTER*, heretofore holden at Lancaster, shall be hereafter holden, on the same circuit, both at *Lancaster* and *Liverpool*, in the same county palatine:

And it is further ordered, that the said county be divided, for the purpose of carrying the said act and this order into effect, into two divisions, which shall respectively be called the *Northern Division* and the *Southern Division*; and that such northern division shall include

the whole of the several hundreds of *Lonsdale*, *Amounderness*, *Leyland*, and *Blackburn*; and that such southern division shall include the whole of the respective hundreds of *Salford* and *West Derby*:

And it is hereby ordered, that the house of correction at *Kirkdale*, in the hundred of *West Derby*, shall and may be used, in manner hereinafter mentioned, as a common gaol, for the purpose of carrying the said act and this order into effect; and that any justice or justices of the peace or coroner for the said county, or any liberty therein, may commit any person duly charged with any offence triable at the assizes, to the said house of correction; and such justice or coroner is required to specify in the commitment, that the commitment is for trial at the assizes; and from the opening of the Court at *Liverpool* aforesaid, the prisoners in the said house of correction, committed for trial at the assizes, shall be in the government, custody, charge, and keeping of the sheriff of the said county palatine, and also the prisoners removed by the said sheriff, pursuant to the direction hereinafter given, from the castle at *Lancaster*, for trial at the assizes to be held at *Liverpool*, shall be kept by the said sheriff in the said house of correction; and all such prisoners so committed or removed as aforesaid, shall continue in the government, custody, charge, and keeping of the said sheriff, in the said house of correction, until the execution of their respective sentences, or until they shall be delivered from thence into the custody in which they ought, by virtue of their respective sentences, to be delivered, or be delivered by due course of law; and it is further ordered, that the governor or keeper of the said house of correction do transmit to the said sheriff or his deputy, a list of the prisoners committed thereto for trial, together with a statement of their respective offences, seven days at least before the commission day of the said assizes to be held at *Liverpool*, in order to enable him to prepare a proper calendar, which the said sheriff is hereby required to do:

And it is further ordered, that in all cases of commitments for trial, or recognizances to appear and prosecute or give evidence at the assizes for any offence supposed to have been committed in the said northern division, such commitment shall be to the castle of *Lancaster*, and the recognizances shall be taken to appear and prosecute, or give evidence, or to appear and answer, at the assizes at *Lancaster*; and for all offences supposed to have been committed in the said southern division, the commitment shall be to the house of correction at *Kirkdale* aforesaid, and the recognizances shall be taken to appear and prosecute, or give evidence, or to appear and answer, at the assizes at *Liverpool*, unless the justice or justices of the peace making any such commitments or taking such recognizances shall, under the special circumstances of the case, think fit to make such commitments for trial, or recognizances to appear and prosecute, or give evidence, or to appear and answer, at the

<sup>h</sup> See *ante*, p. 146.

assizes to be holden in the division, other than that in which the offence shall be supposed to have been committed; in which case such commitments shall be made and recognizances taken, and such trial shall take place accordingly; and in such special case such justice or justices shall and may commit prisoners charged with any offence supposed to have been committed in the northern division, to the said house of correction, for trial at the assizes to be holden at Liverpool; and that all prisoners now or hereafter in custody in the castle of Lancaster for trial at the next ensuing assizes, after the date of this order, for offences appearing by their respective commitments to have been committed in the said southern division (other than such prisoners, if any, as may have been committed by such justice or justices as aforesaid, in such special case as aforesaid, or as may have been removed to the said castle of Lancaster from the said house of correction, by a Court or Judge, as hereinafter provided for), shall be removed by the sheriff of the said county to the said house of correction for trial at the said next assizes to be held at Liverpool, and shall be tried there; provided always, and it is further ordered, that a list of the names of such prisoners, with a short statement of the offences with which they are charged, shall, by the said sheriff, be inserted in one or more of the newspapers published in the said county (so far as the same list can be then made out) ten days before the day fixed for the opening of the commission at the assizes at Liverpool, with a notice that all persons bound by recognizance to appear and prosecute or give evidence against such prisoners so removed, shall appear and give evidence at the said next assizes to be held at Liverpool; and the persons so bound shall so appear and prosecute and give evidence accordingly; and it is further ordered, that all other prisoners now or hereafter in custody in the castle of Lancaster, for trial at the assizes, shall be tried at the assizes held at Lancaster; and all prisoners hereafter in custody, for trial at the assizes, in the said house of correction, shall be tried at the assizes held at Liverpool; but such prisoners as shall be in custody in the said house of correction for trial at the sessions, shall remain therein for trial as heretofore:

And it is further ordered, that all indictments for offences supposed to have been committed in the Northern division of the said county, shall be preferred to the grand jury for the said county of Lancaster; and for offences supposed to have been committed in the Southern division of the said county, shall be preferred to the grand jury for the said county at Liverpool, except in the case of persons committed or held to bail under the special circumstances hereinbefore mentioned, or removed for trial by order of a Court or Judge as hereinafter provided, in which case indictments shall be preferred to the grand jury, either at Lancaster or Liverpool, to or at whichever of the said places the said persons shall be committed, or removed, or held to

bail to appear, and all issues arising upon or out of any indictment, shall be tried at whichever of the said places the said indictment shall have been preferred; and that in all other cases not herein otherwise provided for, an indictment may be preferred either at the assizes held at Lancaster, or at the assizes held at Liverpool:

And it is further ordered, that any person not in custody, against whom any true bill of indictment shall hereafter be found at Lancaster, shall, if committed, be committed to the castle of Lancaster, for trial at the assizes to be held at Lancaster; or in case such indictment shall be found at Liverpool, then such person shall be committed to the said house of correction at Kirkdale, for trial at the assizes to be held at Liverpool:

And it is further ordered, that issues now or hereafter to be joined on any indictments already found at the assizes for offences, wherever supposed to have been committed, shall be tried at the assizes held at Lancaster:

And it is further ordered, that the sheriff of the said county, or his deputy, and the clerk of the crown for the said county palatine, or his deputy, shall attend at the assizes both at Lancaster and Liverpool, and all justices of the peace and coroners bound by law to attend at the assizes, shall attend at the assizes held at Lancaster or Liverpool accordingly as their usual place of residence may be either in the said Northern or Southern division respectively, and those who have no residence in either division, at either place, as may be nearer to their usual place of residence, and all mayors, stewards, bailiffs of liberties, hundreds, and wapentakes in the Northern division, do attend at the assizes at Lancaster, and in the Southern division at the assizes at Liverpool:

And it is further ordered, that every such justice of the peace and coroner shall certify his examinations, informations, inquisitions, bailments, and recognizances in respect of offences which are, pursuant to this order, to be tried at the assizes at Lancaster, to the clerk of the crown, before or at the opening of the Court at Lancaster; and in respect of those to be tried at the assizes at Liverpool, before or at the opening of the Court at Liverpool:

And it is further ordered, that no alteration shall be necessary in the commissions of oyer and terminer and gaol delivery for the said county, and that two assize writs may be issued by the clerk of the crown for the said county palatine, in the same manner as one has heretofore issued, directed to the sheriff of the said county, one of which shall be as near as may be in the form hereunto annexed, marked (A.); and another in the like form, substituting the words "Castle, at Lancaster," for "Court House, at Liverpool;" and "Northern Division," for "Southern Division;" but no deviation in such writs from the said forms, shall in any way invalidate the same; and the sheriff shall return one writ at the assizes at Lancaster, and the other at the assizes at

Liverpool, with the proper schedules or panels annexed thereto, and a schedule of the *nominis ministrorum* for the whole county; and it is also ordered, that writs of subpoena do issue as heretofore, with the proper alteration, and do name the assizes, either at Lancaster or Liverpool, as the case may be, where the attendance of the witnesses is to be given; and that all writs of jury process be altered in like manner, but that no alteration be necessary in any mittimus to the said county palatine, for the trial of any issue joined in any of his Majesty's Courts at Westminster; and further, that the assize writs and subpoenas to be hereafter issued for the next assizes may be tested on any day after the date of this order, and for any subsequent assizes may be tested in manner heretofore used and accustomed:

And it is further ordered, that the sheriff of the said county do summon a grand jury for the body of the said county, which shall attend at the assizes at Lancaster, and be sworn for the body of the whole county as heretofore; and another grand jury (which may consist in part or in all of the same, or may consist altogether of different persons) which shall attend at the assizes at Liverpool, and be sworn in like manner:

And it is further ordered, that the sheriff or other minister to whom belongs the return of the jurors for the trial of issues to be tried at the said assizes at Lancaster or Liverpool, either from the Superior Courts at Westminster, or in the Court of Common Pleas at Lancaster, or any criminal issue, shall summon a competent number of men, named in the jurors' book, to serve on juries indiscriminately on the civil and criminal side, at the said assizes at Lancaster, so as such number be not less than forty-eight, nor more than seventy-two; and also a competent number of the like persons to serve on juries indiscriminately as aforesaid, at the said assizes at Liverpool, so as such number be not less than forty-eight, nor more than seventy-two, unless a Judge, or the Judges in the commission of oyer and terminer and gaol delivery shall direct a greater or less number; in which case such greater or less number shall be summoned; and in summoning such jurors to attend at the said assizes at Lancaster and Liverpool respectively, the said sheriff or other minister shall have regard to the convenience of the said jurors as to their place of residence:

And it is further ordered, that all persons who shall have served as jurors at either of the said assizes, shall have the like privilege and exemption, by virtue of the statute passed in the sixth year of the reign of his late Majesty King George the Fourth, intituled "An Act for Consolidating and Amending the Laws relative to Jurors and Juries," as if he had served at the assizes held for the whole county; and that all and every the powers and provisions of the said last-mentioned statute touching the summoning of jurors, common and special, and the summoning of jurors to serve indiscriminately on the criminal and civil side, and all other the powers and provisions of the

said last-mentioned act, shall be in force with respect to each of the said assizes to be held at Lancaster and Liverpool respectively, so far as they may be applicable thereto, in like manner as they were with respect to the assizes held at Lancaster only:

And it is further ordered, that every declaration hereafter to be filed or delivered in any action in which the issue is intended to be tried at the assizes for the county palatine of Lancaster, held at Lancaster or Liverpool respectively, shall have in the margin, besides the ordinary venue, the words ["Northern Division,"] or ["Southern Division"]; but no other alteration from the ordinary form of such declaration shall be necessary; and issues arising in such actions, if tried at the assizes, shall accordingly be tried at the assizes held at Lancaster and Liverpool respectively: provided nevertheless, and it is further ordered, that in all cases of civil actions in which the venue is by law local, the issues therein shall be tried at Lancaster, in cases where the cause of action shall have arisen in the northern division, and at Liverpool, where the cause of action shall have arisen in the southern division, in like manner as if the said two divisions were two separate counties; and the declarations in such actions shall have in the margin, in addition to the ordinary venue, the words ["Northern Division,"] or ["Southern Division,"] as the case may require, but no other alteration from the ordinary form shall be necessary; nevertheless, it shall be lawful for the Court in which any such issue is joined, or any Judge of the Superior Courts of Common Law at Westminster, to order such issues to be tried at the assizes held in the division in which the cause of action did not arise, if they or he shall think fit; and also to order the words in the margin to be amended in any other cases, so as to cause the trial to take place at the assizes held in another division:

And it is further ordered, that in all cases of issues already joined, or hereafter joined, in which the venue is laid in the county of Lancaster, without any words in the margin specifying the division of the county, such issues shall be tried at the assizes at Lancaster, unless the Court in which such action shall have been commenced, or a Judge thereof, or one of the Judges of the Superior Courts at Westminster, shall otherwise order, by directing the proper words to be inserted in the margin, or otherwise as he shall think fit:

And it is further ordered, that in all cases of indictments removed into the Court of King's Bench at Westminster by *certiorari*, and in all cases of informations triable at the assizes for offences alleged to have been committed, or matters alleged to have arisen, in the said county palatine, the trial of any issue arising therein shall take place at the assizes held at Lancaster, unless the Court in which such information shall be filed, or in the case of indictments, the said Court of King's Bench, or any Judge of the said Courts respectively, or any Judge of the said Court of Common Pleas at Lancaster, shall otherwise order:

And it is further ordered, that his Majesty's Court of King's Bench at Westminster, or any Judge thereof, or any Judge of the Superior Courts at Westminster, being a commissioner of oyer and terminer and gaol delivery for the said county, shall and may, if such Court or Judge shall think fit, order and direct the issue upon any indictment found by the grand jury at Liverpool, to be tried at Lancaster, and *vice versâ*, and also order and direct any prisoner in custody for trial at the assizes in the said house of correction at Kirkdale to be removed to take his trial at Lancaster, and issue a writ of *habeas corpus* accordingly for such removal, and *vice versâ* :

And it is further ordered, that every recognizance which shall be entered into to appear and prosecute or give evidence, or to appear and answer, as the case may be, at the assizes to be held at Lancaster, shall, in case such order shall have been made as last aforesaid for trial at the assizes at Liverpool, be obligatory on the parties bound by such recognizance to appear and prosecute, or give evidence, or appear and answer, as the case may be, and do all other things therein mentioned, at the assizes to be held at Liverpool, in like manner as if such recognizance had been originally entered into for appearing and prosecuting, or giving evidence, or for appearing and answering, or doing such other things, at the assizes held at Liverpool; provided that one week's notice shall have been given, either personally or by leaving the same at the place of residence as of which the parties bound by such recognizances are therein described, to appear at the assizes to be held at Liverpool; and that in like manner recognizances for appearing at Liverpool shall be obligatory on the parties to appear at Lancaster; provided also, that it shall be lawful for the Court or Judge making such order for trial and removal as aforesaid, and they are hereby required to cause the party applying for such order, whether he be a prosecutor or party charged, to enter into a recognizance in such sum, with or without sureties, as such Court or Judge may direct, and conditioned to give such notice as aforesaid to the parties bound by such recognizances, to appear at the assizes at which the trial of such indictment shall be ordered to take place as aforesaid :

And it is further ordered, that nothing herein contained shall extend to issues upon indictments or other proceedings, removed into the Court of Pleas of the Crown at Lancaster, which shall be tried at the assizes held at Lancaster, as heretofore :

And it is further ordered and declared, that nothing herein contained shall extend to prevent the commissioners of oyer and terminer and gaol delivery, or justices of Common Pleas within the said county, or the grand or petty juries sitting either at Lancaster or Liverpool, from having and exercising, at either place, such jurisdiction as now belongs to them by law over the whole county.

[Then follow the Forms of the Assize Writs, as mentioned in the Order.]

## PRACTICAL POINTS OF GENERAL INTEREST.

No. LXXIX.

### DRAMATIC COPYRIGHT.

THE following case has lately been reported, under the Dramatic Copyright Act (3 & 4 W. 4, c. 15, given 6 L. O. 211). By sec. 1 of the statute, it is enacted, that the author of any tragedy, comedy, play, opera, farce, or any other dramatic piece or entertainment, composed, and not printed and published by the author thereof or his assignee, or which thereafter shall be composed, and not printed or published by the author thereof or his assignee, or the assignee of such author, shall have as his own property the sole liberty of representing, or causing to be represented, at any place or places of dramatic entertainment whatsoever, in any part of the united kingdom of Great Britain and Ireland, in the isles of Man, Jersey, and Guernsey, or in any part of the British dominions, any production as aforesaid, not printed and published by the author thereof, or his assignee, and shall be deemed and taken to be the proprietor thereof; and that the author of any such production, printed and published within ten years before the passing of this act by the author thereof or his assignee, or which shall hereafter be so printed and published, *or the assignee of such author*, shall, from the time of passing this act, or from the time of such publication respectively, until the end of twenty-eight years from the day of such first publication of the same, and also, if the author or authors, or the survivor of the authors, shall be living at the end of that period, during the residue of his natural life, have as his own property, the sole liberty of representing, or causing to be represented, the same at any such place of dramatic entertainment as aforesaid, and shall be deemed and taken to be the proprietor thereof: Provided nevertheless, that nothing in this act contained shall prejudice, alter, or affect the right or authority of any person to represent or cause to be represented, at any place or places of dramatic entertainment whatsoever, any such production as aforesaid, in all cases in which the author thereof or his assignee shall, previously to the passing of this act, have given his consent to or authorized such representation; but that such sole liberty of the author or his assignee shall be subject to such right or authority.

Action upon the case. Issue having been joined, an order was made by *Parke, J.*, under stat. 3 & 4 W. 4, c. 42, s. 25, by consent of the parties, that the facts should be stated for the opinion of the Court in a special case; which was as follows. The plaintiff is a bookseller and publisher in London. The defendant is the author of a farce, called "The Green Eyed Monster," composed, printed, and published, within ten years from the passing of the act 3 & 4 W. 4, c. 15, (royal assent 10th June, 1833) entitled "An Act to amend the Laws relating

to Dramatic Literary Property." On the 1st Nov. 1828, the defendant, by an instrument under seal (a copy of which was annexed to the case), assigned to the plaintiff, for a valuable consideration, all his right, title, and interest whatsoever, in the copyright of the said farce. Previously to that assignment, the defendant duly granted to the proprietors of the Haymarket Theatre, for a valuable consideration, the right of representing the said farce at that theatre; the same had been frequently represented and performed there, a manuscript copy of the said farce having been delivered by the defendant to the said proprietors for that purpose; which circumstances were known to the plaintiff before he contracted with the defendant for the purchase of the said copyright. But the defendant, after granting the right of representation at the Haymarket Theatre, still possessed the right of representing, or authorising the representation of the farce, at any other theatre at his pleasure. After the passing of the act above mentioned, and within twelve months before the commencement of this suit, the defendant, claiming to be the person entitled by virtue of the act, without the consent of the plaintiff, caused the said farce to be represented for profit at a place of dramatic entertainment in England, other than the Haymarket Theatre. The plaintiff admitted that, before the passing of the said act, printed dramatic copyright pieces were constantly represented at different theatres, without the consent of any person, and the consent of the assignee of the copyright of such dramatic pieces was not necessary, and was not given or required, to the representation; and pieces performed and not printed were sometimes surreptitiously obtained for the purpose of representation at theatres, and represented without consent in the country, but not in London, or within ten miles thereof. The question for the opinion of the Court was, whether the plaintiff, by virtue of the said assignment, was the assignee of the author within the meaning of the act, and entitled to the liberty of representing the said farce at places of dramatic entertainment, subject to the right or authority of the proprietors of the Haymarket Theatre to represent the farce there. If the Court should be of opinion that the plaintiff was such assignee, it was agreed that judgment should be entered for the plaintiff for one shilling damages; but if the Court should be of a contrary opinion, a *nolle prosequi* was to be entered. The assignment, of which the copy was annexed to the case, was of all the author's right, &c. in the copyright of the farce, and of an opera, with the songs and printed stock thereof, and of all and every the defendant's right, title, and interest whatsoever in the copyright of another farce, and another dramatic piece, "to have and to hold the aforesaid four copyrights to the said John Cumberland, his executors, &c. as his and their absolute property."

Lord Denman, C. J.—It appears to me that the plaintiff is the assignee spoken of in the act. In the early part of the act, this is the kind

of assignee spoken of; for it is the only kind there could then be. Had such an extension of the principle been contemplated as that for which the plaintiff contends, the parties might have made a distinction; but the assignee here takes the whole right of the author: and in the run of the ten years, this will not injure authors; for they will sell for a price including the new privilege. The interest of the author is certainly that which is principally regarded in the statute; but we cannot stretch the meaning so as to put different interpretations upon the word "assignee" in different parts of the statute.

Littledale, J.—I am of the same opinion. The assignee of whom the act speaks, is the assignee of the copyright,—a person already recognized by the law. By the words "not printed or published by the author thereof or his assignee," the assignee of the copyright must be meant. So again, in the words "the author of any such production, printed and published within ten years before the passing of this act by the author thereof or his assignee," the meaning must be the same. We cannot, therefore, say that "assignee" means the assignee of the privilege created by the act. The author may, perhaps, lose some privileges by this construction; but it seems to me that the legislature intended to give the right of representation to the person entitled to the copyright.

Judgment for the plaintiff. *Cumberland v. Planche*, 1 A. & E. 580. See also *Burnett v. Glossop*, 3 Dowl. Prac. Ca. 625.

## USAGES OF THE PROFESSION.

### CONVEYANCE TO DEVISEES.

Sir,

Allow me to observe, in answer to an inquiry inserted at page 89. of the present Vol. of your periodical, that your correspondent might, without any great practical knowledge, have ascertained that the duty of preparing the conveyances to the devisees under the will, under the circumstances he states, clearly devolves upon the solicitors for the trustees. The whole of the transactions arising under the testator's will have been, I presume, conducted by Messrs. H. and B. and they alone have had the care and management of the division and appropriation of all monies and estates thereunder; and the question which is submitted through your columns arises upon the fact of one estate being divisible amongst several devisees, the solicitor for each of whom claims the duty of preparing these conveyances. Now, Sir, inasmuch as the execution of the conveyances is clearly a duty devolving upon the trustees, and a part of their trustee ship, they alone have a right to carry that into effect, and for that purpose their solicitors are entitled most undoubtedly to prepare the conveyances. The trustees are also interested, as your correspondent observes, that the conveyances should be uniform, which they would not be if prepared by the different solicitors; and besides, the solicitors

for the trustees alone can be possessed of the necessary information for the preparation of the conveyances; and upon this view of the case it appears to me that Messrs. H. and B. are clearly entitled to prepare them.

I may however mention, that in a case very much resembling that put by your correspondent, in which I was professionally concerned, the same point was raised; but in that case the trustees had gone to the Court of Chancery and obtained a decree, which directed them to execute conveyances to the devisees; and when the point was discussed before the master, he held that the solicitor for the trustees was entitled to prepare the drafts, and in that, as well as in every other respect, to prosecute his own decree.

The principles of this case appear strongly analogous to that of your correspondent, and upon which it appears to me little or no doubt can be entertained. Homo.

## SELECTIONS FROM CORRESPONDENCE.

### No. CIII.

#### IRREGULARITY.—INDORSEMENT OF PROCESS. —RESIDENCE.

[We have received the following statement from a correspondent, on whose accuracy we can rely.]

Mr. *Humfrey*, on a former day, obtained a rule nisi to set aside the writ and subsequent proceedings, on two grounds, viz. 1st. That the writ being issued into Middlesex, had been served on the defendant in Serjeants' Inn, Chancery Lane, which, it was said, was in the city of London; 2d. That the writ was not indorsed in compliance with the directions of the Uniformity of Process Act, the parish in which the plaintiffs resided being omitted, thus, "This writ was issued in person by Joseph Arden and Richard Edward Arden, who reside at No. 2, Clifford's Inn Passage, Fleet Street, in the city of London."

Mr. Serjeant *Talfourd* shewed cause.—(Mr. *Humfrey* had given up the first point, the plaintiffs' clerk swearing that Serjeants' Inn was within fifty yards of the bounds of the county of Middlesex.)—He contended, that the direction, "mention the city, town, or parish," was to be taken as disjunctive, and not cumulative. Here the city was meant, and Fleet Street was a much better description than the parish of St. Dunstan in the West: and cited *King v. Monkhouse*, 2 Dowl. 221, in which "Gray's Inn, London," was held sufficient, although it was sworn that Gray's Inn was not in the city.

Mr. *Humfrey*, in reply, contended, that the omission was fatal. That the act required that where the plaintiffs resided in a parish, the parish should be stated, as well as the town or city; and stated that the Court of Exchequer had decided that "Bouverie Street, in the city of London," was insufficient, as there might be several Bouverie Streets in the city; and he also contended that the case of *King v. Monkhouse* was not in point, Gray's Inn being *extra parochial*.

The Court said, that if a case should come before them of several places of the name of the residence indorsed, that might require a different construction; but they thought the description in the present case sufficient; and discharged the rule, with costs.

*Arden and another v. Garry*, T. T. 1835. Common Pleas.

#### JUDGES' CHAMBERS.

Mr. Editor,

The numberless points of practice that are daily being decided by Judges at chambers, render an open Court a matter of the greatest importance, both as a furtherance of justice to the public, and as a means of enabling attorneys and their clerks to learn the decision of the Judges in the cases that may come before them. There are instances of orders being granted by some Judges which have been refused by others, where the summonses have been precisely alike. Now it appears to me, if the Hall in Serjeants' Inn were appropriated as a Court to which attorneys and their clerks might be admitted to hear how summonses were decided, it would save numberless absurd summonses being taken out, and prevent the valuable time of the Judges being wasted in listening to them, besides giving an opportunity to attorneys and their clerks of learning in what cases orders will be granted and when refused, instead of their being oftentimes kept two or three hours loitering away their time in the confined chambers that are at present in use. J. S. W.

#### DELAY IN SERVING WRITS IN THE COUNTRY.

Mr. Editor,

With your permission I will avail myself of the assistance of your valuable journal, to give our brethren of the profession in the country a hint as to their delay in the service of process intrusted to them for that purpose by town solicitors. I have now several writs in the country for that purpose, and cannot even get an answer to my applications to know if the writs have been served. My resource will be, as coach fares are cheap and leisure plentiful in the long vacation, to send a clerk down to serve writs in the country, and give him the benefit of the excursion.

CIVIS.

#### DELAY OF JUDGMENTS.

Sir,

It is to be regretted, that when the Courts at Westminster reserve their judgment they do not fix some definite time when they will deliver it; for the consequence is, that the attorney is obliged to attend daily at the sitting of the Court, at considerable trouble oftentimes to himself, and always of expense to his client; both of which might be prevented, by the Court intimating when it is their intention to deliver their judgment. Attorneys have been in attendance a whole term for this purpose; whereas by having the proceedings placed in a paper (as in the Equity Courts), they would know exactly when to expect judgment. L. M.

## STATE OF THE LAW IN INDIA.

WE recently noticed Mr. Thornton's valuable Work, on the State and Prospects of India (see vol. 9, p. 490.) We have now to make some further extracts from his Chapter on "The Judicial System," which we deem peculiarly interesting, in reference to that vast portion of the British Empire.

"The judicial system of India has hitherto been of a most heterogeneous character, and it must probably continue so for a period of which the duration cannot be anticipated. The law of the Hindoos is founded upon their religion. It is of course, in many respects, barbarous and absurd. It is also sometimes extremely vague, and, on the whole, very imperfect. The Mahometans introduced their law, which like that of the Hindoos, was closely connected with their religion. The settlement of the British created a necessity for the introduction of a system of law differing from either. The law of England thus obtained a footing in India; but it did not altogether supersede either of the systems which it found previously in operation. But the Hindoo and Mahometan codes were such as no European people could consent to administer; they were, therefore modified in practice, and while their leading principles were adhered to, their more barbarous provisions were softened or rejected. Circumstances also continually arose to shew the necessity of some additional rules for the administration of justice; and the governments of India, from time to time, enacted various regulations, which, unless annulled by the authorities at home, have the force of law. The principles of judicial administration in India are consequently derived from no fewer than four different sources,—the institutions of the Hindoos, those of the Mahometans, the English Law, and the Regulations of the Indian governments. It seems to be the prevailing opinion, that from the wide differences of these various codes—from the general character of the people—from the diversity of languages, and from other causes, the administration of justice has been far from perfect.

"The law of England is administered in courts established by royal charter, and called Supreme Courts. Of these there are three; one at Calcutta, composed of a Chief Justice and two Puisne Judges; one at Madras, and one at Bombay, composed respectively of a Chief Justice and one Puisne Judge. Formerly the regulations of the Indian governments, which were intended to take effect within the jurisdiction of these Courts, were required to be registered in them. By the late act, registration is declared no longer necessary to give validity to the regulations of the Governor General in Council, and the power of legislation previously enjoyed by the governments of the other precedencies is withdrawn.

"The Supreme Courts exercise jurisdiction

over the European population generally, and under certain circumstances over natives also. In this respect their jurisdiction is understood to be restricted within certain local limits; but they have, in some instances, claimed authority over natives residing beyond those limits, on the ground of constructive inhabitancy; and over landed property to a very wide extent, on the ground that the unmoveable estates of all who are personally subject to them, are also within their jurisdiction. They have directed their receiver to manage the collections of very considerable estates in the interior, and thus have, in fact, rendered the whole of the tenantry liable to the process of the Court. On the principle of constructive residence, a trader residing without the limits, but having commercial dealings within them, may be rendered subject to the jurisdiction of the Court. These vague and uncertain claims of jurisdiction ought to be set at rest, especially as the natives entertain a great dislike to the Supreme Courts. Possibly the expense of their proceedings may be a principal source of their objection. English law is not a very cheap commodity at home, and in India it can hardly be expected at a lower rate than in the original market. This, in the eyes of a native, would stamp the system as one of the worst that could possibly exist. Litigation is with him a great luxury, and to make it dear is regarded as an act of oppression. At the same time it must be allowed, that the members of the Supreme Courts cannot possess much knowledge of the native habits and character, nor any familiarity with the native languages; and under these circumstances, it would be well that some considerable limitations should be put upon their jurisdiction.

"Previously to the passing of the last act, the authority of the Supreme Courts was almost paramount to that of the Government; but by that act the Governor General in Council is empowered to make laws and regulations for all courts of justice, whether established by his Majesty's charter or otherwise; but he cannot abolish any of the former description without the previous sanction of the Court of Directors. This sanction must, of course, be subject to the approval of the Board of Control, though the clause does not specify this provision.

"The Company's Courts are numerous, and have, at different times, been subject to various modifications. In Bengal, the lowest court of civil judicature is that of the Moonsiff. This is a native officer, who has original jurisdiction in cases where both parties are natives; to a certain amount, without appeal, and to a higher amount, subject to the right of appeal to the Zillah Court. He receives no salary, but is paid the amount of the stamp duty taken in lieu of the institution fees on the suits decided. No great care seems to be taken to ensure a due measure of qualification in these officers; and it is represented that, without the protection of appeal, in all cases but suits for very small sums, little confidence would be placed in their decisions.

"The Zillah Court, which is the court of appeal from the Moonsiff and some other subordinate authorities, to be noticed hereafter, has also an original jurisdiction to a limited amount. The zillah judge is an European; his decisions, in the first instance, are subject to appeal, and those given in his appellate character, to a special appeal. Each judge is assisted by two native law officers, a Hindoo pundit and a Mahometan moolavie, who act as his assessors, and give opinions on points of native law. These officers also exercise a direct judicial power, as sudder aumeens. In this character they try causes of limited amount, referred to them by the judge. They may further, at the discretion of the judge, hear appeals from the moonsiffs. If the assistance of the two native law-officers is found insufficient, other natives may be appointed to the office of sudder aumeen, according to the wants of the service. Further each court has, or had (for considerable changes are in progress), one or more European officers, denominated registrars, invested with authority to try causes of a certain class, remitted to them by the judge, and, in certain cases, to hear appeals. It has been proposed to abolish the office of registrar; to create a number of special sudder aumeens, or native judges, of higher rank than previously existed; and to assign to them the duty of determining suits for much larger sums than generally fell under the cognizance of the registrars, as well as that of hearing appeals from the ordinary sudder aumeens. This proposal has been, to a certain extent, acted upon, and the trial of cases in the first instance is now almost wholly in the hands of native judges, their power of jurisdiction being increased to an amount which very few causes in India exceed.

"Above the zillah or district courts were the provincial courts, whose authority, as their name implies, extended over a wider circuit. They had an original jurisdiction from the point where that of the zillah court stopped, extending to a much higher amount, and they also heard and decided appeals from the courts below. It is proposed gradually to abolish these courts.

"Superior to these is the court of Sudder Dewanny and Nizamut Adawlut. To this court are referred all cases in which the judges may differ from their law officers; it has the power of calling for and revising the proceedings of any of the courts, and may suspend from office the judges of the provincial and zillah courts. Suits of large amount are sometimes tried originally in this court, but its jurisdiction is chiefly appellate. Its decision is final in all cases, except where the decree appealed against is for a larger sum than 5,000*l.*, in which case an appeal lies to the King in council. There was formerly a single court of Sudder Dewanny and Nizamut Adawlut for the presidency, consisting of five judges; but it has been determined to confine the jurisdiction of this court to the lower provinces, and to establish another for the western provinces, consisting of three judges.

"The system of judicature in Madras does not essentially differ from that of Bengal before the late changes; but the zillah courts may try original causes to any amount, and suits of any amount may be appealed to the King in council. In Bombay, the judicial arrangements are nearly similar. But there are certain peculiar regulations, in which three different modes are pointed out by which the court may avail itself of native assistance.

"The law administered in these courts is chiefly contained in the regulations passed by the respective governments. In suits regarding succession and inheritance, as well as marriage, caste, and all other religious usages and institutions, the decisions are governed by the Mahometan law with respect to Mahometans, and the Hindoo law with respect to Hindoos, as expounded by the Mahometan and Hindoo law officers of the court. The pleadings are in writing, and consist, 1st, of the *Plaint*, which ought to state precisely the matter of complaint and the amount sought to be recovered; 2dly, the *Answer*; 3dly, the *Reply*; 4thly, the *Rejoinder*. If the plaintiff or defendant have omitted any thing material to the suit in the *plaint* or *answer*, one supplemental pleading of each kind, but no more, is admitted. The pleadings may be, at the option of the parties, either in Persian, Bengalee, or Hindostanee. The witnesses are examined *vide voce* in open court, and the evidence reduced to writing in one of the languages just mentioned."

We have already given, in the notice referred to, an account of the Pleaders in these Courts. Mr. Thornton next adverts to the Criminal Branch of the Law, from which we select the following remarks.

"The administration of the criminal law in Bengal (with the exception of those duties termed magisterial) was originally confided to the provincial courts. Inconvenience having been found to arise from this arrangement, a new set of functionaries were appointed, under the title of commissioners of revenue and circuit, to whom the entire criminal jurisdiction was transferred. This, however, was found to answer no better than the former plan, and it was thought necessary to make provision for relieving the commissioners from their duties as criminal judges, and to invest with that character the judges of the zillah courts. The functions of magistracy which had been previously exercised by the zillah judges, have, by the new arrangement, been transferred to the collectors. The court of Sudder Dewanny and Nizamut Adawlut is, in criminal as in civil matters, the highest authority. It is empowered to grant mitigation or remission of punishment; and no sentence of death, transportation, or perpetual imprisonment, is to be carried into execution without a previous revision of the trial by this court. In Madras the zillah judges and assistant judges try minor offences: the circuit duties are performed by judges of superior rank. It was proposed also



to invest the sudder aumeens with limited powers as criminal judges. In Bombay, the criminal law is administered by session judges, and judges of the Sudder Court make an annual circuit of inspection, with all the powers to revise and correct the proceedings of the judicial officers which were formerly exercised by the Court of Circuit. The collectors exercise a limited judicial authority in criminal cases.

"Criminal justice in Bengal is administered upon the principles of the Mahometan law, of course considerably modified by the force of European opinion. In Bombay, the authority of the Mahometan law is renounced, and a written code substituted. The same plan has either been adopted, or is proposed for adoption, in Madras.

"The use of the Mahometan law throws considerable power into the hands of the Moslem law officer of the court. When the whole of the evidence has been taken, he delivers his futwah or decision. This includes both the law and the fact; the futwah declaring whether or not the fact is proved, and what the Mahometan law is upon the subject. If the law officer finds the fact proved, and the judge agrees with him, the sentence is carried into execution, if it fall short of death, transportation for life, or perpetual imprisonment. If the judge dissent, the whole trial must be referred to the Sudder. If the law officer finds the fact not proved, the prisoner is forthwith released, unless in extraordinary cases, where the judge sees reason to suspect something improper, and takes on himself the responsibility of re-mitting the case. Notwithstanding the large discretion thus entrusted to the native officer, it is said that he rarely attempts to give his judgment without indirectly trying to discover the impression of the judge. But with all this habitual deference in the native officers, the position of the European judge, under the circumstances in which he is placed, does not appear the most dignified.

"The power of the inferior officers of the court appears to have been further increased by a practice alleged to have been rendered necessary by the pressure of business. In the heavier class of offences tried before the Court of Circuit, the evidence was always delivered in the hearing of the judge; but in the trial of misdemeanours, and smaller offences, this wholesome practice is dispensed with. The evidence is previously taken down, and then the witnesses and prisoner are brought before the judge, who puts such further questions as he thinks necessary.

"The Mahometan law of India renders the testimony of two witnesses necessary to conviction. It requires also direct testimony to the fact charged as a criminal offence. The Mahometan law officers, however, contrive to evade this, even in the gravest cases. In a case involving the punishment of death, the Moolavie will sometimes convict on circumstantial evidence only, but will state in his futwah that the extreme sentence is barred by the want of direct testimony: and the prisoner will

escape death, but be subjected to a minor punishment. This mixing up of the degrees of evidence with the measure of punishment is excessively absurd. The punishment which the law denounces may be too severe for the particular case, and if so it ought to be mitigated. But the mitigation should take place upon proper grounds. The degree of guilt can have nothing to do with the degree of evidence. A light degree of criminality is a ground for a light measure of punishment. An insufficient degree of evidence is a ground for exemption from punishment altogether. The man is either guilty or not guilty. There is no middle stage. If guilty, he ought to be punished according to his deserts; if not guilty, he ought to be acquitted. The law requires direct testimony, and declares that conviction cannot lawfully take place upon any thing short of it. But when direct testimony is not to be had, (and considering how cheaply evidence may be purchased in India, it is seldom wanting where any one has an interest in obtaining it,) such is the laudable zeal of the Mahometan interpreters for inflicting punishment, that rather than be disappointed, they will violate the commands of their own law. Yet they have a conscience in their iniquity; they will not put a man to death whom their law declares innocent, as far as human judgment can extend; but they will punish him by fine and imprisonment. His life shall be spared, but his liberty and his purse are trifles. It is not intended to discuss the question, whether or not conviction should take place upon circumstantial evidence alone: all that is meant is to lay down the principle, that the existence of doubt is a ground for acquittal, not for the infliction of a moderated punishment. The Mahometan assessors doubt, yet they strike—with some shew of moderation, indeed, but (according to their own belief) in the dark, as to whether the blow is merited or not. They will not do a great wrong; but they feel no reluctance to inflict a small one. This specimen is not calculated to impress us with a very high reverence for Mahometan morality and jurisprudence."

Mr. Thornton enters into a full and able examination of the objects of the Commission appointed under the late Act, to inquire into the jurisdiction, power, and rules of the existing Courts of Justice and Police establishments, the forms of Judicial Procedure, the nature and operation of the Laws, civil or criminal, written or customary, prevailing in any part of the country, and affecting any class of inhabitants, European or native. We shall probably take another opportunity to advert to the various measures of Law Reform contemplated as the result of the extensive inquiries which are thus instituted. Mr. Thornton's book will be of great service in the discussion and consideration of all projects of improvement relating to the institutions and government of India.

## SUPERIOR COURTS.

## Lords Commissioners' Court.

## INDENTURE OF SETTLEMENT.—CONSTRUCTION.—NEXT OF KIN.

A., by indenture, assigned 2500*l.* in the public stocks to trustees, to pay the interest thereof to B. for his life, and after several remainders over as to the corpus (all which failed), with ultimate limitation to such person or persons as should be next of kin to A. at A.'s death. B. was A.'s only surviving brother at A.'s death, and there were also three children of a pre-deceased brother: Held, that B. was entitled to the whole fund, as being the nearest of kin to A. at A.'s death.

By an indenture dated July 1813, it was witnessed that Peter Elmsley assigned unto A. and W. Young, their executors, &c. the sum of 2500*l.* 3 per cent. bank annuities, in trust to pay the interest and dividends thereof to his brother, Alexander Elmsley, and his assignees, during his life; and after his death, to pay the same among his (Alexander's) lawful children, and in default of such children, and of appointment of the said 2500*l.* by Peter Elmsley, then upon trust to pay the same "to such person or persons as should at the time of Peter Elmsley's death be his (Peter's) next of kin, and for no other use, trust, intent, or purpose." Peter Elmsley died in 1825, without having made any appointment of the said fund, leaving his brother, the said Alexander, and a son and two daughters of a deceased brother, surviving him; and Alexander died in 1831, without lawful children. The children of the other deceased brother filed this bill soon afterwards against the trustees of the settlement and the personal representatives of Alexander Elmsley; and the questions raised in the suit were, whether the limitation over to the next of kin was exclusive of Alexander Elmsley, the tenant for life; and whether, if not excluded, he was entitled to the whole fund as *nearest* of kin, or to a moiety as one of the next of kin, the plaintiffs, in the last case, taking the other moiety. The late *Master of the Rolls*, before whom these questions were argued, held, first, that Alexander Elmsley, having survived Peter, and being one of his next of kin, was not excluded from the benefit which the deed gave him in that character, beyond his life interest; and, secondly, that the words next of kin, in the limitation over, were to be understood according to the sense in which they are used in the Statutes of Distributions, and therefore that the fund was to go, one moiety to Alexander Elmsley's representatives, and the other moiety to the plaintiffs, the children of the settlor's pre-deceased brother.<sup>b</sup>

From this decision both sides appealed; the

plaintiffs contending that Alexander Elmsley had only a life interest, and was not intended or entitled to take any part of the capital fund; while his representatives insisted that he, being the nearest of kin to Peter, at Peter's death, was entitled to the whole; but by an arrangement between the parties the contest in Court was reduced to the question, whether the representatives of Alexander Elmsley were entitled to the whole or to a moiety of the fund.

Mr *Wigram* and Mr. *J. Campbell*, for the plaintiffs, submitted, that they were entitled at all events to half the 2500*l.*, as filling the character of the settlor's next of kin at the time of his death, according to the Statutes of Distributions.<sup>x</sup> Among the cases cited by them were, *Davies v. Bailey*,<sup>c</sup> *Bird v. Wood*,<sup>d</sup> *Hinckley v. MacLarain*,<sup>e</sup> *Phillips v. Garth*,<sup>f</sup> *Thomas v. Hule*,<sup>g</sup> *Green v. Howard*,<sup>h</sup> *Stamp v. Cook*,<sup>i</sup> *Lewndes v. Stone*,<sup>j</sup> *Holloway v. Holloway*,<sup>k</sup> and *Garner v. Lawson*.<sup>l</sup>

Mr. *Tinney* and Mr. *Loat*, for the representatives of Alexander Elmsley.—The settlor, by the words "next of kin," meant *nearest* of kin; and Alexander being the only person who answered that description at the settlor's death, was entitled to the whole fund. The words "next of kin" were not to be understood according to the Statutes of Distributions, unless the gift was meant to be distributed as directed by those statutes in cases of intestacy. There was no reference to those statutes in this indenture, and therefore the words were to be construed as they would be before those statutes were passed—in the common acceptation "next" meaning "nearest." After observing on the cases cited, as inapplicable to this case, or as favoring rather their own side of the question, they referred further to *Brandon v. Brandon*,<sup>m</sup> *Smith v. Campbell*,<sup>n</sup> *Harding v. Glyn*,<sup>o</sup> *Garrick v. Camden*,<sup>p</sup> and *Roper on Legacies*.<sup>q</sup>

Sir *Lancelot Shadwell*, having stated the circumstances of the case, said, the question to be decided was, whether the children of the deceased brother were to participate with the surviving brother in the gift to the next of kin. It was argued, that the words "next of kin" were to be understood here as comprising all the persons entitled to distribution of an intestate's estate under the Statutes of Distribution. By the 22 & 23 Car. 2, c. 10, s. 6, the residue is to be distributed equally to every of the next of kindred in equal degree, and those who legally represent them; so that the statute directly notices that other persons than "next

<sup>x</sup> 22 & 23 Car. 2, c. 10; and 1 Jam. 2, c. 17.

<sup>c</sup> 1 Ves. sen. 84.

<sup>d</sup> 2 Sim. & Stu. 400.

<sup>e</sup> 1 Myl. & K. 27.

<sup>f</sup> 3 Bro. C. C. 64.

<sup>g</sup> Forr. 261.

<sup>h</sup> 1 Bro. C. C. 33.

<sup>i</sup> 1 Cox, 234.

<sup>j</sup> 4 Ves. 649.

<sup>k</sup> 5 Ves. 399.

<sup>l</sup> 3 East, 279.

<sup>m</sup> 3 Swans. 312; S. C. Wils. 14.

<sup>n</sup> 19 Ves. 400.

<sup>o</sup> 1 Atk. 469.

<sup>p</sup> 14 Ves. 372.

<sup>q</sup> P. 115.

<sup>b</sup> Sec 7 Leg. Obs. 139; and 2 Myl. & K. 82.

of kin" are entitled to distribution in cases of intestacy. Under this indenture, the gift is to go to the next of kin only; for no reference is made to distribution according to the statute. The practice of conveyancers has been thought entitled to much weight in these matters, both by this Court and by the House of Lords. When conveyancers in marriage settlements bring the personal property under the limitations in the settlement, in the event of the party's dying without issue, they do not use words of distribution to the next of kin, but say, "to such person or persons as would be entitled to the residue of the personal estate, as if the party died intestate." That is the form in every conveyance of that sort, and a similar form is adopted in decrees<sup>r</sup> of Court; from all which is to be inferred a clear distinction between the next of kin and the persons who would be entitled to distribution under the statutes. There is a *dictum* of Lord Kenyon, when he was Master of the Rolls, in the case of *Stamp v. Cook*,<sup>s</sup> where the question was, what construction was to be put on the words "next relations." The opinion ascribed to Lord Kenyon, in the report, was not necessary, and it is probable the words of the statute were not present to his mind. The decision in *Phillips v. Garth*,<sup>t</sup> by Mr. Justice Buller, who compared that case to *Thomas v. Hule*,<sup>u</sup> was disapproved of in *Smith v. Campbell*, where Sir William Grant observed, that where there is nothing in a will to shew the testator used the words "next of kin" with reference to the Statutes of Distribution, the *nearest* of kindred only would be entitled. Lord Eldon also, in the case of *Garrick v. Lord Camden*,<sup>v</sup> said he always had doubts of the correctness of the decision in *Phillips v. Garth*; and Sir Thomas Plumer, after consideration, expressly declared that it was against the weight of authority.—*Brandon v. Brandon*.<sup>w</sup> Having the express authority of Sir Thomas Plumer, in a case exactly like the present one, and having also the opinions of Lord Eldon and Sir William Grant against the decision of Mr. Justice Buller, I am of opinion, that the construction put by the Master of the Rolls on this gift is wrong.

Sir J. Bernard Bosanquet said, that as the Court was about reversing this judgment, he would state his reasons for concurring in the reversal. The grounds of Mr. Justice Buller's decision in *Phillips v. Garth* was, that the words "next of kin" acquired a technical meaning since the Statute of Distributions. There was no doubt that the words acquired a different meaning where there was an intestacy contemplated, or words in the deed referring to the statute, but not otherwise. That the words here did not imply distribution according to the statute, was clear from this, that

they did not include the wife. The words are to be taken as *descriptio personarum*. There was no ground for saying that the words in this deed imputed more than their natural meaning. The case of *Stamp v. Cook*, decided before *Phillips v. Garth*, is applicable to the present case; but it was somewhat extrajudicial, and the observations of Lord Kenyon were not necessary. His Lordship then examined the cases before referred to, and said that such a series of decisions took away all authority from the case of *Phillips v. Garth*. He was bound to come to the conclusion, that whatever of authority was against Mr. Justice Buller's decision, was against this also.

Judgment below reversed.—*Elmsley v. Young*. Before the Lords Commissioners of the Great Seal, at Westminster, May 4th and 9th, 1835.

### King's Bench.

[Before the Four Judges.]

#### ENLARGED RULE.—FILING AFFIDAVITS.— LACHES.

*The rule is imperative, that affidavits in answer to an enlarged rule should be filed a week before term.*

This was an application for a rule *nisi* to read the affidavits in answer to a rule which had been obtained last term, although they had only been filed three days before term. The terms on which the rule had been enlarged were that all affidavits in an answer to the application should be filed a week before term. This neglect originated from the country attorney's ignorance of the practice, which requires that affidavits should be filed a week before term.

#### Rule nisi granted.

On shewing cause against the former rule, and the rule *nisi* now obtained, it was submitted that the affidavits could not be read, they having been filed, contrary to the practice of the Court, less than a week before the term.

The Court, however, was of opinion that they were irregularly filed, and therefore discharged the rule.

*Turner v. Unwin*, T. T. 1835. K. B. F. J.

### King's Bench Practice Court.

#### ATTORNEY AND CLIENT.—ATTACHMENT FOR NON-PAYMENT OF MONEY.—LIABILITY OF ATTORNEY.

*If an order has been obtained for payment of money by a client, the attorney is not therefore bound to pay it, or liable to attachment for non-payment.*

In this case a rule *nisi* had been obtained for an attachment against an attorney, for not paying over a certain sum of money pursuant to a rule of Court. The rule directed that the client should pay the sum therein mentioned.

<sup>r</sup> Seton on Decrees.

<sup>s</sup> 1 Cox, 239.

<sup>t</sup> 3 Bro. C. C. 69.

<sup>u</sup> Forr. Ves. Temp. Talb. 251.

<sup>v</sup> 14 Ves. 385.

<sup>w</sup> 3 Swans. 312.

On shewing cause against this rule it was contended, that the rule for an attachment had been obtained against the wrong person, for an attorney could not be liable for the debt of his client.

The Court was of opinion that the rule for an attachment had been obtained against the wrong person, and therefore must be discharged, and with costs.

Rule discharged, with costs.—*Poole v. Watkins*, T. T. 1835. K. B. P. C.

#### RE-ADMISSION OF ATTORNEY.—NOTICES OF APPLICATION.

*The Court will only, under special circumstances, dispense with the necessity, in cases of applications for re-admission, for a term's notice, although the notice may have been up during a vacation.*

Application was in this case made on the second day of term to re-admit an attorney. The affidavit on which the application was founded stated that the proper notices had been stuck up on the last day of the last term, and had remained during the whole of the vacation. They expressed the applicant's intention to apply on the first day of this term for re-admission.

The Court.—That will not do. The rule requires a term's notice, and such a course cannot be dispensed with, excepting under special circumstances. He may, however, if he allows his notices to remain till the last day of this term, be re-admitted, he having put them up on the last day of the last term.

Admission refused.—*Ex parte Cross*, T. T. 1835. K. B. P. C.

#### EJECTMENT.—SIGNING CONSENT RULE.—ATTORNEY.—COSTS OF THE DAY.—JUDGMENT AS IN CASE OF A NONSUIT.

*Where the Court will interfere to compel an attorney to pay the costs of the day for not proceeding to trial pursuant to notice.*

On shewing cause against a rule nisi requiring the lessor of the plaintiff or his attorneys to shew cause why they should not sign the consent rule in the present case, the facts, as they appeared in the affidavits, were these:—Certain gentlemen acted as the attorneys for the lessor of the plaintiff, and in that character obtained the consent rule, took it away, but never signed it. Subsequently judgment as in case of a nonsuit was obtained against the lessor of the plaintiff, and notice to tax the costs of the day. They accordingly attended, but they objected to the taxation, on the ground that they had never signed the consent rule. The present application was now made to compel them to sign the consent rule, so as to enable the defendant to obtain the costs of the day for not proceeding to trial. In what the attorneys had done, they had only pursued the usual practice of their office, and therefore could not be considered as acting from improper motives. No application had been

made to them for the purpose of obtaining their signature, but the rule in question had been moved for.

*Coleridge, J.*—I think, as regards the lessor of the plaintiff, the Court has no authority to interfere, as he has not done any thing in the cause, and there is no evidence to shew that the attorneys act as his agents. Therefore, as far as he is concerned, the rule must be discharged. But as regards the attorneys, they are officers of the Court. They have done that which imported they were agents of the lessor of the plaintiff, and took away the consent rule for the purpose of signing it. They suffered the defendant to go on under that belief, and now they make an objection to the taxation of the costs, because they have not signed the consent rule. They have no defence to this rule, as they ought to have signed the consent rule. As to the costs, the Court cannot interfere with the lessor of the plaintiff; and as to the attorneys, I think they ought not to pay the costs, as there is nothing imputing any improper motives to them. They say, in answer, they have only followed the general practice of their office. That appears to me to be an irregular practice; but as there has been no application to them previously to this rule being moved for, I think there should not be costs on either side.

Rule absolute accordingly.—*Doe d. Furze v. Brown*, T. T. 1835. K. B. P. C.

#### INSOLVENT'S DISCHARGE.—WITHDRAWING OPPOSITION.—CANCELLING BAIL-BOND.—FRAUD.

*Where a defendant cannot be arrested on a bill of exchange given for a debt from which he has been discharged as an insolvent.*

In this case a rule nisi had been obtained for cancelling the bail-bond, on the ground that the defendant was not liable, he having been discharged under the Insolvent Act, 7 G. 4, c. 57. The affidavits disclosed the following facts:—The plaintiff had intrusted the defendant with a bill of exchange for 70*l.*, for the purpose of getting it discounted. This the defendant had done, but he refused to hand over to the plaintiff the amount which he had received for the bill; in consequence of which the plaintiff arrested him. On his petitioning the Insolvent Court for his discharge, the plaintiff gave notice of opposition. The defendant then made a proposition to the plaintiff, the substance of which was as follows:—That if he would not oppose his discharge, he (the defendant) would, on obtaining it, give the plaintiff a bill for the amount of his claim, the payment of which the defendant's son would guarantee. To this the plaintiff assented, and the defendant was subsequently discharged. He accordingly gave the bill upon which the present action was brought.

Cause was shewn against this rule, when it was submitted, that the bill for which the present action was brought must be looked upon

as constituting a new debt entirely unconnected with that from which the defendant had been discharged under the Insolvent Act, it having been given some time after such discharge had taken place.

The Court was of opinion, that as it was clear the bill had been given in consideration of the plaintiff's withdrawing his opposition, and that if such a course were permitted it would be very injurious to the interest of the other creditors, as it would be the means of stopping opposing creditors from coming before the Court, and thereby prevent a full examination, which it is the policy of the Insolvent Court to institute; that therefore the present rule must be made absolute for the cancelling of the bail-bond, and that a common appearance must be entered for the defendant.

Rule discharged accordingly.—*Gould v. Williams*, T. T. 1835. K. B. P. C.

**JUDGMENT AS IN CASE OF A NONSUIT.—BAD FAITH.—PREMATURE APPLICATION.**

*A defendant cannot obtain judgment as in case of a nonsuit when the delay has been caused by his own proposition of reference.*

A rule nisi had in this case been obtained for judgment as in case of a nonsuit. The facts appeared to be these:—Issue was joined on the 2d of March, and on the 8th of the same month the defendant made a proposition to refer the cause, from which day till the 12th of May nothing more was heard of him, and then he refused his consent to the reference. The present rule nisi for judgment was obtained in Trinity term last.

On shewing cause against this rule, it was submitted that this application was premature.

The Court thought that the application was too early, and therefore discharged the rule, with costs.

Rule discharged, with costs.—*Watkins v. Giles*, T. T. 1835. K. B. P. C.

**NOTICE OF JUSTIFYING BAIL.—COUNTRY BAIL.—LENGTH OF NOTICE.**

*Two days' notice of justification is sufficient with country bail, if they justify according to the old practice.*

Bail in this case were opposed, on the ground that four days' notice of justification had not been given, as required by the rule of Court.

In support of the bail it was submitted, that the bail being country bail, and having justified according to the old form, there was no necessity for more than two days' notice.

The Court thought that sufficient notice had been given under the old practice, and therefore allowed the bail to justify.

Bail passed.—*Harbottle v. Clark*, T. T. 1835. K. B. P. C.

**JUDGMENT AS IN CASE OF A NONSUIT.—DEFENDANT'S POVERTY.—PEREMPTORY UNDERTAKING.**

*If a plaintiff's answer to a rule for judgment as in case of a nonsuit is the defendant's poverty, it should be shewn that it came to his knowledge only since action brought.*

In this case a rule nisi for judgment as in case of a nonsuit had been obtained.

On shewing cause, an affidavit was produced which alleged the defendant's poverty as the cause of the plaintiff's not proceeding. It did not, however, state that the fact of the defendant's poverty had come to the plaintiff's knowledge since the commencement of the action. Had it not been for the lateness of the time at which the rule was served, the defendant could have obtained a more perfect affidavit.

*Coleridge*, J. said, it should appear that the knowledge of the defendant's poverty had reached him since action brought.

The rule was discharged on giving a peremptory undertaking.—*Mills v. Poole*, T. T. 1835. K. B. P. C.

**WRIT OF TRIAL.—PLEADING.—OBLIGATION TO BEGIN.—PLEA OF PAYMENT.**

*If to a declaration for money lent, a plea of payment is put on the record, the defendant is bound to prove his payment before the plaintiff gives any evidence.*

This was an action which had been tried before the under-sheriff under the Writ of Trial Act, where a verdict had passed for the plaintiff. The declaration, which contained only one count, was for money lent and advanced. The defendant pleaded payment. At the trial of the cause a question was raised as to which party ought to commence. The under-sheriff was of opinion that as the defendant had pleaded payment, he was bound to prove that fact; but who being totally unprovided with evidence for that purpose, a verdict was found for the plaintiff.

A rule nisi had since been obtained to set aside this verdict and enter a nonsuit, upon the ground of there not being sufficient evidence to support a count for money lent, and there was no count on an account stated in the declaration. It appeared that the only evidence which the plaintiff brought forward at the trial was an "I. O. U." for three pounds, signed by the defendant.

On shewing cause against this rule it was submitted, that the plaintiff had given evidence in support of his claim, lest the Court above should be of opinion that the cause ought to go down a second time in consequence of his not having begun.

The Court thought that the defendant was certainly bound to prove the payment of the debt, for by his plea he had admitted the existence of it. The present rule must therefore be discharged.

Rule discharged.—*Richardson v. Fell*, T. T. 1835. K. B. P. C.

## NOTES OF THE WEEK.

## HOUSE OF LORDS.

*Bills for second Reading.*

<i>Title of the Bill.</i>	<i>Proposer.</i>
Residence of Clergy.	Lord Brougham.
Pluralities Prevention.	Lord Brougham.
Ecclesiastical Jurisdic- tions.	Lord Brougham.
Illegal Securities.	
Capital Punishments.	

*In Select Committee.*

Highways.	
Law of Patents.	Lord Brougham.
Wills Execution.	
Executors.	

*Passed.*

Legitimacy of Children.	Lord Lyndhurst.
Annual Indemnity.	

## HOUSE OF COMMONS.

*Bills to be brought in.*

Law of Tenure.	Attorney General.
Law of Escheat.	Attorney General.
Poor Law Amendment.	Mr. Trevor.
Registration of Births, &c.	Mr. Wilks.
Tithes Commutation.	Sir R. Peel, Bart.

*Second Reading.*

Law of Libel.	Mr. O'Connell.
Bankruptcy Funds.	Master of the Rolls.
Ecclesiastical Courts.	Sir F. Pollock.
Clergy Discipline.	Sir F. Pollock.
Infants' Property (Ireland).	
Contempts in Equity (Ireland).	
Parish Vestries.	
Landed Securities (Ireland).	
Lunatic Acts Continuance.	

*In Committee.*

Municipal Corporations.	Lord J. Russell.
Copyholds Enfranchisement.	Attorney General.
Registration of Voters.	Lord J. Russell.
County Coroners.	Mr. Cripps.
Durham Court of Pleas.	
Offences against Person.	
Dissenters' Marriages.	
Marriage Act Amendment.	

*Consideration of Report.*

Abolishing Imprisonment for Debt, &c.	Attorney General.
	8th July.
Limitation of Polls.	

*Third Reading.*

Loan Societies.	
Prisoners' Defence.	Mr. Ewart.

## ANSWERS TO QUERIES.

*Ratio of Landlord and Tenant.*

## NOTICE TO QUIT. P. 80.

A quarter of a year contains, by legal computation, 91 days, and half a year contains 182 days; for the odd hours, in legal computation, are rejected. 1 Inst. 135; Selwyn's N. P. tit. Ejectment. And it has been decided that a notice served on the 28th of September, to quit on the 25th of March, although the period contain only 179 days, is a good notice, being for a customary half year. *Doe d. Harrop v. Green*, 4 Esp. N. P. C. 199; *Roe d. Durant v. Doe*, 4 Moo. & Pay. 391. GRADUS.

It has been held in *Harrop v. Green*, 4 Esp. 198, that a notice given on the 29th of September, to quit on Lady-day, is a good notice; and even where notice was given on the 30th of September, being the day after the quarter-day, to quit at the following Lady-day, it has also been held sufficient, and good notice; *vide* *Espinasse N. P.* 460; probably on the principle of its being reasonable notice; for what is reasonable is matter of circumstance. Therefore I should say the notice of *B.* (the tenant) to *A.*, is good and sufficient, on the same grounds. T. D. T.

*Ratio of Property and Conveyancing.*

## WITNESS.—LEGACY. P. 144.

1. If the will by which the legacy was left to *A. B.* relates only to personal property, he can receive his legacy under it, witnesses not being required to a will of personality. See *Emanuel v. Constable*, 3 Russell, 436. But the 25 Geo. 2, c. 6, s. 1, has enacted, "that to any person attesting the execution of any will who is beneficially interested therein, the beneficial devise, legacy, estate, interest, or gift shall be void, but the party shall be admitted as a witness of the execution of such will or codicil." Therefore the question of *H. M. S.* will be answered according to the circumstances of the case. T. D. T.

2. If the codicil relates to real property, the bequest to the witness is void, under the 25 Geo. 2, c. 6. But it has been decided, that a legacy to an attesting witness of a will of personal estate is not void; the words in the statute 25 G. 2, c. 6, "any will or codicil," being construed to mean "any such will or codicil" as by the Statute of Frauds is required to be attested by witnesses. *Brett v. Brett*, 3 Addams, 210; *Emanuel v. Constable*, 3 Russell, 436. GRADUS.

## WARD OF CHANCERY. P. 142.

In settlements of the property of female wards of Court, much will depend upon the fortune of the husband, and his conduct. If a beggar marries the woman for the sake of her fortune, the Court will not permit him to touch that fortune; but if the husband be of equal rank and fortune with the ward, and as

considerable a settlement is made by the one as by the other, attention will be paid to such circumstances. *Ball v. Coutts*, 1 Ves. & Bea. 297, 303. The usual settlement seems to be, to settle one-fifth of the dividends and interest of the property upon the husband, and the residue upon the wife, for her sole and separate use, during their joint lives, with a clause to prevent anticipation (*Chaussing v. Parsonage*, 5 Ves. 17), and a power to the wife to give another one-fifth to the husband by will; the residue, subject to a provision for maintenance, to accumulate, and with the principal to go to the children at their ages of twenty-one or marriage, or if only one child, to that child; and in the event of a second marriage, a power to the wife to charge by way of appointment to each child by the first marriage. *Wells v. Price*, 5 Ves. 398. In case of no children, the husband surviving, the limitation is, in default of appointment, to her next of kin, exclusive of the husband. *Bathurst v. Murray*, 8 Ves. 74. It may be as well to mention, for the satisfaction of *A.*, that the marriage of a ward of Court, without consent, being considered as a contempt, on a petition by the guardian, all parties concerned would be ordered to attend, and the husband be probably committed, and restrained from receiving his wife's visits. *Maddock's Chancery*, 1—350.

S. D.

## TRUST.—CREDITOR. P. 143.

A voluntary conveyance of real estate, or a chattel interest, in favour of a child, by one not indebted at the time, though he afterwards becomes indebted, is good as against future creditors, though not against purchasers (1 Atkins, 15, 16), provided there be no particular evidence or badge of fraud; a power of revocation for instance (*Peacock v. Monk*, 1 Ves. 132), or retention of possession. *Bates v. Graves*, 2 Ves. 292; *Stileman v. Ashdown*, 2 Atk. 481.

S. D.

## VESTING OF LEGACY. P. 143.

If a legatee die in the life time of the testator, the legacy is *lapsed* (unless it be a joint legacy, or a tenancy in common, with a bequest over to the survivor), even if expressed to be to *A.* and his representatives; *Elliot v. Davenport*, 1 P. Wms. 83; as a testator is never supposed to mean to give to any but those who survive him, unless the intention is perfectly clear; *Carbyn v. French*, 4 Ves. 435: and it seems to me, that the bequest would be considered to be to such nephews and nieces as were alive at the testator's death. The next of kin of the two deceased nephews could not take in any way, the legacy never having vested in the two deceased nephews, in consequence of their death in testator's life-time.

S. D.

## Common Law.

## WIFE'S EFFECTS.—SEPARATION. P. 62.

A separation does not put an end to a marriage, and consequently does not affect the rights of the parties. *Stephens v. Totty*, Cro. Eliz. 908. The husband is entitled to the effects, he surviving her. *Squib v. Wynn*, 1 P. Wms. 380. SPES.

## QUERIES.

## Law of Property and Conveyancing.

## BEQUEST.—DISPOSAL OF REVERSIONARY INTEREST.

*A.* gives 1000*l.* stock, by will, to his executors, upon trust to pay the dividends to *B.* for her life, and after her death, to divide the principal among her (*B.*'s) four children (naming them) in equal shares, and their respective executors, &c. Provided that if any of the children die in the life-time of *B.* without leaving issue, then the original, as well as accrued shares of them so dying, should be in trust for the survivors or survivor. *C.*, one of *B.*'s four children, who has a wife and several children, wishes to sell his expectant interest under the will; but in estimating the value of his interest, the following questions arise:—1. Has *C.* a vested interest? 2. Presuming he has not, and he should die in the life-time of his mother, leaving children who survived her, would a purchaser have a right to *C.*'s share in preference to his children, or does the proviso as to survivorship imply a bequest to *C.*'s children in case he should not live to acquire a vested interest?

## Common Law.

## NOTE.—INDORSEMENT.

*A.* gives a promissory note to *C.* in the name of *D.*, as under:—

"I promise to pay to *D.* or order the sum of £ , within twelve months from the date hereof, value received.

"To Mr. *D.*"

"*A.*"

Is it necessary for *D.* to indorse this note over to *C.*, before *C.* can bring any action upon it against *A.*?

## THE EDITOR'S LETTER BOX.

The letter on the Instruction which an Articled Clerk ought to receive, shall be attended to.

We are reminded that the article commencing at p. 147, should have had the initial of our correspondent "*M.*;" to whom we are also indebted for two other papers received this week.

The request of "*Spes*" has been attended to.

The Queries of *G. D.* and "*Investigator*" have been received.

The letter of *T. B.* shall be considered.

# The Legal Observer.

Vol. X.

SATURDAY, JULY 11, 1835.

No. CCLXXIX.

— "Quod magis ad nos  
Pertinet, et nescire malum est, agitamus.

HORAT.

## CHANGE OF ASSIZES.

### WILTSHIRE AND LANCASHIRE.

We notice with much satisfaction the progress of the useful alteration which was effected by the act 3 & 4 W. 4, c. 71, for the removal or adjournment of assizes, by which a very material part of the expense and inconvenience attendant upon trials, especially in large counties, will now be avoided. This is one of the valuable reforms in the administration of justice of which the profession has always approved.

Our readers would find in the last Number (p. 194), a copy of the Orders in Council relating to the Change of Assizes in two counties—one on the Western and the other the Northern Circuit; and it may here be convenient to state briefly the practical effect of the change. By the 3 & 4 W. 4, c. 71, intituled, "An act for the Appointment of Convenient Places for the Holding of Assizes in England and Wales," it was enacted, that his Majesty, with the advice of his Privy Council, should have power from time to time to order and direct at what place or places the assizes and sessions and other commissions should be holden, and to order such assizes and sessions to be holden *at more than one place in the same county on the same circuit*; and to direct the assizes and sessions for criminal business to be holden for the whole county at one place, and for the dispatch of civil business at one or more place or places in such county on the same circuit; and to order any special commissions of oyer and terminer and gaol delivery to be holden at any one or more places in the same county.

It was also enacted, that it should be lawful to divide any such county for the purposes of the act, and to make rules and regulations touching the venue in all cases, civil and criminal, to be tried within any division of such county, and touching jurors, the use of any house of correction or prison, and the alteration of any writs, proceedings,

or any other matters requisite for carrying the act into effect.

Petitions having been presented under this act for changing the assizes in Wiltshire and Lancashire, these Orders have accordingly been made.

The first Order relates to

#### *Wiltshire,*

and effects no other alteration than directing the assizes to be holden alternately at Salisbury and Devizes. The ensuing assizes, appointed to be held on the 15th August, will take place at *Devizes*. It has not been deemed necessary to make any division of this county. The practitioner will be careful to give notice of trial for Devizes, instead of Salisbury, for the Summer Circuit, and prepare his Jury Process, Subpœnas, &c. accordingly.

The next Order relates to the County Palatine of

#### *Lancashire,*

which, under the provisions of the act, is divided as follows: namely, the *Northern* division,—consisting of the hundreds of Lonsdale, Amounderness, Leyland, and Blackburn; and the *Southern* division, comprising Salford and West Derby. The assizes are to be holden on the same Circuit both at Lancaster and Liverpool, namely, (as shewn by the Circuit Paper, p. 176) at *Lancaster* on the 12th August, and at *Liverpool* on the 15th August.

1st, The arrangements for the dispatch of *Criminal* business are as follow:

The house of correction at Kirkdale in West Derby may be used as a common gaol: the commitments to specify that the persons are for trial at the assizes. The Sheriff, from the opening of the Court at Liverpool, is to have charge of the prisoners, and the Gaoler is to send the Sheriff a list of the prisoners seven days before the commission day, to enable him to prepare a calendar. Commitments in the *Northern* division to be made to the Castle at *Lancaster*, and recognizances to be taken for



the assizes at Lancaster. Commitments in the Southern division to be made to the House of Correction at Kirkdale, and recognizances taken for Liverpool, unless the magistrate shall think the trial, for special reasons, ought to take place in the other division. Prisoners now at Lancaster Castle for offences committed in the Southern division (except on special commitment) to be removed to the House of Correction for trial at Liverpool. A list of the prisoners and their offences to be published by the Sheriff in one or more of the county newspapers, ten days before the commission day at Liverpool, with a notice for all persons concerned to appear at Liverpool at the next assizes. The other prisoners now or hereafter in Lancaster Castle to be tried at Lancaster; and prisoners hereafter in the House of Correction to be tried at Liverpool. Prisoners in the House of Correction for trial at the sessions to remain as heretofore. Indictments for offences in the Northern division to be presented to the grand jury for Lancaster, and in the Southern division at Liverpool (except special commitments) and commitments to be made accordingly. Issues on indictments *already found* to be tried at Lancaster. Magistrates, coroners, and all officers bound by law to attend the assizes, are to appear at Lancaster and Liverpool according as their residence may be. Examinations to be sent to the proper division. Two assize writs to be issued by the Clerk of the Crown for the county. The Sheriff to return one writ at Lancaster and the other at Liverpool, with pannels annexed. Subpœnas to issue as heretofore, with the proper alteration of Lancaster or Liverpool, where the witnesses are to attend. Such writs to be tested any day after the date of the order (24th June). The Sheriff to summon a grand jury at Lancaster and another at Liverpool.

2d. *As to the Civil Business*, the following is the substance of the new regulations.

The Sheriff, or other returning officer, to summon a competent number to serve on juries at Lancaster and Liverpool, having regard to the convenience of the jurors and their residence; jurors having served, to be exempt under the Jury Act of 6 G. 4; and the powers of that act are to be applicable to the new Assizes. The jury is to be summoned both for criminal and civil business.

Declarations in actions to be tried at Lancaster or Liverpool respectively to have in the margin, besides the venue, the words "Northern Division," or "Southern Division"; but no other alteration; and the is-

ssues therein to be tried accordingly. Where the venue is *local*, the issue is to be tried at Lancaster, if the cause of action arose in the Northern division; and at Liverpool, if it arose in the Southern division; and the declaration in such case is to have in the margin, in addition to the venue, the words "Northern Division" or "Southern Division," as the case may require.

The Court or a Judge may however order such issues to be tried in the division where the action did not arise, if thought fit.

Issues already joined, or hereafter joined, where the division is not specified in the margin, shall be tried at Lancaster, unless otherwise ordered by a Judge.

3d. *As to writs of Certiorari, Habeas Corpus, Recognizances, &c.*

Indictments removed to the Court of King's Bench by *certiorari*, and informations triable at the assizes, to be tried at Lancaster, unless the Court or a Judge shall otherwise order.

The Court of King's Bench, or any Judge of the Superior Courts, may order any indictment found at Liverpool to be tried at Lancaster, and *vice versa*; or any prisoner at Kirkdale to be tried at Lancaster, and *vice versa*; and a writ of *habeas corpus* to issue accordingly.

Recognizances entered into for Lancaster shall, in case of such removal, be obligatory for Liverpool, provided a week's notice be given either personally or at the residence of the party.

Indictments removed to the Court of Pleas of the Crown at Lancaster may be tried as heretofore.

Commissioners of Oyer and Terminer, and Justices of Common Pleas within the county, and Grand and Petty Juries, may exercise their jurisdiction as heretofore.

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## INTERNATIONAL LAW.—BILL OF EXCHANGE.

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We beg to draw the attention of our readers to a very important decision pronounced on appeal by the Court Royal of Douai, as to the liability of Mr. Tilney Pole Long Wellealey on a bill of exchange given by him to Mr. Phillips, the auctioneer, and after proceedings taken in this country, indorsed by him to Monsieur Tourrasse, a native of France, and resident in Paris. The report is abridged and

translated from the *Répertoire du Droit Commercial*, edited by M. F. M. Patorni, Avocat, and published in Paris.

**Court Royal of Douai.**

CONTRACT OF EXCHANGE.—LAW OF NATIONS.  
—ARREST.

*Does the contract of exchange belong to the Law of Nations?* Resolved, impliedly, that it does.

Consequently, are the rights attached to that contract always regulated solely by the laws of the country to which the parties thereto belong; or, on the contrary, do not the tribunals within whose jurisdiction the lawful possessor is, become competent to determine them; and is not the extent of the rights of the contract to be governed and determined by the laws of the kingdom where the latter is domiciled; so that a bill of exchange, of which the drawer and acceptor are foreigners, and which by means of indorsement becomes the property of a Frenchman, would in every way be assimilated, as to remedy, to a French commercial security? Resolved, in the affirmative.

In other words, is the Frenchman, to whose order a bill of exchange of foreign origin, that is to say, written out of France, and drawn and accepted by two foreigners, entitled to the benefit of article 14 of the Civil Code? Resolved, he is.

Resolved, that the incompetence ratione personæ cannot be made a ground of appeal unless it is urged in the first instance.

Resolved, impliedly, that a commercial instrument drawn by a person residing in the same city as the acceptor, is in England a bill of exchange.

Resolved, that a bill payable to order, which does not mention the present or future consideration, and which, instead of the express acceptance of the drawee, only contains his signature, has in England the nature of a bill of exchange, and ought to have all the effects attached to a contract of exchange.

Resolved, that the law of the place of indorsement, although the definitive receipt of the bill has taken place in another country, alone governs the form and manner of indorsement; so that an indorsement written at London in favour of a commercial house at Paris, which receives it at Paris, and in the indorsement nothing is mentioned of the consideration, operates not as a mere authority, but transfers the property in it, in the same manner as a regular indorsement would.

Resolved, that a bill over-due for several years, recently protested, may still be availably negotiated.

Resolved, that a bill of exchange on which judicial proceedings have been taken, and on which a judgment by consent has been obtained before the King's Bench, may be assimilated to a commercial security, and remains negotiable.

Resolved, that though the judgment is of a higher nature than the bill of exchange, and

that the judgment has been partially satisfied by payments on account, the bill is still in force.

Resolved, that the judgment does not prevent proceedings being taken against the acceptor in France.

WELLESLEY V. TOURASSE.

This was an appeal from the judgment of the Civil Tribunal of Boulogne to the Court Royal of Douai, in the case of *Tourasse v. Wellesley*. The facts were these: Mr. Tilney Pole Long Wellesley had become indebted to a considerable amount to Mr. Henry Phillips, the auctioneer in London. The former accordingly accepted a bill of exchange drawn by the latter for 3225*l.*, with interest at 5 per cent. per annum, at one month's date. The acceptance of this bill was merely the signature of Mr. Wellesley across the face of it. The date was the 28th October, 1828. When the bill became due, it was dishonoured, and Wellesley was arrested on it. He gave bail, and afterwards a *cognovit* was given by him, the bail consenting that they should not be freed thereby from their liability; and judgment was subsequently signed on the *cognovit*, and a *ca. sa.* issued thereon, but which could not be carried into effect on account of the defendant in that proceeding being elected a member of parliament. While possessed of this privilege, he removed himself to Calais in the kingdom of France. On the 27th November, 1833, the bill was protested at the instance of Phillips by a London notary. This protest was registered at Boulogne on the 29th of December following, together with the bill of exchange, which had been duly stamped at Paris on the 11th of the same month. On the 28th of November, the day after the protest, the bill was negotiated at the house of Lewis and Allemby, merchants at London, who by an indorsement, in which there was no mention made of consideration received, transmitted it to their correspondent, Mr. Tourasse, a merchant at Paris. At first Mr. Tourasse hesitated to take the bill, but after receiving assurances on the subject from the house of Lewis and Allemby, he finally, on the 13th December, put the bill to the account of that firm. Having thus become legal proprietor of the bill, he applied to the President of the Civil Tribunal of Boulogne, to obtain leave to arrest Wellesley, who was at that time at Calais. Leave having been obtained, he was at his own request taken to Boulogne, where, having given security, he was set at liberty. At length the Tribunal pronounced the following judgment:

"Considering, that all the facts of the case tend to establish that Tourasse is only the nominal plaintiff; that it is not probable he should have received even in account a security for so considerable a sum, when the state of that security, the time which has run since it became due, the proceedings already had on it, and the small amount of the sums for which Tourasse was the creditor of Lewis and Al-

lemby, in proportion to the amount of the bill:

"Considering, that it also appears from the evidence produced, that there was due from Wellesley on the bill at the time of its alleged transfer from Phillips to Lewis and Allemby, and from them to Tourasse, no greater a sum than 1,834*l.*; so that the bill could not seriously be transferred as security for a sum of 3,225*l.* :

"Considering, that before the delivery to Tourasse, proceedings had been taken by Phillips on the judgment obtained by him, and that partial payments have been made in consequence; that it results from these facts that the primitive title, whatever its nature might have been, has not been conveyed by Phillips merely by simple indorsement, as a portion of the debt was extinguished by payments; an account was still open between Wellesley and Phillips; and that that account could only be discussed with the latter or the grantee of the judgment pronounced in his favour:

"Considering, that if Tourasse were the *bond fide* holder of the bill, his claim would be no better founded; that it appears from the evidence that Phillips, being the holder of a security for 3,225*l.*, bearing interest, and accepted in his favour by Wellesley, and claiming besides to be his creditor in other matters, sued in the Court of King's Bench for all the money due to him; that Wellesley, after having contested the debt, acknowledged by a document under the hand of his attorney, that he owed to Phillips a sum of 4,100*l.*, of which 3,000*l.* only bore interest; that the parties having agreed on the amount, a judgment by consent was pronounced, which condemned Wellesley to pay Phillips a sum of 7,000*l.*; but it appears that judgment had only for its object to insure the execution of the arrangement: that in fact a writ of execution was issued for the 7,000*l.* on the judgment, but the indorsement on the writ directed only 4,219*l.* to be levied, of which 3,000*l.* bore interest: that Mr. Tourasse himself acknowledged that the execution was to be confined pursuant to the *cognovit*; and the difference of 119*l.* arose from the addition of the costs to the principal debt:

"Considering, that that judgment which has been executed by the seizure of Wellesley's furniture was a primitive title, which it has entirely modified, and that therefore a new debt has been created in consequence of this substitution of the new debt for the old:

"Considering, that Tourasse could have no right to make use of a title of which the previous holders of it could no longer avail themselves:

"The *Tribunal* having deliberated thereon, declares null and void the proceedings against Wellesley, as well as his provisory arrest. It further orders the money deposited in lieu of bail, to be paid out of Court; and condemns Tourasse to pay 1,000 francs damages, interest on the money deposited, and costs."

Against this decision Tourasse appealed to

the Court Royal of Douai; and after hearing counsel on both sides, the following decree was pronounced on the various objections made on behalf of Wellesley.

As to the objection on the ground of the incompetence of the French Tribunals to decide on the cause, as the incompetence put forward by Wellesley is an incompetence *ratione personarum*, which cannot be objected for the first time in an appeal, according to the terms of articles 168 and 169 of the Code of Civil Procedure;<sup>a</sup> as, besides, if Tourasse, by the indorsement in his favour, has become the *bond fide* holder of this bill, he is the direct creditor of Wellesley, and may proceed against the latter before the French Tribunals, according to the provisions of article 14 of the Civil Code;<sup>b</sup>

As to the argument, that the indorsement not stating the value to be received, had not transferred the property in the bill to Tourasse, and would, therefore, as far as he was concerned, only operate as a power, according to articles 136, 137, and 138 of the Commercial Code;<sup>c</sup>

Since, in England, the indorsement need not contain such a statement in order to transfer the property in a bill of exchange or promissory note; as the indorsement was made at London; as it is not the law of the place where the contract is concluded, but that of the place where the instrument is prepared, which regulates the form of it, and determines its form and effect according to the maxim "*locus regit actum*;"

As to the argument that Tourasse was only the nominal plaintiff at the instance of Lewis and Allemby, the London house;

As to the commercial transactions between Tourasse and Lewis and Allemby, which existed for several years, and the nature of them was, particularly on the part of Tourasse, the supply of goods, left no reason for

<sup>a</sup> Art. 168. "The party who shall have been summoned before the tribunal different from that which has jurisdiction over the subject-matter, may require it to be referred to the competent tribunal."

Art. 169. "Such party shall be bound to make this objection before all other exceptions and defences."

<sup>b</sup> Art. 14. "A foreigner, although not resident in France, may be cited before the French Tribunals in order to compel the fulfilment of obligations contracted by him in France with a Frenchman; he may also be cited before the Tribunals of France for obligations contracted by him in a foreign country with respect to Frenchmen."

<sup>c</sup> Art. 136. "The property in a bill of exchange is conveyed by means of indorsement."

Art. 137. "The indorsement is dated; it expresses the value to have been received, and it states the name of the person to whose order it has passed."

Art. 138. "If the indorsement is not conformable to the provisions of the preceding article, it does not convey the property in the bill, but is a mere power." (*Procurations*.)

doubting the substantial nature of their transactions, and the reality of the writings which proved them; the circumstance that at the moment when Tourasse received this bill on the account current, he was a creditor of the house of Lewis and Altemby for considerable sums, and that he did not give any money in exchange for this bill, but that he only received it on the account current, and consequently without any discount; the known solvency of Wellesley, and the assurance that if he had not paid this bill, although it was five years overdue, it was in consequence of his parliamentary privilege; finally, the caution which Tourasse had used before he received the bill in question; all these facts unite to give the indorsement in question the effect of a real and *bond fide* conveyance of the property in the bill:

As to the argument that the bill was extinguished by the substitution of a new debt for that constituted by it:

Inasmuch as the *cognovit* of the 29th of May, 1830, was only a friendly arrangement between Phillips and Wellesley, which modified the debt as to its amount, the time of payment, and the interest it was to bear, but did not extinguish it; it has not been superseded, and consequently a new debt has not been created: the same remark may be made with respect to the judgment, which could give the creditor new rights accessory to his debt, but have not deprived him of those which the bill conferred on him:

As to the argument that in consequence of the judgment obtained in the Court of King's Bench by Phillips against Wellesley, the bill could not be further transferred by indorsement, nor become the subject of a new judicial proceeding in France against Wellesley:

Inasmuch as a bill of exchange or a promissory note is in its nature negotiable until the extinction of the debt contracted by the acceptor; as the judgment obtained against the latter by the holder at the time of its falling due, far from producing an extinction of the debt, acknowledges, confirms, and guarantees it, and is not, consequently, an obstacle to its being transmitted to a third person by indorsement; as by the English law, he who receives the bill after it has become due is liable to all the exceptions of equity and justice which the acceptor might oppose to him who was the holder at the time of its falling due, and ought consequently to be liable to all deductions of the sums paid to the previous holders; as, according to the same law, Phillips, who obtained the first judgment, could not undoubtedly proceed a second time on that bill, but that he might proceed for the same purpose before the tribunals of a country not subject to the territorial jurisdiction of the Court of King's Bench, and where the first sentence could not be executed because it emanated from a foreign country;

Consequently Tourasse may proceed before the French tribunals for the payment of that sum which remains legitimately due from Wellesley;

The Court, therefore, pronounces this judgment:

As the solution of the preceding questions prove that Tourasse has only used his rights, and that consequently the claim of Wellesley for compensation for the injury of which he complains, are devoid of foundation, and consequently in pursuance of the law of the 17th of April, 1832,<sup>d</sup> the Court, notwithstanding the objections made on the part of Wellesley, annuls the judgment appealed against; and doing that which the judges of the inferior court ought to have done, condemns him to imprisonment until he shall have paid to Tourasse the sum of 102,430*fr.* and 60 *centimes*, allowing the deduction of all sums which Wellesley shall shew himself to have paid on account of the bill of exchange in question, or to the amount of which the debt shall have been validly extinguished. The Court also condemns him to the costs of the two proceedings in this case, and to the fine deposited on his appeal. It also orders the restitution of the fine deposited on the present appeal.

[Since this decision, it has been determined to take the case before the Court of Cassation at Paris. Ed.]

## NEW BILLS IN PARLIAMENT.

### FURTHER AMENDMENTS IN THE IMPRISONMENT FOR DEBT BILL.

The last amendments in this Bill are as follow:

Sec. 120. That if any debtor shall destroy, alter, mutilate or falsify, or cause to be destroyed, altered, mutilated, or falsified, any of his books, papers, writings, or securities, or has made or been privy to the making of any fraudulent entries in any books of account or other document, with intent to defraud a creditor, he shall be guilty of a misdemeanor, and be liable to be imprisoned in any common gaol or

<sup>d</sup> The Court here refers to articles 14 and 15. By art. 14 it is provided, that every judgment obtained by a Frenchman against a foreigner not domiciled in France, shall enable the former to arrest his debtor, unless the sum for which the judgment is pronounced is less than 150 francs, without distinction between civil and commercial debt.

By art. 15 it is provided, that "before the judgment, but after the debt has become due, the President of the Tribunal of the first instance, in whose *arrondissement* the foreigner is, may, if sufficient grounds are laid, order his provisional arrest at the instance of the French creditor." The law contains various other provisions, among which article 16 is the most interesting to Englishmen. The words of it are—"The provisional arrest shall not take place, or shall cease, if the foreigner shews that he possesses on French territory a commercial establishment, or real property, of a value sufficient to insure the payment of the debt, or if he gives the security of a person domiciled in France, and solvent, for that purpose."

house of correction for any time not exceeding three years, with or without hard labour.

156. Reciting that it is expedient that such arrangements between traders liable to become bankrupts and their creditors as may be approved of by a proper majority of such creditors should be encouraged, and that a small number of dissenting creditors should not be enabled to frustrate such arrangements: it is enacted, that every deed of arrangement, (whether by trust, composition, inspection, or otherwise,) duly executed by or on behalf of seven-eighths in number and value of such creditors, touching such trader's debts and liabilities, and his release therefrom, and the distribution, inspection, conduct and management of his estate, or all or any of such matters, or any matters having reference thereto, shall be as effectual and obligatory in all respects upon all the creditors who shall not have executed, as if they had duly executed the same; and such deed, when so executed, shall not be liable to be disturbed or impeached by reason of any prior or subsequent act of bankruptcy; nor shall the execution thereof by the trader be deemed an act of bankruptcy.

157. That it shall be lawful for the Court of Review, or a Judge thereof, upon the petition in writing of any such trader, or of any of his creditors, founded upon any such affidavit as the said Court or Judge shall deem sufficient, and showing that seven-eighths in number and value of his creditors, resident in the united kingdom have assented to any deed or memorandum of arrangement, and setting forth the terms or heads of such deed or memorandum of arrangement, to order a writ of injunction to issue under the seal of the said Court, to restrain any creditor from taking or continuing any proceedings against the said trader for such time as the said Court or Judge shall think fit, and also to renew or rescind such writ of injunction, if the same shall appear necessary, and to make every such order, and exercise every such jurisdiction, in or over the matter of the said petition, and the rights and claims of the said trader and his creditors, and all costs and expenses which shall be incurred by them respectively in the said Court, or otherwise as to the said Court or Judge shall appear right; and further, that if the trustees or trustee, or inspectors or inspector for the time being of such deed of arrangement as aforesaid, shall be satisfied that seven-eighths in number and value of the said creditors shall have duly executed the said deed, it shall be lawful for such trustees or trustee, inspectors or inspector, to certify the same in writing; and such certificate shall be lodged with the registrar of the said Court of Review, together with a list of all the creditors of the said trader (distinguishing those who have executed the said deed from those who have not executed the same); and such certificate shall thereupon be *prima facie* evidence that the said deed of arrangement has been duly executed by seven-eighths in number and value of the said creditors, according to the meaning of this statute;

and such certificate shall be three times successively published in the London Gazette; but any creditor or other person whom the same may concern shall be at liberty by sufficient evidence to prove the contrary within three months after the last of such insertions.

158. That any creditor who shall seek to take the benefit of such part of this act as relates to such deeds of arrangement as aforesaid, shall lodge with the principal Registrar of the Court of Review, a list of all debts due or growing due by him, accompanied by an affidavit, verifying to the best of the trader's knowledge and belief, the amount thereof, and stating which of the creditors are resident in the united kingdom, and which are abroad, and that the same shall be filed in the said Court of Review; and that any omission in the said list which shall appear to the said Court to have been made through the culpable negligence or fraud, or evil intention of such trader, shall deprive such trader of the benefit of all provisions made for his relief and discharge in any such deed as aforesaid; but any omission or incorrectness in the amount of the debts in the said list, as to other persons, shall not defeat or otherwise affect such deed.

159. That all creditors of a trader, taking the benefit of such parts of this act as relates to such deeds of arrangement as aforesaid, shall have the same rights respectively as to set-off, mutual credit, lien and priority; and joint and separate assets shall be distributed in like manner as under a fiat in bankruptcy; and no creditor shall be prejudiced or affected by being a party to such deed, or by such deed being obligatory upon him as to his right or remedy against any person other than such trader, and every person who could be entitled to prove under a fiat in bankruptcy against any such trader, shall be deemed a creditor within the meaning of this statute.

160. That every trader, creditor, and other person who shall take the benefit of such part of this act as relates to such deeds of arrangement as aforesaid, or shall do or assent to any thing in pursuance thereof, or on whom such deed of arrangement as aforesaid shall be, or appear to be obligatory, as herein provided, or who shall claim or withhold any real or personal estate, right or interest, which shall actually or apparently belong to such trader, or be liable to be distributed among his creditors, and also every agreement, deed, composition, arrangement, act, matter, and thing whatsoever, entered into, executed or done, under or in pursuance of such part of this act as aforesaid, or to which such part of this act as aforesaid shall extend, or which shall relate to any trader taking the benefit of such part of this act as aforesaid, or to his estate, shall be under the jurisdiction of the Court of Review, and amenable accordingly on petition or motion made to the said Court, which shall make such order therein as to the said Court shall seem just.

170. That it shall be lawful for the Lords Commissioners of his Majesty's Treasury for the time being, or any three or more of them, and they are hereby required, within the space

of twelve calendar months next after the passing of this act, by examination on oath or otherwise, (which oath they and each of them are and is hereby authorised to administer,) to ascertain if any, and if any, what compensation ought to be made to all or any officer who may claim compensation for any loss alleged to have been sustained by them by reason of this act, the said Commissioners, having regard to the conditions on which the appointment of any such officer was made, or to any notice which at the time of such appointment may have been given to such officer, that such office was to be holden subject to any provision by parliament for the abolition or regulation thereof; and that in all cases in which it shall appear to the said Lords Commissioners that compensation ought to be granted, it shall be lawful for the said Lords Commissioners, or any three or more of them, by warrant under their hands, to order or direct that such annual or other compensation as aforesaid, or any of them, as to the said Lords Commissioners in their discretion shall seem just and reasonable; and all such compensations, whether annual or in gross, shall be issued and paid and payable out of the said Fee Fund.

### EQUITABLE ASSIGNMENTS.— NOTICE.

IN a former volume (vol. 9, p. 101, tit. Disputed Decisions, *Smith v. Smith*, 2 Cr. & Mee. 231; 8 L. O. 327), some remarks will be found upon the doctrine of notice requisite to be given on assignments of equitable interests in funds in the hands of third parties. The object of that discussion was to show in how hazardous a position a purchaser of such interests was placed, however honest his dealings might be, in case he should neglect to give notice to the persons in whose hands the funds vested.

It will not be denied, that where a person incurs a hazard in buying a particular species of property, in proportion to that hazard will the property be deteriorated in value. All doctrines therefore which a Court of Equity lays down should proceed with the utmost caution, where the value of property in the hands of the beneficial owner may thereby become of no value at all.

How far this doctrine of notice may have this effect, has in some measure been shewn; for admitting notice to be actually requisite, the case of *Smith v. Smith* has shown how very easily such notice may be lost; for if a verbal notice be given to one of two trustees, how easily may the trace of such notice be lost, by the death or removal of such party.

This doctrine of notice called loudly for a decision of the House of Lords; and such decision has at length taken place (24th June), but contrary to what might have been wished for or expected. The case (*Kuster v. Cockerell*) was this: The present Duke of Marlborough, then the

Marquis of Blandford, along with the late Duke, conveyed certain estates to trustees for sale, to raise money to pay off debts of the present Duke, and to hold the surplus in certain proportions for the late and present Duke, and subject to such trust, the property was to be held in trust for the late Duke for life, with remainder to the present Duke in fee. During the existence of the above trusts, the present Duke granted annuities to several persons, with powers of distress, and a term to a trustee, to commence on the death of the late Duke. No notice was given at the time of these annuities to the trustees under the first deed, nor did it appear that the annuitants were aware of such trust deed. At a later period the present Duke assigned all his interest in the money to arise by sale, and all interest in the property, to Sir C. Cockerell, by way of a security for money advanced. No notice of this latter deed was given to the trustees under the first deed for four or five years; but it was afterwards given, prior to a notice given at a subsequent period by the first annuitants. The money remaining in the hands of the trustees, a bill was filed to establish the rights of these different claimants; and the master having reported that the first annuitant had the preference, notwithstanding the prior notice, an exception was taken to this report; and on argument of this exception before Sir J. Leach, he held it good, on the ground of the second incumbrancer having gained a priority by reason of his notice. From this decision an appeal was brought before the House of Lords; and after argument, Lord Lyndhurst (Lord Brougham assenting) affirmed the decision of Sir J. Leach, on the doctrine established by the cases of *Dearle v. Hall*, and *Loweridge v. Couper*, 3 Russ.

Before offering a few remarks on the second head of this paper, a few remarks on this case may not be unacceptable, although, as most of the readers must know, that a decision by the House of Lords puts an end to further discussion on the point then before them.

On reference to the statement of the above case, it will be found that there is nothing to shew that the first annuitants were aware of the existence of the trust deed; for they appear to have been dealing with the present Duke on the security of a term to arise on the decease of the late Duke, out of property, to the legal estate of which the present Duke had no doubt shewn a title. Without, therefore, they wilfully shut their eyes to the knowledge of this deed, they certainly seem to have had a preferable claim to a party who at a future time, with full knowledge of the trust deed, advances money to the present Duke, and yet neglects to give notice to the trustees for four or five years. Nobody, I think, will argue, that because this latter party has been fortunate enough to get a notice conveyed to the trustees before the former parties, who were less awake to their rights, he should be considered as standing in a better situation. The matter is now set at rest by a decision which cannot further be disputed, and it is perhaps

therefore useless to say more upon the subject.

This case leads to the making a few remarks on the Appeal Court of the House of Lords, as to its present component parts. The Lords who sat to hear the present appeal were Lords Lyndhurst and Brougham; the former of these delivered judgment, the latter merely concurring. Now if we examine the cases on the subject in dispute, we shall find that three out of four of them are Lord Lyndhurst's own decisions. What good, therefore, is there arising from an appeal of this kind? the object of an appeal not being so much a rehearing, as the obtaining the opinion of another judge, who has not the feeling, that if he decides contrary to the first decision he thereby contradicts his own judgment. Lord Lyndhurst's legal character stands too high for any one to believe that if he found he had got wrong he would be ashamed of owning it; but this may not be the case with all. Besides, I conceive it to be a great hardship on a man to make him sit in review on his own judgments. It is all very well to allow him, if he chooses, to be present on such appeal, and to explain to the Appeal Judge his particular reasons for the decision he has made; but all, I think, will own, that the strongest minds are prejudiced against contradicting themselves, and therefore I think they should not be obliged to do it. Lord Eldon has sat in the House of Lords and heard his own decisions reversed by Lords Manners and Redesdale, without remark. This I think is far preferable to making a man reverse his own decisions. It is, however, singular, that so large a Court of Appeal (the Privy Council) should have been provided for matters arising in the colonies, while for matters arising at home we are so ill supplied as in the Court of Appeal in the House of Lords. M.

### SELECTIONS FROM CORRESPONDENCE. No. CIV.

#### INHERITANCE ACT, 3 & 4 W. 4, c. 106.

"And be it further enacted, that in every case descent shall be traced from the purchaser; and to the intent that the pedigree may never be carried further back than the circumstances of the case and the nature of the title shall require, the person last entitled to the land shall, for the purposes of this act, be considered to have been the purchaser thereof, unless it shall be proved that he inherited the same, in which case the person from whom he inherited the same shall be considered to have been the purchaser, unless it shall be proved that he inherited the same; and in like manner the last person from whom the land shall be proved to have been inherited, shall in every case be considered to have been the purchaser, unless it shall be proved that he inherited the same." 3 & 4 W. 4, c. 106,

It was with no little surprise that I saw the following construction put upon the above clause of the Inheritance Act, by a correspondent in your number of 27th June, viz. that if John Stiles died seized of purchased land, leaving two daughters, one of whom subsequently dies in the life-time of the other, intestate, leaving two daughters, one of whom subsequently dies intestate, her share would, by virtue of the above clause, become divisible between her surviving sister and her aunt. To this is added, "the case proposed has been overlooked by the framers of the act. The omission indeed is so obvious, that in all probability, should the case ever come before the Court, it would consider itself bound to allow the general policy of the law to prevail, and not put that construction upon the section which would manifestly work so great an injustice." This construction amounts to an humble confession that your correspondent is little read in the Chapter of Descents, otherwise he would have found, that previous to the above act the same result would have followed, if he was now right in his present construction. This proves how requisite it is to know the exact state of the law at the passing of an act, before an attempt is made to point out errors in the act.

Let us then consider who in the above case would have been the party entitled previous to the act. By the 5th Canon—"On failure of lineal descendants or issue of the person last seized, the inheritance shall descend to his collateral relations, *being of the blood of the first purchaser*." To find out who this party is, we must resort to the 6th Canon, viz. "that the collateral heir of the person last seized must be his next collateral kinsman of the whole blood." I shall not go into the number of the parties, and their relative positions under this head of collateral kinsmen; it being sufficient to state, that in the first degree stand brothers and sisters or their descendants, and in the second stand uncles and aunts or their descendants: this is sufficient for the present purpose. What difference then, I ask, does the above clause make? It merely declares (by way of inducement), that descent shall be traced from the purchaser. This was only declaring what before the act was the case, and therefore only an inducement to what follows in the after portion of the section, viz. the preventing, as far as possible, the property from escheating, by declaring that the last person entitled should be considered as the purchaser, unless he was proved to inherit it, &c.: thus, if John Stiles having land by descent from his mother, dies leaving no heirs on that side, the land would escheat, sooner than go to the father's side: if, on the contrary, he had taken by purchase, both lines of heirs would take before the lord. The object of the present clause was to throw upon the lord the proof of shewing a descent from a quarter where all the heirs had failed; and in default of his so doing, it should go as purchased lands would go—in both lines. Now if, previous to the act, a person had died intestate, without issue leaving an aunt and the

child of a deceased uncle, would any one contend that the aunt took in preference to, or divided this property with the cousin, merely because the uncle chanced to be dead? Certainly not. But yet we find, when the present act has introduced a parent as a nearer relation to take before the uncle, a person arguing that the descendant of the mother, *i. e.* the sister of the deceased, is only in equal degree with the aunt. It is too absurd to require further comment. Compare the degrees according to the civil law: from the deceased daughter to the mother is one, and from the mother to the surviving sister is two. Now how stands the aunt from the daughter?—To mother one; from mother to her father (John Stiles) two; from John Stiles to the aunt three. Now when two and three can be shewn to be the same, I shall be willing to succumb to the new construction of descents. Again, according to the new doctrine, if John Stiles died seised, leaving two granddaughters by his eldest son, and a son, on the death of one of the daughters the son would take in preference to the other daughter. M. T.

### REVIEW.

*The Equity Pleader: comprising all usual Forms of Bills, Answers, Pleas, Demurrers, Interrogatories, &c.* By a Chancery Barrister. Richards & Co. 1835.

THIS little work is written in connection with the Chancery Practice published by the proprietors of this work; although it is not by the same author. It appears to us to be carefully executed, and we have no doubt our readers will find it useful. In the works already before the profession, containing forms of Equity Pleadings, the bills, answers, and other forms, are printed from beginning to end: so that, if a form for a particular statement or charge be wanted, the whole bill, or perhaps several bills, must be read before it can be found: in the present work, the forms of all usual statements, prayers, &c. are arranged alphabetically, so that any one may be readily found. The notes also contain much useful matter, concisely given. More, we think, will be learnt from the whole work, of Equity Pleading, than from the works of greater pretensions. We should recommend no student to be without it.

### LAW OF ATTORNEYS.

#### ATTORNEYS PRACTISING IN CHANCERY.

The following case may be of use to our readers.

Upon the taxations of costs before the master, in pursuance of an award, it was discovered that Mr. Pattison, the solicitor of the plaintiffs, although an attorney in the Court of Common Pleas, had not been admitted a solicitor in the Court of Chancery; and it is thereupon insisted on the part of the petitioner,

that on the taxation Mr. Pattison, should be allowed those fees only which he had paid to the clerk in court. The master, however, overruled this objection, and proceeded to tax the costs as if Mr. Pattison, had been actually a solicitor, upon the ground that Messrs. Brooksbank and Farn, his agents, being solicitors in the cause, Mr. Pattison, in consequence, obtained a sum out of Court, in part of the amount of the bills so taxed, and the petitioner, in order to avoid an attachment, was compelled to pay the sum of 94*l.* for the residue of the taxed costs. The petitioner prayed that the master might review his taxation, and that Mr. Pattison might be allowed those fees only which had been paid by him to his clerk in court, or that he might replace in court, and repay to the petitioner what he had improperly received.

It was admitted at the bar, that Mr. Pattison was not a solicitor, and that Messrs. Brooksbank and Farn, who acted as his agents, were not aware of that fact.

In support of the petition the following cases were cited; *Prebble v. Boghurst*, 1 Russ. & M. 744; *Coates v. Huchyard*, 1 Russ. & M. 746; *Sumner v. Ridgway*, 1 Russ. & M. 748.

Against the petition it was contended, that by the 2 G. 2, c. 53, s. 10, an attorney was at liberty to practise in the Court of Chancery in the name of a solicitor, as his agent; and further, that the petitioner could not avail himself of the objection that Mr. Pattison was not a solicitor, the client who employed Mr. Pattison being alone competent to raise that objection.

The *Master of the Rolls*.—I have read the tenth section of 2 G. 2, c. 23, with great attention. It is clear that it contains no provision to enable an attorney to practise in the name of a solicitor, as his agent. A solicitor may, under that section of the act, practise in the name of an attorney, as his agent; but an attorney cannot practise in the name of a solicitor. There is here no doubt that Mr. Pattison did conduct the suit of his client by his agents, who were solicitors, and who were not aware that Mr. Pattison did not himself fill the character of a solicitor. I am of opinion, therefore, that the case of Mr. Pattison falls within the effect of the decisions to which I have been referred. The only difference between this and the cases cited is, that in those cases the client sought relief against the attorney who had acted as his solicitor; and here it is not the client, but it is the person who is ordered to indemnify the client in respect of the costs; and the question is, what costs, under such an order, is this party to pay? He is to pay the costs which the client is legally bound to pay. The client was not legally compellable to pay to Mr. Pattison more than the fees which Mr. Pattison had by his agent paid to his clerk in court; and these, therefore, are the only sums in respect of which the petitioner is liable. Let the master review his report, allowing to Mr. Pattison those fees only which he has paid to his clerk in court, and Mr. Pattison must repay what, upon such review, it shall be found that he has improperly received out of Court, or from the petitioner. *Hockley v. Bantock*, 2 M. & K. 437.



## SUPERIOR COURTS.

## Lords Commissioners' Court.

PRACTICE.—PLEA OF ADVERSE POSSESSION.—  
PRODUCTION OF DOCUMENTS.

*To a bill making title as heir under a limitation over in a will, and charging that there were in the defendant's possession documents which would shew the truth of the statements in the bill, a plea of adverse possession for seventy-three years was put in : Held, that such plea was defective, in not setting forth the circumstances of adverse possession, and in not being accompanied with an answer to the charge of the possession of the documents.*

*Documents relating to an estate, the subject of the suit, are referred to in defendant's answer, and admitted to be in his possession, but denied to be of any use to the plaintiff : the Court will, upon motion, before the hearing of the cause, order them to be deposited with the master or clerk in court for the plaintiff's inspection.*

The plaintiff, by his bill filed in 1833, and afterwards amended, stated himself to be the heir at law of one John Hardman, who died in 1765, and who, by his will dated in 1764, devised his undivided moiety of a fee simple estate in Lancashire (in default of issue of his own body, and of issue of his nephews therein mentioned, which events happened) to his right heirs for ever, subject to a term for 99 years given by his said will in the premises to the testator's executors, in trust to enable the devisees of the said estate successively, as they should come into possession thereof, to jointure their wives, and raise portions for younger children, and in the mean time to attend the inheritance. The bill further stated, that the testator's widow, and his brother's widow (who was entitled to the other moiety of the estate), both named executrices in the will, proved the same, received the rents of the estate as trustees of the said term, during their lives, and granted leases of the same, and that their lessees continued in possession under such leases until 1815, paying rents up to that time to the testator's widow, the surviving executrix, or her executors, in whom the term became vested on her death in 1795; and it also stated that the defendant Ellames, from and after 1815, was in possession of both moieties of the estate, and for some years accounted to the representatives of the testator's widow for the rents of his moiety, but had lately refused to do so, alleging that he had purchased the estate. The plaintiff, after deducing his title as heir at law of the testator, and stating that he had obtained letters of administration to his father and grandfather, who died respectively in 1822 and in 1786, and thereby became their personal representative, stated that as such heir he was entitled to the said moiety of the said estate, and as such representative he was entitled to

the rents thereof in the hands of the executrix's representatives, and of the defendant Ellames; and he prayed for a declaration of the Court to that effect, and for an account, &c. &c. The bill charged against the defendant Ellames, that he had at the time of his pretended purchase, notice of the limitation in the said will in favour of the testator's heirs, and of the plaintiff's right, and of the trusts of the term; and it alleged, that he and the other defendants (the representatives of the executrix) had in their possession various documents relating to the estate, which if produced would shew the plaintiff's title, and the truth of the statements in his bill.

To this bill the defendant Ellames put in a plea of adverse possession ever since 1759; and that plea having come on to be argued before the Vice-Chancellor, was overruled by his Honor, on the grounds, *first*, that it should state such circumstances as would enable the plaintiff to know what facts he would have to prove when required to meet the truth of the plea; and *secondly*, that it was further defective, in not being accompanied with an answer to the allegations in the bill as to documents being in defendant's possession shewing the truth of the matters stated in the bill.

The defendant Ellames appealed to the Court of Chancery. Lord Chancellor Brougham affirmed the decision below, overruling the plea, and gave in writing his reasons for his judgment, which is not yet reported; but the tenor of it may be inferred from the reference made to it by his Lordship in moving judgment in the House of Lords some days after, in an appeal there on a plea of heir *ex parte paternâ*, to a bill claiming title *ex parte maternâ*, in *Harland v. Emerson*,<sup>a</sup> where the recent decisions on those pleas are cited.

The defendant then put in an answer to the bill, and with respect to the documents charged to be in his possession, he stated some, and craved leave to refer to others in his possession, in the usual terms of such reference in an answer. On a motion, without notice, at the Rolls, an order was made on the defendant to deposit the documents so referred to with the master or clerk in court, for the inspection of the plaintiff. This was a motion to discharge that order.

Mr. Kinderley, Mr. Wigram, and Mr. Booth, in support of the motion.—A mere reference to deeds in an answer will not justify the Court in ordering the production of them before the hearing of the cause. *Sparke v. Montriou*.<sup>b</sup> If they are material to the plaintiff's case, he should file a bill of discovery. Those words of reference occur in all answers, and if production should follow such reference, no man's title deeds could be safe. Discovery of documents is for the purpose of aiding a plaintiff's title at law; but an heir at law, claiming as such, cannot be aided by the production of a will or conveyance or other deed. It is decided that he has no right to

<sup>a</sup> 2 Clarke & Finn. App. Cas. 10—21.

<sup>b</sup> 1 You. & Col. 103.

deeds in the possession of devisees. *Shaftsbury v. Arrowsmith*; *Burton v. Perkins*.<sup>c</sup> The plaintiff's title as heir is not denied here, and he requires no aid from the defendants to prove it. It is a rule of Courts of Equity, in ordering the production of papers for a plaintiff, not to give those which constitute the evidence of the defendant's title, and the Courts never order production unless the instrument is necessary to plaintiff's case. *Evans v. Richards*; <sup>d</sup> *Simpson v. Snellenham*.<sup>e</sup>

Mr. Jacob and Mr. G. Richards, contra.—There are three states of circumstances in which applications of this sort are made and granted—*first*, where the parties litigant have a common property or interest in the documents called for, as joint tenant, tenants in common, partners in trade, &c.; *secondly*, where the documents relate and are material to the case of the party calling for them; and, *thirdly*, where they are referred to in the answer, and so made part and parcel of the answer. The practice with draftsmen is not to refer to any deeds which they wish not to be produced. Documents are seldom stated in *hæc verba* in pleadings, but the effect of them is stated, and they are then referred to for the greater accuracy; and such reference is made, *first*, to save the party answering from the consequences of perjury; and, *secondly*, to protect him from damage to his own interest by any misstatement of their effect, and to avoid exceptions to the answer. The principle on which the Courts act in ordering the production of documents, whether on motion or on cross-bill for discovery, is, that a party is entitled to all the evidence necessary before the hearing of his case on the merits; for, if not communicated until then, he may be taken by surprise, or may lose all benefit from a mere inspection or *oyer* in Court during the argument; and the slightest reference in an answer to documents entitles a plaintiff to an inspection of them. *Bulton v. Corporation of Liverpool*; <sup>f</sup> *The Princess of Wales v. Earl of Liverpool*; <sup>g</sup> *Elton v. Walton*; <sup>h</sup> *Bellison v. Farrington*.<sup>i</sup>

Sir Lancelot Shudwell.—The defendant, in one part of his answer, craved leave to refer to a certain indenture, which, in a subsequent part, he denies to be of any use in establishing the plaintiff's title. It was argued on behalf of the defendant, that this indenture was not a part of the answer, but was merely referred to. Deeds and other documents may be stated in an answer in *hæc verba*, or they may be scheduled, in neither of which cases are they ordered to be produced until the hearing, or they may be only referred to. There are three modes of such reference in an answer; the documents may be referred to and admitted to be in the defendant's possession, custody, or power; or they may be referred to as not in

his possession or power; or they may be merely referred to. If documents referred to and admitted to be in defendant's possession—which is the case here, although mixed up in the arguments with questions of a different nature—relate solely to the defendant's title, they are not to be produced to the plaintiff. That doctrine is laid down in two cases in the Court of Exchequer, *Benson v. Bligh*,<sup>j</sup> and *Hichins v. Lowe*,<sup>k</sup> and it is supported by this late Master of the Rolls, when he was Vice Chancellor, in *Jones v. Lewis*.<sup>l</sup> If the documents referred to are not admitted to be in the defendant's possession, it is clear the Court cannot order him to produce them, unless it turns out that the defendant has power over the person who possesses them. In *Darwin v. Clarke*,<sup>m</sup> where the answer admitted the execution of an instrument and craved leave to refer to it when produced, but did not admit it to be in the possession or power of the defendant, Lord Eldon refused to order the production of it. The same learned Lord went further in the case of *Atkins v. Wright*,<sup>n</sup> in refusing a motion for the production of a document, although referred to in the answer as in the defendant's possession, but not described, nor offered to be produced—a decision which is not consistent with his Lordship's order in the subsequent case of *Evans v. Richards*,<sup>o</sup> or other cases under this head. When the deed or other instrument is referred to and in the defendant's possession, and not exposing his own title, it appears to be long the practice to order the production of it. In the case of *Herbert and others v. The Dean and Chapter of Westminster*,<sup>p</sup> Lord Macclesfield said, "Since the plaintiffs in their answer to the cross-bill referred to vestry books, by that means making them part of their answer, for that reason the Court ought to let the defendants see them, otherwise there would be no relying on the answer of those who are guarding themselves by reference for fear of a mistake and to avoid exceptions to their answer; wherefore, let the plaintiffs bring the vestry books before the Master, and let the defendants take copies, if they please, to the intent that the cause may come more fully before the Court at the hearing." In the case of *Bettison v. Farrington*<sup>q</sup> it was laid down that defendants, by referring to deeds in their answer, made them part thereof; other cases in the second and third volumes of Pere Williams are not of the same authority. But the doctrine is fully supported by Lord Eldon, in the case of *Marsh v. Sibbald*,<sup>r</sup> where his Lordship said every paper, book, letter, &c. referred to in an answer is incorporated in the answer and made part of it, and may be read with the answer, if the plaintiff can shew that it is in effect and substance part of the answer. I am clear in my view of the cases, that when a de-

<sup>c</sup> 4 Ves. 66.<sup>d</sup> 1 Swans. 7.<sup>e</sup> 5 Madd. 16.<sup>f</sup> 3 Sim. 467; S. C. 1 Myl. & K. 88.<sup>g</sup> 1 Swans. 114, 580.<sup>h</sup> 6 Ves. 288—92.<sup>i</sup> 3 P. Wms. 363.<sup>j</sup> 7 Price, 205.<sup>k</sup> 13 Price, 193.<sup>l</sup> 2 Sim. & Stu. 242.<sup>m</sup> 8 Ves. 158.<sup>n</sup> 14 Ves. 211.<sup>o</sup> 1 Swans. 7.<sup>p</sup> 1 P. Wms. 773.<sup>q</sup> 3 P. Wms. 363.<sup>r</sup> 2 Ves. & B. 375.

defendant charges himself with being the depository of documents by referring to them in his answer, the Court will order him to produce them for the convenient inspection of the plaintiff, before the hearing of the cause on the merits. It is only consistent with justice that if the defendant refer to a deed so as to make it part of his answer, the plaintiff ought to know as well what that part of the answer is, before the hearing, as any other part of the answer, and the defendant is bound, therefore, to produce it, as if it were recited. I have communicated with my Lords Commissioners on this point, and we are of opinion, for those reasons which I have here stated, that this motion ought to be refused, with costs.

*Hardman v. Ellames and others*, at Westminster, before the Lords Commissioners of the Great Seal, May 2d and 9th, 1835.

### King's Bench Practice Court.

#### WRIT OF CA. SA.—CORONER.—INTEREST OF SHERIFF.—RECORD.

*The fact of the sheriff's being interested in a cause need not be set forth on a writ of ca. sa. directed to the coroner, nor is it necessary that that circumstance should be shewn on record before suing out such a writ.*

*The defendant, being already in custody at the suit of another, is sufficiently charged in execution, if the writ be indorsed by the coroner, and carried by him to the gaoler.*

In this case the defendant had been taken on a writ of *capias*, which was directed to the plaintiff, in his capacity of high-sheriff; but he had subsequently escaped, and the plaintiff was then sued, and was eventually compelled to pay the amount due by defendant. That sum was then sought to be recovered of him by the sheriff, to whom he gave a *cognovit*, and a *ca. sa.* was subsequently sued out, but the sheriff being a party interested it was directed to the coroner of the county. The defendant was at this time in custody in the county gaol on another suit, and the coroner therefore did not make out his usual warrant, but merely indorsed the writ, and carried it to the keeper of the gaol. A rule *nisi* had under these circumstances been obtained, on the ground that as there was no mention made of the sheriff's being interested, there appeared no reason why the writ should not have been directed to him, instead of the coroner. Another objection taken to the proceedings was, that the defendant had not in point of fact been charged in custody upon the writ of *ca. sa.*

Cause was now shewn against this rule, when it was contended, that inasmuch as there was no authority to shew the necessity for setting forth the interest of the sheriff in the writ, it would be sufficient if that were explained on the record. The second objection must also fall, because, as the defendant was already in custody, the only step to be taken by the coroner was to indorse the writ, and carry it

to the gaoler in whose keeping the defendant was.

The Court thought there was no necessity for suggesting on the writ of *ca. sa.* that the sheriff was interested, if that were done on the record. The writ could only be directed to the coroner by law when the sheriff had an interest in the case. With regard to the second objection, the coroner had done all that he could under the circumstances; the defendant being already in gaol it would be useless for him to make out his warrant.

Rule discharged.—*Barston v. Trutch*, T. T. 1835. K. B. P. C.

#### PRISONER'S DISCHARGE.—DEBT.—NOTICE.—RULE NISI.

*A prisoner seeking his discharge under 48 G. 3, c. 123, for a debt under 20l., must give ten days' notice of his intention to apply, or the rule in the first instance can only be nisi.*

A rule was moved for for the discharge of the defendant, who had been in custody for twelve months, for a debt not exceeding 20l. It appeared from the affidavits, that every requisite step had been taken, except that of giving ten days' notice pursuant to the rule 1 Reg. Gen. H. T. 2 W. 4, s. 90. The only question now was, whether, as no notice had been given, he was entitled to a rule absolute for his discharge, or only a rule *nisi*.

The Court thought that as the proper notice had not been served, the rule must be *nisi* in the first instance.

Rule *nisi* accordingly.—*Moore v. Clay*, T. T. 1835. K. B. P. C.

#### AFFIDAVIT.—DEBT.—INTEREST.—AGREEMENT.

*In an affidavit for debt and interest, the latter must be shewn to be due upon a special agreement.*

A rule had been obtained for the discharge of the defendant, who was in custody, on the ground of the affidavit of debt being defective. In the first part of the affidavit it was stated, that the defendant was indebted to the plaintiffs in the sum of 112l., for principal and interest on a joint and several promissory note for 100l., drawn by the defendant, and payable to the plaintiffs, with lawful interest for the same. The latter part of the affidavit also stated that he was further indebted in the sum of 259l. for money lent, advanced, and expended by the plaintiffs at his desire, and for money due and payable from him for interest upon and forbearance of divers large sums of money due and payable from the defendant to the plaintiffs.

It was contended, that the claim to interest was not shewn in the latter part of the affidavit sufficiently clearly, there being no agreement to pay interest stated.

Cause was now shewn, when it was submitted, that the right to interest was explained as

clearly as the circumstances of the case required. The interest being generally claimed, it should be presumed to be legal. A case was cited, where an affidavit of debt claiming interest was held to be good, although it neither shewed the amount of the original debt, nor the period when the interest began to run.

On the other hand it was contended, that a plaintiff should clearly shew his claim to be good, in order to hold a defendant to bail. A defendant, it had long ago been decided, could only be arrested for interest in pursuance of an agreement, and not where it arose as damages. From the language of the affidavit here, the latter might be the case. Had it appeared that the interest was claimed upon an agreement, the case would be altered.

The Court said, the question for their consideration was, whether interest appeared to have been agreed to be paid, or whether it was claimed as damages. From the wording of the affidavit the latter might be the case. Part of the affidavit being bad, the whole was so, of course.

Rule absolute.—*Drake v. Harding*, T. T. 1835. K. B. P. C.

ATTORNEY AND CLIENT.—TAXING ATTORNEY'S BILL.—LACHES.—PAYMENT ON ACCOUNT.

*In order to disentitle a client to have his attorney's bill taxed after a lapse of four years, the latter must shew payment, or that which is equivalent to it.*

In this case a rule nisi had been obtained for rescinding a Judge's order, which directed the taxation of an attorney's bill, on the ground of too long a time having elapsed since the delivery of the bill and the application for the order. The facts disclosed in the affidavits were these: The business had been done by the attorney between the years 1826 and 1831, and at the time the bill was delivered, the client expressed himself satisfied with the several items, and paid a sum of money on account.

Cause was shewn against this rule, when it was submitted, that the client was entitled at any time while the bill remained unpaid to have it taxed, and that the mere partial payment and expression of satisfaction by the client were insufficient to waive his right to taxation.

*Coleridge, J.* was of opinion, that unless the attorney could shew some act done by the client, which was tantamount to payment, the client was clearly entitled under the established rule to have his bill taxed. As to the satisfaction expressed by the client at the bill, the payment on account, lapse of four years since the delivery of the bill and obtaining the order to tax, I do not consider they are sufficient to waive the client's privilege to have his bill taxed. The present rule must therefore be discharged.

Rule discharged.—*Woollaston v. Weston*, T. T. 1835. K. B. P. C.

AWARD.—ARBITRATION.—COSTS IN THE CAUSE.—MASTER'S TAXATION.

*The party ultimately successful on an award, is entitled to all intermediate costs attending the award, as costs in the cause.*

In this case a rule nisi had been obtained for reviewing the master's taxation. The facts appeared to be these: A rule had been obtained for setting aside the award in this case, and the Court ordered, that the verdict should be reduced from 171*l.*, the sum found to be due to the plaintiff by the arbitrator, to 22*l.* 10*s.* Upon the taxation of the costs, the master allowed the plaintiff the costs of shewing cause against this rule as costs in the cause, on the ground of his having ultimately succeeded.

On shewing cause against this rule it was submitted, that the master had acted right in treating these costs as costs in the cause.

The Court thought that the master had taxed the costs properly. There was in fact no verdict until after the rule for setting aside the award was disposed of; consequently all proceedings previous to the discussion of that rule must be regarded as steps in the cause. The present rule must therefore be discharged.

Rule discharged.—*Goodall v. Ray*, T. T. 1835. K. B. P. C.

Eschequer of Pleas.

COURT OF REQUESTS ACT.—PAYMENT OF MONEY INTO COURT.—SUGGESTIONS TO DEPRIVE THE PLAINTIFF OF HIS COSTS.

*After payment of money into Court, under the new rules, in a personal action, the defendant cannot apply to the Court to deprive the plaintiff of his costs, on the ground that such sum so paid in was less than a sum which was recoverable in a court of requests, because the plaintiff had taken such money out of Court in satisfaction of his demand.*

This was an application to deprive the plaintiff of his costs under a court of requests act of the county of Cardigan, on the ground that he had recovered a sum less than 40*s.*, which was the amount over which the court in question had jurisdiction. It appeared that the action was originally brought for 8*l.* 2*s.*, for which a particular of demand was attached to the declaration. On this declaration the defendant paid into court, under the rule of Hilary Term, 4 W. 4, the sum of 1*l.* 15*s.* This amount the plaintiff took out of court in full satisfaction of his demand, and thus entitled himself to the full amount of his costs down to the time of taking out the money.

A rule nisi was obtained for the purpose of depriving the plaintiff of his costs, on the ground of a less sum than 40*s.*, having been recovered by him in the action which he had brought in the superior court.

On shewing cause against the rule it was contended, that the defendant having paid in

this money under the rule of court, which gave the plaintiff his costs down to the time of such payment, if he took it out in satisfaction of his demand it was too late for him now to contend that the amount recovered was less than that which was recoverable in the court of requests. The defendant by his own act had placed himself in a situation which prevented him from objecting to the plaintiff receiving his costs.

The Court was of opinion, that as this sum had been paid into court under the rule of Hilary Term, 4 W. 4, and taken by the plaintiff in satisfaction of his demand, it was too late for him to object to the plaintiff's claim to costs. The condition contained in the rule under which the payment had been made was, that if the plaintiff took the money out of court which the plaintiff had paid in satisfaction of the demand, the plaintiff should receive his costs. The defendant having paid in money on a rule containing such a condition, he was bound by it, and therefore the plaintiff was entitled to receive his costs.

Rule discharged.—*Furrent v. Morgan*, E. T. 1835. Excheq.

#### SHERIFF'S COURT.—NOTICE OF TRIAL.—JUDGMENT AS IN CASE OF A NONSUIT.

*Although Sheriffs' Courts may be held after the writ of trial has issued, judgment as in case of a nonsuit cannot be obtained till two terms more expire from issue joined.*

In this case a rule nisi had been obtained in Hilary term, for judgment as in case of a nonsuit. The facts as they appeared from the affidavits, were these. Issue was joined on the 9th August. A Judge's order for the trial of the cause before the undersheriff was obtained and served on the 18th. An affidavit made by the undersheriff was then produced, which stated that he had held court days for the trial of causes whenever notice had been given him.

On shewing cause against this rule, it was contended that this application was premature, two terms not having elapsed, as was required by the practice of the Court.

The Court was of opinion that this application had been clearly premature; for although court days had passed, the motion should not have been made till this term. The present rule must therefore be discharged, and with costs.

Rule discharged, with costs.—*Harle v. Wilson*, E. T. 1835. Excheq.

#### WRIT OF TRIAL.—JUDGMENT AS IN CASE OF A NONSUIT.—PEREMPTORY UNDERTAKING.

*When the Court will grant judgment as in case of a nonsuit, absolute in the first instance, where the cause is to be tried before the sheriff.*

In this case an application was made for a rule absolute in the first instance for judgment

as in case of a nonsuit. The facts disclosed by the affidavit in support of the application were these. The defendant obtained a rule nisi for judgment as in case of a nonsuit last Michaelmas term. This rule was discharged on the plaintiff's giving a peremptory undertaking to try at the next assizes. Subsequently, however, a judge's order was obtained, directing the trial of the cause to take place before the under-sheriff, in order to relieve the plaintiff from his undertaking to try at the assizes. Several Courts have been held by the under-sheriff for the trial of causes, but the plaintiff had given no notice of trial.

The Court said, that although the judge's order had been obtained, and which merely directed a change of the Court in which the cause was to be tried, yet the plaintiff was still bound by his peremptory undertaking. The rule now sought therefore must be granted.

Rule absolute.—*Williams v. Edwards*, E. T. 1835. Exchequer.

### NOTES OF THE WEEK.

#### Royal Assents.

Annual Indemnity.

#### HOUSE OF LORDS.

##### Bills for second Reading.

Title of the Bill.	Proposer.
Residence of Clergy.	Lord Brougham.
Pluralities Prevention.	Lord Brougham.
Ecclesiastical Jurisdiction.	Lord Brougham.
Illegal Securities.	
Capital Punishments.	
Education & Charities.	Lord Brougham.
Certiorari.	Lord Denman.
Loan Societies.	
London Small Debts.	

##### In Select Committee.

Highways.	
Law of Patents.	Lord Brougham.
Wills Execution.	
Executors.	

#### HOUSE OF COMMONS.

##### Bills to be brought in.

Law of Tenure.	Attorney General.
Law of Escheat.	Attorney General.
Poor Law Amendment.	Mr. Trevor.
Registration of Births, &c.	Mr. Wilks.
Tithes Commutation.	Sir R. Peel, Bart.

*Second Reading.*

Law of Libel. Mr. O'Connell.  
 Bankruptcy Funds. Master of the Rolls.  
 Ecclesiastical Courts.  
 Clergy Discipline. Sir F. Pollock.  
 Infants' Property (Ireland).  
 Parish Vestries.  
 Landed Securities (Ireland).  
 Church of Ireland.  
 Limitation of Real Actions Amendment.

*In Committee.*

Municipal Corporations. Lord J. Russell.  
 Copyholds Enfranchisement. Attorney General.  
 Registration of Voters. Lord J. Russell.  
 County Coroners. Mr. Cripps.  
 Durham Court of Pleas.  
 Offences against Person.  
 Dissenters' Marriages.  
 Marriage Act Amendment.  
 Contempts in Equity (Ireland).  
 Lunatic Acts Continuance.

*Consideration of Report.*

Abolishing Imprisonment for Debt, &c. Attorney General.  
 8th July.  
 Limitation of Polls.

*Third Reading.*

Prisoners' Defence. Mr. Ewart.

*Passed.*

Loan Societies.  
 London Small Debts.

## IMPRISONMENT FOR DEBT.

On the motion of Mr. Freshfield, the following returns have been ordered :

An account of the number of Writs of Execution issued out of his Majesty's Palace Court at Westminster, from 1st January 1834, to 1st January, 1835, with the sums directed to be levied and received therefrom, distinguishing the number of Writs of Execution against the person from those against the effects, and the proportion of sums recovered on one class of executions from the other, and where the sums sought to be recovered by such executions have not been obtained, stating the reason of such executions being ineffectual : also the number of executions first issued against the effects, without obtaining the amount of the levy, and executions afterwards issued against the person of the same party, and the sums recovered thereby.

## JUDGES' CHAMBERS.

We observe that another petition has been presented to the House of Commons, for better accommodation for the Judges of the Courts of Common Law sitting in Cham-

bers. We hope it will be followed by some specific proposition for carrying the object into effect.

## CONSOLIDATING COMMON LAW OFFICES.

The Report of the Commissioners of Fees, under 1 W. 4, c. 58, has just been printed, recommending a consolidation of the offices in the King's Bench and Common Pleas, similar to the Exchequer, by which a considerable saving will be immediately effected and a very large one when the Compensations cease. The plan proposed is, that there should be four Masters or Prothonotaries in each of the three Courts, at 1200*l.* a-year, with a competent number of Clerks. Three of the Masters of each Court to attend daily, to tax costs indiscriminately in all the Courts, and superintend the general business of the office, leaving the other Master to attend the Court when sitting. The Report is signed by Mr. Serjt. Goulburn, Mr. Dwarrris, Mr. Dickenson, and Mr. Hill, the King's Counsel.

We shall probably give some of the details in an early number.

## ANSWERS TO QUERIES.

## State of Property and Embanking.

## TRUST CREDITOR. P. 143.

Mr. Justice Blackstone, in his Commentaries, vol. 2, p. 297, after distinguishing between good and valuable consideration, says, "that deeds made upon good consideration only, are considered as merely voluntary, and are frequently set aside in favour of creditors and *bond fide* purchasers. The transaction in this case is, I presume, founded merely on a good consideration, namely, that of natural love and affection; and although binding on *A. B.* himself (see note to Chitty's edition of Blackstone), it would no doubt be set aside in favour of the creditor. I also refer *H. P.* to the case of *Holliday v. Atkinson*, 5 B. & C. 501, in which *Abbott, C. J.* thought that *an intention to avoid the legacy duty* was not a sufficient consideration to support an action on a promissory note by the payee against the executors of the maker. GRADUS.

## COVENANT.—UNDERLEASE. P. 143.

The words "assign, transfer, or set over," usually contained in covenants or provisions against assignment, have been long since held not to include underleases. *Cruse v. Bugby*, 2 W. Black. 766; S. C. 3 Wils. 234 : and these words are surely of a more general restrictive nature than those mentioned by W. S. GRADUS.

## LEGATEE'S AGE.—BAPTISM. P. 143.

Entries in family bibles have been held to be admissible evidence in all matters relating to birth, pedigree, &c., on the principle that they are the natural effusions of a party who must know the truth. *Whitelocke v. Baker*, 13 Ves. 514. The rule with regard to interest in the case of a legacy given generally out of the personal estate is, that it commences at the expiration of a year after the testator's decease; but if the legacy be payable on a certain day, and the will be silent in respect of interest, it is a general rule that the interest shall commence only from that time. *Sitwell v. Bernard*, 6 Ves. 520. GRADUS.

## WILL.—WITNESS.—TRUSTEE. P. 144.

An executor, devisee in trust for sale, who was also an attesting witness to the will (but who, be it observed, was not beneficially interested), was held to be a competent witness. *Phipps v. Pilcher*, 1 Madd. 144; S. C. 6 Taunt. 220. L. M.

## Law of Attorneys.

## SIGNED BILL. P. 142.

The statute 2 G. 2, c. 23, requires the bill to be subscribed with the proper hand of the attorney. I conceive, therefore, that *T. N.* having written his name at the head of the bill merely, has not complied with the words of the statute. GRADUS.

## QUERIES.

## Law of Landlord and Tenant.

## NOTICE TO QUIT.

*A.* is tenant in fee, and *B.* is his yearly tenant. *A.* leases premises to *C.* for twenty-one years, among which *B.*'s are included. *C.* has given *B.* notice to quit; but *B.* refuses to go out, alleging that *A.* was the person to give the notice, and not *C.* *C.* has as yet received no rent, but has exerted his ownership over a part of *B.*'s premises by repairing the roof. Is the notice by *C.* good? Can *C.* bring ejectment, or distrain, or is he driven to his action? And if so, what action?

MINOR.

## LANDLORD AND TENANT.—TENDER.

*A.* tenant to *B.*, at the expiration of his tenancy, tendered to him the key, by telling him that he had brought him the key, and was about to take it out of his pocket; but *B.* told him that he would not receive it, as he considered that he had accepted the premises for a further term, by holding over. Was this a good tender? R. R.

## Common Law.

## VESTRY.—ADJOURNMENT.

Has a vestry, legally called for the purpose of granting a rate for the relief of the poor, the power to adjourn, owing to the absence of one of the churchwardens and the acting overseer? and is it necessary, for the validity of the rate to be made, that the parishioners have notice of such adjournment? F. B.

## ACCIDENTAL INJURY.—REMEDY.

*A.*, while standing at the bar of a public-house, was injured by the accidental discharge of a gun, by a daughter of the landlord's, in a room above the bar, the contents coming through the ceiling, and inflicting numerous wounds; the wounded man was confined to his bed for six weeks, a doctor's bill incurred, and his family deprived of his support for nearly three months. What claim has the man against the landlord? N. J.

## Law of Property and Conveyancing.

## ELECTOR.—QUALIFICATION.

*A.*, who has just attained his majority, is desirous to have a vote in the election of a knight of the shire. *B.*, his father, has several freeholds within the county, and is willing to meet the wishes of *A.* In what manner can this be legally effected, so that *B.* may have the absolute disposal of the property at his death? T. O. B.

## AD VALOREM STAMP.

*A.* has a mortgage upon certain premises belonging to *B.* to a larger amount than the value of such premises. *B.* is anxious to convey the property to *A.* absolutely. Must the *ad valorem* duty be paid on such deed? T. O. B.

## Law of Attorneys.

## SIGNED BILL.

Is it necessary that a solicitor should deliver his bill, for business which has solely been transacted in an *Ecclesiastical Court*, a month previous to his commencing an action thereon? The 2 G. 2, c. 23, s. 23, does not seem to extend to Ecclesiastical Courts: but if not, is there any rule in Doctors' Commons which has the same effect? Has it ever come under the notice of the Court? L. M.

## THE EDITOR'S LETTER BOX.

The letters on the Delays at the Registrar's Office in Chancery, and on the Power of suing a Copartner, shall receive early attention.

The Queries and Answers of S. P. Q.; A.; J. I. A.; S.; M. A.; Virtus; and I. B., have been received.

The Pamphlet on Copyholds is under consideration. The correction subsequently sent, shall be attended to.

# The Legal Observer.

Vol. X.

SATURDAY, JULY 18, 1835.

No. CCLXXX.

— "Quod magis ad nos  
Pertinet, et nescire malum est, agimus.

HORAT.

## PARLIAMENTARY NOTICES.

### THE PRISONERS' COUNSEL BILL.

THE bill for allowing Prisoners the full benefit of Counsel, passed the House of Commons after a severe struggle. It is now we believe, for the second time, before the House of Lords. After weighing maturely the different arguments for and against this measure, we are inclined to give it our concurrence; and we must say, that it counts among its supporters most of the distinguished lawyers of the day, of all parties. Lord Lyndhurst, Lord Brougham, Lord Abinger, the Attorney General, Sir Frederick Pollock, and many others, some of them from the first, others won over during its repeated discussion, all rank among its friends; while on the other side, we can only at this moment remember one or two Chairmen of Quarter Sessions, who, probably fatigued by the brawling of some hard-fighting junior, cannot endure the thought of giving him unlimited time and scope for his tongue; and here indeed we might agree with them. If the allowing counsel to prisoners be only to unloose the inexperienced tongues of young gentlemen bent on "distinguishing" themselves; if every case of petty larceny is to be magnified by counsel into the importance of high treason; we should indeed regret the passing of the bill: but we apprehend no such result; we hope much better things from the good taste and judgment of the bar. But even if it is to be so—if every John Nokes is to be elevated to the rank of a Sidney; still if it be the maxim of our law, "that ninety-nine guilty shall rather escape than one innocent man be punished," then we say this bill should pass into law.

There are cases almost in the experience of us all, where a speech may unquestionably save an innocent man, and where it is his only chance. It is to be remembered,

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that as a general rule, both judges and juries are, perhaps without knowing it, prejudiced against prisoners, and it is very difficult for a counsel not to feel a bias towards endeavouring to get a conviction: nay, we are inclined to think that his cool, unembellished, and apparently impartial opening statement, has often more weight with a jury, than a more direct and laboured attack on their feelings would have. To a tradesman or farmer, the mere imputation of crime, of theft or violence, goes a great way against the accused; and we certainly frequently find a prisoner convicted by the jury on very insufficient evidence. If therefore the purposes of justice are to be answered, the arguments of inconvenience or of waste of time cannot, we conceive, be entertained for a moment. As a general rule, discussion will confirm the escape of the innocent, but must clinch the punishment of the guilty.

We sincerely trust, therefore, for these and many other reasons that might be urged, that the bill may pass the House of Lords. It has, we are glad to see, on the motion of Lord Lyndhurst, been referred to a select committee.

The 4th section, by which counsel or attorneys are allowed to persons accused of offences on which the magistrates have the power of summary conviction, should be extended to other cases. A commitment to prison is often as serious as any summary conviction.

### LOCAL COURTS.

Sir William Follett has given notice of a clause<sup>a</sup> to be inserted in the Corporation Bill, which will have the effect of establishing a species of Local Courts in all the new boroughs. This question will probably have been discussed before this meets the eye of

<sup>a</sup> "Sir William Follett, on further consideration of report, to move clauses establishing Local Courts of Record in the boroughs mentioned in the schedules to the act."



our readers. We shall probably return to it next week.

#### THE REVISING BARRISTERS.

Mr. Whittle Harvey has put a notice on the Journals of the House of Commons, of which the following is a copy:

"Return of the names of the revising barristers on each of the circuits, with the period at which each barrister was first so appointed, and the period at which each such barrister was called to the bar, distinguishing those who attend at the assizes on the circuits on which they have been so appointed from those who do not, and distinguishing those who practise at Westminster Hall from those who do not: Also return of the names of the judges who made the last appointment of revising barristers on the circuits: Also return of the quarter sessions at which each such barrister practises, and when he attended such sessions last; and also of the names of the different places on the circuit to which each such barrister attends professionally during the assizes: Also return of the names of the barristers on each circuit who have not been appointed revisers, with the period at which each such barrister was called to the bar."

The same gentleman also gave notice that he would move for "a return specifying the names of every barrister who now holds, or within the last twelve months has so done, any situation whatever of honour or profit, at home or abroad, by virtue of any act of parliament or commission, the nature and title of his office, by whom appointed, and the emoluments, if any, incidental thereto: such return to state whether the party is in receipt of any retiring pension or other allowance."

We presume that these notices are to be used merely *in terrorem*. If they are to be acted on, the first question which would arise would be, by whom these returns could be made. We do not see how the bar individually could be compelled to answer them without an act of parliament for that purpose.

#### PERIOD OF LIMITATION OF ACTIONS.

We understand that one case has recently been before the Court of Exchequer Chamber,<sup>a</sup> and that two others are depending, on the effect of the 42d section of the Act

for the Limitation of Actions relating to Real Property,<sup>b</sup> and the 3d section of the Law Amendment Act,<sup>c</sup> as to a point to which both acts seem to apply, and are apparently inconsistent: other such cases are likely to arise on the coming circuits, and we therefore think it will be acceptable to our readers to see the state of the question.

We will so present the two enactments that our readers may minutely compare the resemblance and differences between them.

By the first mentioned act it is enacted,—

"That no arrears of rent or of interest in respect of any sum of money charged upon or payable out of land, shall be recovered by any distress, action, or suit, but within six years next after the same shall have become due, or next after an acknowledgment of the same in writing shall have been given to the person entitled thereto or his agent, signed by the person by whom the same was payable or his agent."

By the Law Amendment Act it is enacted,—

"That all actions of debt for rent upon an indenture of demise, all actions of covenant or debt upon any bond or other specialty, shall be commenced and sued within the time and limitation herein-after expressed and not after, that is to say, the said actions of debt for rent upon an indenture of demise, or covenant or debt upon any bond or other specialty, within ten years after the end of this present session, or within twenty years after the cause of such action or actions, but not after."

Now, it is quite clear, that arrears of rent are, where the demise is by indenture, recoverable by action of debt for the rent upon the indenture; and interest of money charged upon land, where there is a covenant to pay it, is recoverable either by action of covenant or debt on the covenant or specialty: and therefore, so far, the two enactments relate to the same causes of action or subject-matters: but the two enactments differ; for the one, speaking more directly of the subject-matter, says, it shall only be recoverable within six years; whilst the other, speaking of the mode of recovery, says, that it shall be put in force only within twenty years. Which of the two, then, is the operative limitation? Mr. Theobald,<sup>d</sup>

<sup>b</sup> 3 & 4 W. 4, c. 27, passed 24th July, 1833.

<sup>c</sup> 3 & 4 W. 4, c. 42, passed 14th Aug. 1833.

<sup>d</sup> Theobald's Edition of the Law Amendment Act, p. 7, n. c. We believe this is the only edition of the act in which the above very important question was anticipated.

<sup>a</sup> This case went off on another point.

in treating of this very question, says, "For the want apparently of concert between the persons intrusted with drawing the new acts founded on the reports of the different commissioners, they are marred with many inconsistencies and slight variances. The Act for the Limitation of Actions relating to Real Property (3 & 4 W. 4, c. 27) which received the royal assent on the 24th July, this year (1833), enacts (s. 42)," &c. (See the enactment stated above.) "Now this provision includes some of the subjects of the above section. (See the enactment above.) It includes all actions for arrears of rent to which the Statute of James was inapplicable, and all actions for arrears of interest upon any indenture of mortgage: yet while the one says all such actions shall be brought within twenty years, the other says, in effect, they shall be brought within six years. What, then, is the effect of these diversities? Until the 31st December, 1833, it is clear, the common law is restrained only by the above provision; till then twenty years is the period of limitation, and I conceive that afterwards six years is the period of limitation. In support of this opinion it may be observed, that though the act which was passed last in terms *affirms* the right to sue within twenty years, yet its essence is a negative of the right at any later period. Had its form corresponded with its essence, it would have said, "no action for rent upon, &c. shall be brought after twenty years from the cause of action;" but its meaning is the same; and therefore it is not contradictory to the provision passed in July,—that no such action shall be brought after six years from the cause of action. As the present act was passed last, the period of limitation would be twenty years, supposing this not to be a correct view of the two enactments."

After thus arguing the question as between these two different *acts* of parliament, Mr. Theobald points out the very same incongruity between two different *sections* of the same act, so far as both relate to the recovery of *rent*; for whilst one, the 42d, given above, makes six years the period of limitation, the 2d section makes it twenty years: upon which Mr. Theobald observes as follows: "Here" (that is, in the 2d section) "two cases are provided for; one the case of a person suc-

ceeding to a claim, the other of a person whose claim is of the first instance; and in both the period of limitation is twenty years: but in the 42d section, which seems so general as to apply to these cases also, is six years. The true point of view is, to see in what relation the two sections stand respectively to the common law: they stand in the same relation; both are restrictive; they are therefore both to be construed as restrictive enactments, and neither of them as enabling enactments; and then the incongruity comes merely to this,—that there are two restrictions of different degrees, one of which includes the other; like those Chinese puzzles, consisting of a number of independent balls, the trick of which is to bring them all into one another." Now we must say, this seems to us a satisfactory mode of arguing the question; and we understand that the Judges in the Exchequer Chamber, in the case already alluded to, strongly leaned to the same conclusion: at first Lord *Abinger* was of a different opinion, but afterwards came to the same opinion. As a test of the principle of interpretation assumed by Mr. Theobald as the basis of his reasoning,—suppose a case the reverse of the one arising on these acts, the case of two acts of parliament, one removing some common law disability from and after a particular period; as, for instance, "from and after the first day of January 1840, no married woman shall by reason of her coverture be incapable of contracting on her own account:" and another enacting, "that from and after the 1st day of June 1836, it shall be lawful for any married woman to bind herself by any promise or obligation, as fully as she might if she were a feme sole." Could it be doubted that the last mentioned enactment would take effect, notwithstanding the other, which may be supposed to be passed at a still later period? and this is precisely analogous to the question of the period of limitation. Our readers, however, will take this with all just distrust of a mere private opinion on so important a question; and we trust they will think we have only done our duty in laying the question before them. These debated points, argued with ingenuity, afford to the young lawyer the most appropriate amusement, and one not barren of instruction.

\* The Law Amendment Act is meant. Ed.

## POWER OF BANKRUPTCY COMMISSIONERS TO COMMIT FOR CONTEMPT.

## COURT OF EXCHEQUER.

Sir *William Follett* moved for a rule to shew cause why the estreat of a fine of 10*l.* imposed by Mr. Fane, one of the Commissioners of Bankrupt, on Mr. George Faulkner, should not be set aside; the question being, whether a Commissioner of Bankrupt, sitting in Basinghall Street, had power to fine and imprison. The question arose in the *matter of Kensington*, against whom a fiat had been sued out by Messrs. Adlington, Gregory, and Faulkner, as the agents of a Mr. Owens. An offer was made by a Mr. Jones, a client of Mr. Owens, to purchase the bankrupt's property "for 500*l.* down, on having an assignment duly made over to him," and the learned counsel proceeded to read the correspondence which had passed, shewing that this offer was made and accepted upon the understanding, on both sides, that the expenses of the assignment were to be paid out of the estate, and that Mr. Faulkner (who had not been consulted about the sale) was instructed by the assignee to prepare such conveyance accordingly. On the matter subsequently coming before Mr. Commissioner Fane, he considered that, whatever was the understanding, Mr. Jones's letter must be considered as the contract, and that by that letter the assignee was not legally bound to bear the expenses of the contract, and he thereupon summoned Mr. Faulkner before him to reprimand him for what he (the Commissioner) termed a neglect and breach of duty, in not informing the assignee that he was only bound by the words of the letter, without reference to the understanding of the parties, and that he ought to have insisted on the purchaser's paying for the conveyance. An audit meeting took place on the 8th of January, which was attended by a clerk of Messrs. Adlington and Co., Mr. Faulkner not being able to be there in person. Mr. Fane then took an opportunity of commenting in strong terms on the conduct of Mr. Faulkner in the presence of the creditors, and desired his clerk to tell him that he (Mr. Fane) considered it highly improper and unjust that the estate should be saddled with these charges. On receiving this message, Mr. Faulkner wrote a letter to the Commissioner, which constituted the alleged contempt, and which was delivered on that evening to a porter in Basinghall Street. The following is a copy of the letter, which the learned counsel read:

*Re Kensington.*

Sir,—I have received a message by my clerk, that you consider it highly improper and unjust that the estate should be saddled with these charges. Without entering upon the question how far it was consistent with the station you fill to send such a message by that gentleman, I beg to repeat my own opinion, that it would be dishonest to attempt to cast them on Mr. Jones; and that I am fully prepared to meet your charge when and where

you may think proper. In the mean time it appears to me that the expression of opinion on either side is not likely to benefit the estate to which you assume the character of protector. It would be satisfactory to me, if I could pay over the money.

I am, Sir, &c.

For partners and self,

G. F.

Mr. Faulkner heard no more of the matter until the 18th of the same month, when he was again summoned to attend before the Commissioner on the 23d; and upon asking at whose instance and for what purpose he was so summoned, the Commissioner refused to answer until Mr. Faulkner was sworn. On his being sworn, Mr. Fane, without asking any questions touching the bankrupt's estate and effects, put the letter of the 8th of January into his hands, desiring to know whether it was his hand-writing. This was of course admitted, and the Commissioner thereupon produced a written judgment, imposing a fine of 10*l.* upon Mr. Faulkner, for his contempt of Court in writing the letter above referred to. Sir *William Follett* read a portion of Mr. Fane's judgment, in which he stated, that he had felt great judicial indignation at what had taken place, and that he had to declare publicly, that the writing and sending the letter in question was a contempt of Court, punishable, at his discretion, with fine or imprisonment, or both; and that finding himself armed with such extensive powers he had delayed his judgment that he might not act without due deliberation, and have an opportunity of consulting his brother Commissioners; and he then felt himself bound to pronounce Mr. Faulkner guilty of a contempt of Court in writing the letter referred to, and he fined him 10*l.* accordingly. Sir *William Follett* then proceeded to notice the various clauses in the act establishing the Court of Bankruptcy, and stated that he understood Mr. Fane and the other Commissioners rested the power which they claimed in this respect upon the 1st section of the act 1 & 2 W. 4, c. 56, which he read to the Court.

Rule *nisi* granted.—1st May, 1835.

On a subsequent day the *Attorney General* shewed cause, stating that Mr. Faulkner was professionally concerned, as agent for a country attorney, in the sale of the estate of the bankrupt to a person named Jones; and a question arose upon whom the expense of the conveyance was to fall. Mr. Faulkner made out a bill charging the estate; but Mr. Fane thought that the purchaser should pay the costs, as was usual in such cases. On the 6th of January, Mr. Faulkner being much offended by some remarks made by Mr. Fane in the discharge of his duty, wrote to him a letter, which he did not notice, and on the 8th he wrote another letter, which he had copied by a clerk into the letter-book, and signed in the names of the firm of which he was a partner, which letter contained these expressions:—"I am fully prepared to meet the charge which you have brought against me, when and where you may

think proper; in the mean time, any expression of opinion by either side is not likely to benefit the estate.”—Mr. Fane did not reply to this letter, but on the 23d, Mr. Faulkner having been summoned to give evidence on the estate and effects of the bankrupt, he asked him if he was the writer of the letter. Mr. Faulkner having admitted that he was, he fined him 10*l.*; and the question now was, whether Mr. Fane, sitting as an individual Commissioner, had power to impose a fine?—for if he had the power this Court would not inquire whether the fine was excessive, or properly imposed. Now, there can be no doubt, that a Judge of a Court of Record can impose a fine and commit for contempt, for that power is incidental to a Court of Record. A Court Leet, at Manchester, had lately imposed a fine of 300*l.* on a person for refusing to take upon himself the office of constable, and it was removed by *certiorari* into the Court of King’s Bench. There was no doubt that any Court of Record could impose a fine for contempt, and this Court could not inquire into the nature of the contempt. The cases on this subject were collected in Viner’s Abridgment; and one of these was, where an officer served a man with an order of the Master of the Rolls: the man, on being served, said, “The Master of the Rolls may ———,” and for so saying, the Master of the Rolls granted an attachment against him “for too much familiarity,” and said that the Lord Keeper would commit him for such conduct. The question now was, whether the Commissioners of the Bankruptcy Court were empowered by 1 & 2 W. 4, c. 56, to commit for contempt? for he admitted that before the act the Commissioners had no such power.

Mr. Baron Parke.—Any contempt offered to them was considered as being offered to the Great Seal, and was punishable before the Lord Chancellor.

The Attorney General.—Precisely so; they could not fight *proprio Marte*, but now, by the act constituting the Bankruptcy Court, they are made Judges of a Court of Record, and as incidental thereto he submitted that they had power to commit for contempt. The 1st section of that act enacted, that it should be lawful for his Majesty to erect and establish a Court of Judicature, which shall be called “The Court of Bankruptcy,” and to appoint “one person, being a serjeant, or barrister at law, of not less than ten years’ standing, to be the Chief Judge of the said Court, and three persons, being serjeants or barristers at law of not less than ten years’ standing at the bar, &c. to be other Judges of the said Court, and six persons, being barristers at law of not less than seven years’ standing at the bar, to be called Commissioners of the said Court, &c.; and the same Court shall be and constitute a Court of Law and Equity, and shall, together with every Judge and Commissioner thereof, use and exercise all the rights, incidents, and privileges of a Court of Record or Judge of a Court of Record, and all other rights, incidents, and privileges, as fully to all intents and

purposes as the same are used, exercised, and enjoyed by any one of his Majesty’s Courts of Law or Judges of his Majesty’s Courts of Law at Westminster.” By this section not only the Court of Review and Court of Commissioners were Courts of Record, but any one individual of the Judges appointed under the act, was a Judge of a Court of Record whilst sitting in the discharge of functions imposed by the act, and could commit for contempt in the same manner as a Judge at Chambers, or a Judge at *Nisi Prius*, could commit for contempt. Mr. Justice Best imposed three different fines on one person at the same trial at *Nisi Prius*, at Guildhall, for contempt; and the Court of King’s Bench recognised his power to do so in *Rex v. Davison*, 4 B. & A. 329. The Court of Review and the Commissioners form all together the Court of Bankruptcy, but they all never sit together, consequently, unless the Subdivision Courts have power to fine for contempt, the Court of Bankruptcy have not the power at all, for all the Judges never meet together; and if any branch of that Court possessed that power, every individual Commissioner sitting under the provisions of the act, possessed the same power. If the Court of Review had such authority, each of the Subdivision Courts formed under section 6, and each Commissioner sitting separately, had it also.

Lord Abinger observed, that the act of parliament spoke of “The Court of Bankruptcy,” but on reading the act through, he could not understand when such Court was established, or what were its functions. He presumed that there was the Court of Review, the Subdivision Court, and the single Commissioner; but where did the Court of Bankruptcy exist—it seemed to have a name without a local habitation.

Mr. Baron Parke thought that the first section merely gave the protection of Judges of a Court of Record to Judges appointed under this act; that is, not to be liable to actions for any thing done by them in discharge of their duties.

Mr. Richards followed on the same side with the Attorney General, and contended that a single Commissioner had the same power to commit for contempt that the Court of Review had.

Lord Abinger.—If a Commissioner has such power, does he carry it about with him wherever he goes? Can it be contended, that if a person writes an impertinent letter to a Judge, he can punish the writer for contempt? Could the writing of such a letter be considered as an obstruction to the proceedings of the Court?

Mr. Richards was not called upon to answer that question. It was sufficient for his purpose to say that the party had acknowledged himself to be the writer of the letter before the Commissioner whilst sitting judicially.

Sir William Follett, in support of the rule, contended that Mr. Faulkner had been guilty of no contempt. The letter in question contained no expression that could be construed

into a contempt; and even if it did, that letter was written and left with the porter at Basinghall Street on the evening of the 8th of January, when Mr. Fane was not sitting in the character of a Commissioner; therefore it could not be considered an obstruction of the proceedings of the Court; and a Judge has no more power than any other individual to punish a person for sending a private letter to him. But, independently of it being no contempt, he contended that a Commissioner had no power, under any circumstances, to commit or fine for contempt; and that the late act, instead of enlarging, had abridged the power of the Commissioners in that respect. Now it was admitted, that before the passing of the act, Commissioners of Bankrupts had no power to commit for contempt: and sect. 7 enacts, that it shall be lawful for one or more of the six Commissioners to perform and execute all the powers, duties, and authorities, by any act of parliament now in force, vested in Commissioners of Bankrupts, &c.: provided always, that no single Commissioner shall have power to commit any bankrupt, or other person examined before him, otherwise than to the care and custody of a messenger or other officer of the said Court, to be by him brought before a Subdivision Court, or the Court of Review, within three days after such commitment. Now the Commissioners, before the passing of that act, had power to commit any person who was under examination before them, for refusing to answer; yet a single Commissioner cannot do so; so that the power of the Commissioners is contracted, instead of being enlarged. It was evidently not the intention of the legislature to confer such large powers on the Commissioners.

Mr. *Wightman* and Mr. *Cowling* followed on the same side.

Lord *Abinger* observed, that if he had entertained any doubt on the subject, he would have taken time to consider his judgment, out of respect to the gentleman concerned, who had evidently acted on an erroneous construction of the act. He doubted for some time, the act being so complicated, whether a single Commissioner had such power; but on examination, he felt satisfied that Mr. Fane had exercised a power which the act did not give him. The first section of the act constituted the Bankruptcy Court a Court of Record, and the Judges thereof Judges of a Court of Record; and it was contended, therefore, that any such Judge, whilst exercising the functions imposed by the act, had all the powers of a Court of Record; but that was by inference only, and he did not think that such important powers should be conferred inferentially. In his opinion, the first section meant merely to extend to the Judges of that Court the protection of Judges of a Court of Record, that is, not to be subject to actions for any thing done by them judicially; and that it did not mean to confer on each Judge all the powers of a Court of Record; for the powers of these Judges were defined in subsequent sections. The first section stands by itself;

and if it has any meaning at all, it is to extend to the Judges the protection above alluded to. A Judge of the Court of King's Bench may in his judicial character grant a warrant, and he is protected from an action for so doing; yet he could not fine or commit to prison any person for contempt offered to him whilst signing such warrant. There was no instance of such a thing being done without the interference of the Court. Again, Judges sitting at chambers are Judges of a Court of Record; yet as the sittings in chambers are not a Court of Record, their orders cannot be enforced until they are made a rule of the Court; which shews that a Judge of a Court of Record has not, as such, merely, power to commit for contempt. So a Commissioner, while sitting as such, has no such power. A Judge at *nisi prius* is different; for a *nisi prius* Court is a Court of Record. It appeared to him, that the object of the act was to form a Court of Review and a Court of Commissioners; and that all together should have the same power and authority which the Commissioners and the Court of Chancery had before: and sect. 7 confers on a single Commissioner the same power which the Commissioners had previously; but the Commissioners had not power to commit for contempt; their remedy was by attachment before the Lord Chancellor; and the Court of Review exercises now all the powers which the Lord Chancellor had previously exercised. His Lordship did not see why a Commissioner could not complain of contempt to the Court of Review. It was evident, from sect. 7, that a single Commissioner could not commit for contempt a person under examination before him, as these Commissioners could do before; therefore the power of the Commissioners was abridged by this act. Finding nothing in this act to confer a power to commit in the Commissioner, it would be a violent construction of it to decide that a single Commissioner had such power; and that made it unnecessary to consider whether the conduct of Mr. Faulkner was such a contempt as would justify a Court of Record to commit him.

Mr. Baron *Bolland* concurred in the opinion of the Lord Chief Baron.

Mr. Baron *Alderson* agreed with the Attorney General, that if Mr. Fane had power to commit for contempt, the contempt was not examinable in this Court. Then if such a large power was conferred on an irresponsible person, it ought to appear clearly that the legislature intended to confer it. In his opinion, the act, by constituting the Judges of the Court of Bankruptcy Judges of a Court of Record, meant only that they should not be answerable for acts done in their judicial capacity; and that was more consistent with other provisions of the act, than the construction contended for by the Attorney General.

Rule absolute to restore the 10*l.* to Mr. Faulkner. 13th June, 1835.

## NEW BILLS IN PARLIAMENT.

## IRISH CHURCH REVENUES.

This is intitled "A Bill for the better Regulation of Ecclesiastical Revenues, and the Promotion of Religious and Moral Instruction in Ireland."

The preamble recites, that with a view of rendering the incomes arising from tithes more certain in amount, and more easy of collection, several acts have been from time to time passed for the establishment of compositions for tithes throughout Ireland; but the interposition of Parliament is further necessary, in reference to various circumstances peculiar to that part of the united kingdom.

That his Majesty had been pleased to issue a commission, bearing date the 5th of August, in the 5th year of his Majesty's reign, authorising and directing the persons therein named to inquire whether adequate provision is now made for the religious instruction, and for the general education of the people of Ireland.

That it appears by the first Report of the Commissioners named in such commission, that in some parishes there are no members of the Established Church, and in other parishes few such members.

That it is just and necessary for the establishment of peace and good order in Ireland, and conducive to religion and morality, that, after adequate provision made for the spiritual wants of the members of the established church, the surplus income of such parishes shall be applied to the moral and religious education of the people, without distinction of religious persuasion; and also that the said composition for tithes shall be made payable by persons having a perpetual estate or interest in the lands subject thereto, a reasonable deduction being made upon the amount thereof, in consideration of the greater facility and security of collection arising out of such transfer of the liability to the payment thereof, from the occupying tenantry to the owners of such estates and interests.

The following is the substance of the proposed enactments, with some of the more important clauses stated fully.

1. Compositions for tithes abolished, except arrears due by or to undertaking landlords, and except arrears due by persons having perpetual estates or interests in the land for the year 1834, with a saving for pending suits.

2. All lands subject to the payment of tithe compositions, charged with an annual sum by way of rent charge, equal to seven tenths of such compositions, to be payable by the party having the first estate of inheritance, &c. in such lands.

3. That any estate or interest, held under any deed or instrument containing any provision, contract, or covenant for the perpetual renewal thereof, and any estate or interest held for any term of years whereof at least 100 shall be to come and unexpired on the 30th day of November, 1835; and any estate

held by lease or demise immediately from and under any archbishop, bishop, or other ecclesiastical person, in any lands belonging to the see or other spiritual promotion or dignity of such archbishop, bishop, or other ecclesiastical person, or under the Ecclesiastical Commissioners for Ireland, being parcel of the lands vested, or which may become vested in them under the provisions of 3 & 4 W. 4, intituled, "An act to alter and amend the Laws relating to the Temporalities of the Church in Ireland," shall be deemed and taken to be, for all purposes relating to the said rent-charges, equivalent to a perpetual estate or interest; and that each tenant in dower or tenant by curtesy, and each person having under the limitations of any settlement, by deed, will, act of parliament, or otherwise, any estate for life, or other particular estate thereby created or limited out of or in any estate of inheritance, or out of or in any such equivalent estate, as hereby defined, shall be, during such his interest, liable to the payment of such rent-charge, as fully to all intents and purposes as if he were seised of or intitled to the whole estate in such inheritance or perpetual interest.

4. If leases under the law now in force be free of tithes, the estate held thereunder shall not be liable to rent-charge. On determination of any estate chargeable with rent-charge, the next estate shall become chargeable.

5. If any person who would have been liable to tithe composition, hold mediately or immediately under the person liable to such rent-charge, the amount of such rent-charge may be recovered as rent from the next tenant, and so downwards to the person primarily liable.

6. Such leases, &c. of tithes as have now the effect of suspending compositions, shall determine, and none other.

7. Rent-charges to be under the management of Commissioners of Land Revenues.

8. Commissioners of Land Revenues, with consent of Treasury, may make regulations for collection, &c. of rent-charges.

9. Compositions for tithes may be revised, on application to the Commissioners of Land Revenues.

10. Grounds on which application for revision may be founded shall be submitted to the Commissioners of Land Revenues for their consideration; and if found sufficient, such revision shall be allowed.

11. Barristers to be appointed for the purpose of such revision.

12. That the barristers so authorised to proceed with the revision of such compositions, shall give public notice of the several times and places at which, pursuant to such order and direction, they will hold courts for such purpose, as well by advertisements, to be inserted at least ten days previous to each such time, in some newspaper circulating within the respective parish or parishes in which each such composition may have been established, as by notices to be posted on the several places for posting notices of applications for grand jury presentments at special sessions for the division or district in which each such parish

may be situate; and at the time and places so notified such barrister shall in open court proceed to revise each such composition, and shall in the first place inquire into and ascertain the manner in which each such composition may have been calculated, and require the party who may have applied for such revision to specify his or their objections thereto, and to produce evidence in support thereof; and such barristers, having heard all such evidence and objections, and all such other evidence and objections as shall be offered or made by or in behalf of any party entitled, or who may have been entitled to such composition, or by or in behalf of any owner or occupier of land subject to such composition, shall correct any error or injustice which shall appear to them to have occurred in the calculation of such composition, and make such order for confirming, increasing, or decreasing the amount of each such composition as they shall think just and equitable: Provided always, that if it shall appear to such barrister that the annual amount of the sums paid or recovered on account of tithes in any such parish, shall not have varied above one-fifth part of the average annual amount of the whole during the series of seven years, with reference whereto such composition may have been calculated, then and in such case the amount of such composition shall be fixed according to the average annual amount of the sums so paid and recovered during such seven years, unless it shall be shewn that such payments were made with an admission that the tithes were of greater value, or that more was due: And provided further, that where any sum shall have been included in computing the amount of any such composition on the evidence of any promissory note or other instrument or agreement, or of any adjudication made by any ecclesiastical or other court or justices, in default of the appearance of the party against whom such adjudication may have been made, the said barristers shall inquire into the real value of the tithes, in respect whereof such promissory note, instrument, or agreement or adjudication may have been made, in all cases where evidence of such value may be produced, and correct accordingly the amount of such composition: and provided further, that when any sums shall have been added to the average amount of the tithe paid, or agreed or adjudged to be paid during any such series of years as aforesaid, the said barristers shall examine into the sufficiency of the grounds and reasons upon which such addition has been made, as set forth in the statement subjoined to the certificate of such composition, and shall allow or disallow the same, and deduct or reduce or increase the sum so added, as to them shall seem just: and provided further that where the tithes of any land, not having been actually paid or adjudged to be paid during the series of years with reference whereto any composition may have been calculated, the tithes of such land may have been estimated or calculated according to the payments made for tithes of the like kind in the same or any adjoining parish, or according to such in-

formation as may have been obtained, the said barristers shall inquire into the facts and the accuracy of such information, and the fairness of any such estimate, and amend or confirm the calculation of such composition accordingly: And provided further, that where the amount of any composition shall have been fixed by agreement, such amount not having been ascertained by any commissioner or commissioners, or umpire, under the provisions of the said recited acts, and that it shall appear that either of the parties thereto entered into such agreement in ignorance of any facts, the knowledge whereof was material to making an equitable arrangement between them, or under any concealment or misrepresentation of such facts, and that such agreement was unjust, the said barristers shall inquire into and ascertain and fix the just amount of composition which ought to be established in lieu of the sum so fixed by agreement: And provided further, that where in the calculation of any such composition, it shall appear to the said barristers that any sum has been included on account of the tithes of any land which they shall deem to have been tithe-free, the said barristers shall exclude such sums in calculating the amount of such composition; and if such barristers shall entertain any doubt or difficulty in determining the exemption of any such land from tithe, it shall be lawful for the Courts of Chancery and Exchequer in Ireland, upon the petition of the said barristers, showing the facts of the case, (which the said barristers are hereby required to ascertain and state according to the best information they can procure) either to make an order allowing or disallowing such claim of exemption or referring the matter to any master, or to the chief remembrancer, with liberty for the parties interested in the determination of such matter to attend him, and with such other directions as the Court shall deem proper, or to direct such feigned issue or other proceeding as the Court in its discretion may deem proper for ascertaining the exemption or non-exemption of such lands; and in case of any such application to either of the said Courts, the said barristers shall proceed with the revision of such composition, and fix the amount thereof, without reference to such claim of exemption, provided, that if the matter be determined in favor of the party claiming such exemption, such Court shall direct the said Commissioners of Land Revenues to reduce the amount of rent-charge payable in lieu of such composition, to amend the rental of such rent-charges accordingly; and the costs of such petition and reference, or other proceedings, shall be in the discretion of such Court, and payment thereof enforced against any of the parties interested in such matter who may appear to litigate the same, by attachment or otherwise, as such Court may direct.

13. Composition may be reduced or increased by agreement between the land-owners and tithe-owner.

14. Barristers revising compositions, shall make order for payment of the expenses by such party as they think fit, subject to certain rules.

15. Barristers shall transmit their award to the Lord Lieutenant, to be laid before the Commissioners of Land Revenues, who shall amend rentals of rent-charges and applotments accordingly.

16. Lord Lieutenants may order advances from the consolidated fund to defray the expenses incurred in revision of composition.

17. Barristers may compel attendance of witnesses.

18. Barristers may allow expenses to witnesses not interested in the matter.

19. Witnesses and barristers how to be paid; and expenses of revision how to be repaid.

20. Appeals now before Privy Council may be referred to barristers under this act.

21. Proceedings where the liability of lands to rent-charge shall be disputed.

22. What prescriptions to be valid in law, in case of claims of exemption from tithes.

23. To what cases this act shall extend.

24. Time during which lands shall be held by persons entitled to the tithes thereof to be excluded in the computation, as also the time during which any person capable of resisting any claim shall be an infant, &c.

25. That in all actions and suits to be commenced after the passing of this act, it shall be sufficient to allege that the exemption or discharge claimed was actually exercised and enjoyed for such of the periods mentioned in this act as may be applicable to the case; and any proviso, exception, incapacity, disability, contract, agreement, deed, or writing herein mentioned, or any other matter of fact or law, not inconsistent with the simple fact of the exercise and enjoyment of the matter claimed, shall be specially alleged and set forth, and shall not be received in evidence, or any general traverse or denial of the matter claimed.

26. No presumption allowed in support of any claim for any less period than herein mentioned.

27. When tithe-free lands have been subjected to composition, such composition shall be reduced.

28. Persons entitled to compositions for tithes shall deliver up to the Commissioners of Land Revenues the attested copies of certificates and applotment books.

29. Penalty on any person neglecting to deliver such documents to Commissioners within a month from passing of act.

30. The Commissioners of Land Revenues may amend applotments.

31. Distinct rentals, showing the rent-charges payable out of the lands in each parish shall be framed; and a certificate of the gross amount, and of the proportions in which such amount may be distributable among the several persons entitled to compositions for tithes out of each parish, delivered to the Ecclesiastical Commissioners for Ireland.

32. The rental shall be enrolled in the office where the King's rentals are preserved.

33. Receivers shall give receipts and also enter receipts in a book to be lodged in the Record Office.

34. Rent-charges how to be recovered.

35. Where rent-charge in arrear, and the person liable thereto shall not be in the occupation of the lands charged therewith, or where such person may not be known, a Court of Equity may order the rents of such lands to be received in liquidation of such rent-charge, &c.

36. Receivers may distrain in cases where the person liable to the payment of the rent-charge is in occupation of the land.

37. Persons liable to rent-charges and not paying same, liable to interest on the amount.

38. Commissioners of Land Revenues may apportion rent-charges.

39. Tithe compositions shall be increased or diminished according to the price of corn during the last seven years, as compared with the price stated in the certificates thereof, and the amount of the rent-charges calculated accordingly; and a like variation, according to the price of corn, shall take place every year in the amount of the rent-charges.

40. On the 1st of December in this present year, and on 1st November in every succeeding year, Ecclesiastical Commissioners to take an account of the gross amount of the rent-charges accrued due out of each parish, and issue warrants on the Commissioners of Land Revenues for the amount, subject to a deduction of sixpence in the pound.

41. Rents and sums due by owners of tithes shall be deducted.

42. Present incumbents to receive further payment of 5l. per cent. from the perpetuity purchase fund.

43. Corporations aggregate, incumbents without cure of souls, and lessees of tithes, excluded from the benefit of this additional payment.

44. Ecclesiastical Commissioners shall invest the monies arising in the perpetuity fund account in Exchequer bills.

45. In cases of doubt as to the rights of the parties entitled to payment, the Ecclesiastical Commissioners shall apply by petition to the Court of Chancery or Exchequer for its direction.

46. Certificates of compositions shall be only *prima facie* evidence of the rights of the persons entitled thereto as between themselves.

47. If warrants defaced, new warrants may be given instead, and the former warrants cancelled.

48. If warrants lost, others may be issued for the same amount, an indemnity being given by the person receiving such other warrant.

49. A time to be appointed for paying off warrants.

50. All sums payable under 3 & 4 W. 4, c. 100, s. 19, remitted and refunded.

51. The residue of the money applicable to the relief of the owners of tithes under the said act, shall be paid to the Ecclesiastical Commissioners, and applied—together with the sums arising to credit of the account hereinafter mentioned—in payment of the arrears of compositions due for 1834.

52. Persons who may not have received payment of their compositions for 1834, shall ap-



ply for relief by memorial, such relief not to extend to compositions payable by undertaking landlords.

53. Upon application for relief under this act, proclamation to be issued, enjoining payment of arrears due by such persons as would be liable to pay rent under this act, subject to a deduction of 15*l.* per cent. Proceedings in case of default. Collectors of excise shall give a receipt to parties making payment, which shall be a sufficient acquittance.

54. In default of obedience to proclamation, an application by petition of Attorney General to be made to the Court of Chancery or Exchequer, or Assistant Barrister, for an order against defaulters, for the whole sum due, without any deduction. Court of Chancery or Exchequer, or Barrister, to examine into the matter of the petition.

55. Petition not to abate by death of parties. Notices of any proceeding to be taken on such petition, shall be given to the party fourteen days previously.

56. Monies paid or recovered under this act, to be paid over to Ecclesiastical Commissioners.

57. Costs to respondents unjustly sued.

58. Upon the next vacancy of the church of any parish in which there are not more than fifty members of the established church, such church may be sequestered.

59. If such parish contain no such members of the established church, the occasional duty shall be committed to a neighbouring minister.

60. If there be any members of the established church, the cure of souls may either be committed to the care of a neighbouring minister, or a separate curate appointed.

61. But wherever there is now a church or chapel and a resident minister in any parish falling under the foregoing provisions, a separate curate shall be appointed, how small soever the numbers of the members of the established church.

62. The stipends to neighbouring ministers charged with the occasional duties, fixed.

63. The stipends to separate curates fixed.

64. Places of worship to be provided in parishes coming under the operation of this act.

65. Bishop of diocese to be associated with the Commissioners in providing for the spiritual wants of parishes coming under the operation of this act.

66. Glebe house may be let, unless curate desire to occupy the same; also glebe lands.

67. Commissioners to pay off charges of suppressed benefices.

68. Commissioners may recover sums to successors in benefices; and also for dilapidations.

69. If sequestration of the church shall be removed, the incumbent succeeding liable to charges, or a fair proportion thereof.

70. In case of parishes forming part of unions, the Ecclesiastical Commissioners may, if they think fit, separate such parishes from the union, and deal therewith as single parishes.

71. If the union shall be maintained, the income of the next incumbent shall be subject to such reduction as the lord lieutenant shall direct, with regard to extent of duty in the parishes of such union, and not containing more than fifty members of the established church.

72. Where parishes are united to other parishes, not contiguous, they shall be dis-united on the next avoidance.

73. Charges on unions provided for.

74. Glebe house or church in disunited parish may nevertheless be used for purposes of union.

75. No episcopal union to be made without notice to the Ecclesiastical Commissioners.

76. The income of parishes which might have fallen under the 116*th* sect. of 3 & 4 W. 4, c. 37, shall, if falling under provisions of this act, be carried to the reserve fund.

77. For reduction of benefices whereof the revenues shall be disproportioned to the ecclesiastical duty: 3 & 4 W. 4, c. 37. No benefice to be reduced below 300*l.* per annum.

78. Parishes falling under operation of this act, not to be filled without notice.

79. The Ecclesiastical Commissioners shall compensate the owners of advowsons coming under the operation of this act, unless such advowsons belong to the King or Ecclesiastical Corporations. If owners dissatisfied, they may apply to the Court of Chancery. Trinity College to be compensated by having a benefice in the King's gift, in lieu of that sequestered or reduced in value.

80. Application of money, where owners under disability.

81. If sequestration be removed, the advowson to vest in his Majesty.

82. The Ecclesiastical Commissioners shall keep a separate account, to be called "The Reserve Fund Account." Monies in such account, how to be applied.

83. Ecclesiastical Commissioners may borrow money on credit of the reserve fund, for the purpose of indemnifying the owners of advowsons.

84. For the removal of the sequestration or resumption of income, in parishes where the spiritual wants thereof shall increase.

85. Ecclesiastical Commissioners shall make an annual report to the Lord Lieutenant.

86. Property of minor canons and vicars choral, vested in the Ecclesiastical Commissioners, subject to existing interests, and for the maintenance of such members of such corporations as have duties to perform.

87. Sect. 1 of 4 & 5 W. 4, c. 90, amended.

88. Tithes, &c. appropriated from dignities, &c. may be carried to general fund under administration of Ecclesiastical Commissioners.

89. Tenants of bishops, &c. may, instead of paying purchase money of perpetuities, give a mortgage at three and a half per cent., payable within ten years.

90. Commissioners of Land Revenues and Ecclesiastical Commissioners may examine on oath, or receive depositions.

91. Ecclesiastical Commissioners may employ additional clerks.

92. Treasury may advance money on credit of the rent-charges granted by this act, not exceeding the annual amount thereof.

93. Tithe composition acts shall be taken to extend to his Majesty.

94. The provisions of this act shall extend to his Majesty.

95. Notices, how to be served.

96. No stamp duty payable.

97. Nor office fees.

98. Provision against forgery.

99. The like against perjury.

100. Limitation of actions.

101. Interpretation of words used in this act.

#### CERTIORARI.

By the 5 W. & M. c. 11, no writ of *certiorari* at the prosecution of the party indicted, can be granted out of the King's Bench, to remove such indictment before trial at the quarter sessions, unless awarded on motion of counsel and by rule of court, the party indicted finding sureties for 20*l.* to appear and plead. According to the practice of the King's Bench, on removal of indictments and presentments from a court of assize by *certiorari*, the party indicted is required to enter into a recognizance for 50*l.* only.

It is by this bill proposed to be enacted, that no writ of *certiorari* shall issue at the instance of any party indicted or presented, for removing any indictment or presentment from the quarter sessions or assize, without a rule of court or Judge's order; and the Court or Judge may direct such recognizance to be taken in any amount which shall appear necessary for the ends of justice.

According to the present practice of the King's Bench, a *prosecutor* may obtain a *certiorari* without any application to the Court or notice to the defendant, who may be taken by surprise and harassed and oppressed: it is therefore to be enacted, that no prosecutor shall be entitled to such *certiorari* without a rule or order of the court or a Judge, who may impose such conditions respecting costs or otherwise as shall seem conducive to the ends of justice.

#### LIMITATION OF REAL ACTIONS.—QUARE IMPEDIT.

Doubts having been entertained whether the several periods limited by the 3 & 4 W. 4, c. 27, for bringing a *quare impedit* or other action or suit to enforce a right to present or bestow any ecclesiastical benefice, as the patron thereof, apply to the case of a bishop claiming a right to collate to or bestow any ecclesiastical benefice in his diocese; it is proposed by this bill to enact as follows:

That at the determination of the period limited for bringing a writ of *quare impedit*, the right and title of the bishop claiming a right to collate to or bestow any ecclesiastical benefice, shall be extinguished; but this enactment is not to affect the right of a bishop to collate by reason of lapse.

And the 3 & 4 W. 4, c. 27, is to be extended by this bill to ecclesiastical benefices in Ireland.

### SELECTIONS FROM CORRESPONDENCE. No. CV.

#### IMPRISONMENT FOR DEBT BILL.

Sir,

Much has been the discussion respecting this most important measure, both in and out of parliament, and many have been the opinions, expressed through the Legal Observer; yet notwithstanding such discussions and opinions, it appears wholly overlooked, as to how the learned Attorney-General intends to *prevent* any person from arresting another for a debt or sum of money which is not nor ever was due. The only provision the learned gentleman appears to have made against it is, that no person shall be arrested for any debt, &c., *except in cases of fraud, or where the debtor is about to abscond.* Is this sufficient? Will this remedy cure the disease? The answer is too obvious to require a moment's pause. The man who is wicked enough to swear that a debt is due to him when such is not the fact, would not hesitate to tack on to the oath that fraud had been committed, or that the alleged debtor was about to abscond, or in fact to make any other oath required to suit his own purpose. What is there, then, in this wonderful production, which has undergone so many revisions, to prevent this? What is the bill for? It appears to me, I must confess, to amount to nothing at all, as regards the principal point the Attorney-General has, over and over again, stated he had in view, namely, to prevent the imprisonment of an innocent man for a false debt, with a view to extort money from him. If this bill should pass, will it have that effect? It appears to me to be quite clear that it will not.

T. B.

#### ON THE RIGHT OF THE ASSIGNEES OF A BANKRUPT TO ACCOUNT.

A case has been recently reported, as to the right a bankrupt has in equity, to call his assignees to account. It was decided by the present Lord Chief Baron, (*Abinger*); and we shall insert a part of the judgment before giving the statement of the case. And first, as to the statutes affecting the point.

"The first statute in bankruptcy, was in the time of Hen. 8. (34 & 35 Hen. 8, c. 4.) That gave to the Lord Chancellor and to the Privy Council power to dispose of bankrupts' estates. There is not a word about assignees, nor is there any defined mode of proceeding to settle what the form should be. It was left very much at the discretion of the members of the Privy Council, to make such orders as they should think fit. Then comes the statute of Eliz. (13 Eliz. c. 7, s. 2.), which gave power

to the Lord Chancellor, if he thought fit, to name commissioners, that is to say, to exercise the authority the Privy Council had before exercised in a general way, by means of commissioners appointed by him, and accountable of course to him or the Privy Council for their transactions; and then comes a clause in the statute, that if the bankrupt's estate should pay and satisfy all the demands against him, the commissioners should account to him, and pay him the surplus. The next statute in point of order is the statute of James, which carries the obligation a step farther; for the bankrupt is entitled to demand of the commissioners an account of his estate, to demand from them payment of the surplus of his estate, and also to proceed against those who withheld the estate, to recover it in his own person,—in his own name,—if the debts should be all paid. That might afford an answer to the argument drawn from the case before Sir *W. Grant*, who decided that, where all the bankrupt's debts were paid, and a portion of his real estate remain unappropriated for that purpose, it was not divested from him; and that therefore, it would not, because the commission of bankruptcy intervened, go to his heir, and disappoint his devisee; *Charman v. Charman*, 14 Ves. 580. Sir *W. Grant* in effect says that, if his debts be all paid, the bankrupt is not absolutely divested, so as to be deprived of all interest whatsoever in his estate; that in truth he, by that very statute, has a right to recover the unappropriated part of his estate. But in the statute of James, (1 Jac. 1, c. 15, ss. 13, 15), which authorizes the commissioners to assign (not to constitute assignees as at present constituted,) for the purpose of disposing of the estate more effectually, it is quite clear that the proceedings must be under the statute to call on the commissioners to account. I will not say whether the proceedings should be by bill in equity or not, because the statute says, that on application to the commissioners, they shall account; and the Lord Chancellor may make an order on them, the commissioners, so to do.

"The subsequent statutes in some degree modify the powers of assignees in bankruptcy, till we come to the time of Geo. 1, when the first statute was made, which was afterwards the foundation of the 5 Geo. 2. The 5 Geo. 2, is the first which exactly defines the duties of assignees, and imposes obligations on them. Among those obligations is to be found this,—that they are to make dividends by order of the commissioners, once, twice, and as often as there may be occasion: they are also to account upon oath to the commissioners for their receipts and expenditure, and shew to them what they have in hand when the commissioners made a dividend, 5 Geo. 2, c. 30, s. 33. The commissioners therefore are the proper persons to ascertain, under any circumstances, the state of the bankrupt's estate; it is their duty on the application of the bankrupt, to call the assignees to account on oath for the administration of the bankrupt's estate. There is therefore no occasion to give the

bankrupt any other remedy. That is the remedy given by statute, and it is not necessary for the furtherance of justice, to entitle him to come to a court of equity. But I will not say that an extreme case may not be put, where a bankrupt might come into a court of equity. I do not wish to lay down any such principle; because the imagination may suggest a case where it would be very hard indeed to deny him a remedy, and where no inconvenience could result; and let me suppose this case:—A man is an officer in the army, and has a real estate, and while serving abroad, some creditors, together with some other persons, enter into a conspiracy to defraud him of his real estate, and they set him up falsely as a trader, and take out a commission of bankruptcy against him, and then obtain the ordinary means of disposing of his real estate. He returns to his own country, having heard nothing of this, and finds these proceedings. That would be a very proper case to apply to a court of equity to set aside the fraud, and compel these persons to give an account of what they have done. I only put this as an imaginary case, because I mean to protect myself from any conclusion that a case might not arise in which a court of equity would have jurisdiction. I do not deny the jurisdiction.

"It would be very satisfactory to me, if I could find any precise case to govern me on the subject. I should think it my duty at all times to treat such a case with the greatest respect, and in this particular instance to adhere to it. I asked if any case could be found, where any bill had been permitted to be filed against assignees by an uncertificated bankrupt, to bring them to an account of his estate; and the bar has candidly answered, that no such case can be found; and I am brought to that conclusion by Lord *Eldon's* judgment in the case of *Santon v. Davis*, 18 Ves. 72. Upon examining that case I find that Lord *Eldon*, who had as much experience as any man who ever sat in a court of equity, himself stated that the bar could furnish no such precedent; and on looking at the matter on principle, I own it appears to me that nothing could be more dangerous, than to set an example of a case that might be acted on as a precedent for such a proceeding."

The following was the case to which his Lordship refused relief. The bill stated that, previous to the year 1802, the plaintiff had been in partnership with Daniel Backhouse and others, and that they purchased plantations in the West Indies, as part of the partnership assets. That the partnership was dissolved in 1802; and that, in March 1808, a deed was executed, whereby Backhouse sold to the plaintiff all his interest in the partnership for the sum of 40,000*l.* to be secured by different bonds. That soon after the execution of this deed, the plaintiff discovered that he had been imposed upon by Backhouse; that the liabilities of the partnership had been greater, and the value of the property less, than had been supposed; and that Backhouse knew of this before he executed the deed. That the plain-

tiff, accordingly, instituted proceedings in Chancery to set aside the deed, and that an issue was directed to try its validity; but that owing to the absence of the plaintiff's leading counsel, and other circumstances, the verdict was found against him, establishing the deed. That in March 1815, the plaintiff being on the point of embarking for Holland, in order to effect some beneficial arrangements for the partnership estate, executed certain conveyances of his real and personal estate, for the benefit of his wife and children; and that in the same month he proceeded to Rotterdam. That immediately after his departure, the executors of Backhouse, who was then dead, being desirous of depriving the plaintiff of the means of unravelling the fraudulent conduct of Backhouse, and preventing the plaintiff from setting aside the deed of March 1808, entered into a conspiracy to ruin the plaintiff, and in order thereto, sued out a commission of bankrupt against him; and that two of the executors caused themselves, together with the defendant Barnes, to be made assignees under the commission, and there was collusion between the plaintiff's eldest son, the defendant, John Collingwood Tarleton, and the assignees, and that by their joint fraudulent contrivances they procured the deeds of 1815 to be set aside; and likewise by means of an order in an alleged bankruptcy, procured the sale of the plaintiff's interest in an estate, called the Collingwood estate, to J. C. Tarleton, at an undervalue, which estate the said J. C. Tarleton afterwards mortgaged to the assignees of Backhouse. That the assignees had received divers large sums of money on account of the plaintiff's estate and effects, much more than sufficient to pay the debts, which, in fact had been paid in full with interest. That the plaintiff had frequently applied to the defendant, J. C. Tarleton, to deliver up possession of the estate so purchased, and to account for the rents and profits; and that he had also applied to the assignees to come to an account, and pay him the surplus; but that the defendants had refused to comply with such requests. The bill contained many general charges of fraud and collusion against the defendants; and amongst other things, it charged that they conspired to prevent the plaintiff from returning to England; the son representing to him that his return would expose him to penalties for nonsurrender under the bankrupt laws; but that if he continued to absent himself, an arrangement might be effected with his creditors. The bill contained an allegation, that all the debts proved under the commission had been fully paid and satisfied by and out of the plaintiff's estate and effects, and the proceeds thereof; and that after payment thereof there remained, and does now remain, or ought to remain, in the hands of the said assignees, a large balance or surplus of the plaintiff's estate and effects. The bill prayed that the said defendants, the assignees, might under the decree of this Court, account for all and singular the real and personal estates and effects of the plaintiff, which have been possessed or received

by them under the commission, or which, but for their wilful neglect or default, might have been received, and of their application thereof; and that they might be charged and made liable to answer for all loss or damage arising from the improper sale and disposition thereof or any part thereof; and might be decreed to pay and transfer to the plaintiff the surplus thereof which might remain, after payment and satisfaction of all the debts proved under the said commission, and all interest payable thereon respectively, and the expenses of the commission; and that the aforesaid sale to the said J. C. Tarleton might be declared fraudulent and void as against the plaintiff; and that the last named defendant might account for the rents, profits, and produce of the Collingwood estate; and that all necessary directions might be given for effectuating the several purposes aforesaid, and for general relief. To this bill, which was filed against the assignees and J. C. Tarleton, and no other party, James Barnes, one of the assignees, put in a general demurrer for want of equity.

Demurrer allowed. *Tarleton v. Hornby*, 1 Yo. & Coll. 172.

## SUPERIOR COURTS.

### Lords Commissioners' Court.

#### BOND.—ATTORNEY AND CLIENT.—COSTS.

*A client, at the instance of his solicitor, executed a bond to a third person, to secure the payment of a sum alleged by the solicitor to be due to him for costs for which he had not delivered a bill of costs at that time, nor were the costs ever taxed. To a bill by the client's representatives, charging fraud in respect to the costs due, the obligee in the bond and the solicitor put in a general demurrer: Held, that the parties are bound to answer the charges of misrepresentation by the solicitor, and knowledge thereof by the obligee. Demurrer overruled.*

This bill was filed by the plaintiffs, as administrators of a Mr. Cresswell, and it prayed that a bond for 3000*l.* executed by him in 1821, at the instance of his attorney, Mr. Bevir, to the defendant, Mr. Wiltshire, might be delivered up to be cancelled, and an account taken of what was really due from Cresswell to Bevir, and that Wiltshire might be restrained from proceeding with an action at law for the recovery of the amount of this bond. From the statements in the bill and the affidavits it appeared, that Bevir was the attorney of Cresswell, and that Cresswell was an old man of very weak, if not unsound mind, at the time he entered into the obligation, and he had actually been pronounced of unsound mind by the verdict of a jury in 1823. Mr. Bevir, as his confidential solicitor, had a claim for costs to the amount of something less than 1000*l.*; but the bill alleged and charged, among other things, that Mr. Bevir, concealing the real amount of

the costs, which had never been taxed, persuaded Mr. Cresswell that a larger sum was due to him, and by such means prevailed on him to give the bond for 3000*l.* to Mr. Wiltshire, stating that he (Bevir) owed Wiltshire that sum, and that he was pressed for payment; that Cresswell had no dealings of any kind with Wiltshire; that therefore the bond had been obtained by fraud and misrepresentation on the part of Bevir, and that it must be delivered up by Wiltshire, without reference to any claim which he might be able to establish against Bevir.

The defendants put in a demurrer to the bill, for want of equity. The Master of the Rolls, before whom the matter was argued in November last, allowed the demurrer, and the plaintiffs appealed against the decision, first to the late Lord Chancellor, who resigned the Great Seal before the arguments were brought to a close; and now to the Lords Commissioners, before whom the matter was argued by Mr. Tinney and Mr. Munro, for the plaintiffs, in support of the appeal; and *contrò*, by Sir William Horne and Mr. Wilbraham.

Sir Launcelot Shadwell.—It does not appear to us necessary to postpone this case for consideration. We are clearly of opinion that the order of the Court below ought to be reversed. The bill in one part of it alleges that it was doubtful whether any thing was due from Mr. Cresswell to Bevir, but in another part it admitted that some sum under 1000*l.* might be due to him. Mr. Wiltshire contended, by his counsel, that 3000*l.* was due to him from Mr. Bevir, and that he (Bevir) alleged the same sum was due to himself from Mr. Cresswell. The bill charges that that representation made by Bevir as to the amount due to him at the time of the bond, was false, and no bill of costs had been given in by him at that time. Whether the sum of 3000*l.* was or not due to Bevir, he and Mr. Cresswell might have arranged among themselves to execute a bond for that sum; but as the bill charges that 3000*l.* was not due, and there is no evidence that it was, this Court will not allow a bond to secure costs to an attorney to stand, if the costs were not actually due at the time of its execution. There is a charge that Bevir, by false representations as to the amount of the costs due to him, prevailed on Mr. Cresswell to execute the bond, for which no consideration was given. The plaintiffs are the administrators with the will annexed of Mr. Cresswell, and they call on Bevir to account with them, and to state the costs alleged by him to be due, and they say he has refused to account, and to justify his refusal alleges that the sum secured by the bond was due to him from Cresswell, and due by him (Bevir) to Wiltshire,—all which the plaintiffs charge to be false. There is no question made in this case as to the lapse of time since the death of Mr. Cresswell, for it is evident that it happened by ignorance of the plaintiffs that the transaction was for a *bona fide* consideration, until after paying some sums for interest they came to suspect the nature of it. The bill charges that Mr. Wilt-

shire knew that Bevir was the solicitor of Mr. Cresswell, and might have known that so large a sum was not due to him as that for which the bond was given; and that Bevir was the only solicitor who perused the bond, acting therein as the solicitor for Cresswell and Wiltshire. The whole came to this: that 3000*l.* was claimed by Bevir to be due to him for costs, but that such sum was not due, and no representation in fact made that it was truly due; and Mr. Wiltshire must be taken to be affected with the knowledge that no such sum was due, and that no bill of costs was delivered at the time. As a consequence of all the circumstances, a Court of Equity will give relief to the plaintiffs, who are willing to allow to Bevir in account what was really due to him: the demurrer must be overruled, and the charges in the bill must be answered.

Sir John B. Bosanquet also gave his judgment, repeating that on the whole state of the case, Mr. Wiltshire must be taken to have knowledge of the misrepresentation made by Bevir of the amount due to him from Mr. Cresswell; and he concurred in the observations made by his Brother Lord Commissioner.

The order below reversed—demurrer overruled—deposit to be returned to the plaintiffs—two months time to be given to the defendants to answer—and an injunction in the mean time not to sue at law on the bond.—*Harrison and another v. Wiltshire and another*, before the Lords Commissioners, at Westminster, June 8th, 1835.

### King's Bench Practice Court.

EXAMINATION OF WITNESSES ON INTERROGATORIES. — COMMISSION. — COSTS. — FOREIGN WITNESS.

*It is a matter of course to direct a commission for the examination of witnesses abroad, and therefore no condition as to the payment of costs will be engrafted.*

In this case a rule *nisi* had been obtained for issuing a commission to America, under 1 W. 4, c. 22, s. 4.

Cause was shewn against this rule, when it was submitted, that the defendant, who had obtained the rule, ought to pay the costs of the commission.

*Coleridge, J.*—The statute directs those costs to be costs in the cause, unless otherwise ordered by the Court. I do not see any reason for making such order, and therefore the present rule must be made absolute.

Rule absolute.—*Prince v. Samu*, T. T. 1835. K. B. P. C.

### Eschequer of Pleas.

CHANGING VENUE.—ATTORNEY.—PRIVILEGE.—WAIVER.

*An attorney waives his privilege of keeping the venue in Middlesex, if he declares as a common person.*

This was an application on the part of the

defendant, to change the venue in this cause on the common affidavit.

The peculiarity in the case was this: The plaintiff was an attorney; he however did not sue in his character of attorney, but appeared by another attorney. The officers of the court had refused to draw up the rule for the change of venue, alleging, as a ground for such refusal, the plaintiff's privilege.

*Per Curiam*.—We are of opinion that, as the plaintiff does not sue as a privileged person, no cognizance ought to have been taken of the fact of his being an attorney.

Rule granted.—*Lowless v. Timms*, E. T. 1835. Excheq.

**AFFIDAVIT TO HOLD TO BAIL.—BILL OF EXCHANGE.—INDICTMENT FOR PERJURY.—NOTICE.**

*If it is sought to hold the drawer of a bill of exchange to bail, the affidavit of debt must shew the default of the acceptor.*

In this case a rule *nisi* had been obtained for discharging the defendant out of custody on entering a common appearance, on the ground of a defect in the affidavit to hold to bail. The defect complained of was this: The affidavit was against the drawer of a bill of exchange, and stated that it still remained due and owing to the deponent; but it did not state that the bill had been presented for payment, or that any notice had been given of its being due.

*Per Curiam*.—The affidavit is not sufficiently certain. No indictment for perjury would lie on such an affidavit. The present rule must therefore be absolute, but without costs.

Rule absolute, without costs.—*Simpson v. Dick*, E. T. 1835. Excheq.

**JUSTIFYING BAIL.—INDORSEMENT OF ATTORNEY'S NAME.**

*What attorney's name should appear as the attorney putting in bail.*

Bail was objected to in this case, on the ground of the attorney in whose name they were put in and justifying, not being an attorney of this Court.

In support of the bail it was submitted, that, as the name of the attorney's agent had been used, and the proceedings were indorsed "*Eley by Cole*," the latter being an attorney of the Court, was all the Court required.

The Court said that was not sufficient. *Cole* should appear as attorney in the cause. The defendant may take till *Monday* to amend.

Time given accordingly.—*Marder's Bail*, E. T. 1835. Excheq.

**ARREST OF JUDGMENT.—WRIT OF ERROR.—FRIVOLOUS GROUNDS.—SLANDER.**

*Although the grounds suggested for arresting a judgment in an action for slander,*

*have been considered by the Court as insufficient, that is no ground for striking them out as frivolous, pursuant to the rules of Hilary Term, 4 W. 4.*

This was an action for slander, and at the trial the plaintiff obtained a verdict. In the following term an application was made and a rule obtained for the purpose of arresting the judgment on two grounds, at that time stated.

Cause was afterwards shewn against the rule, and the Court was ultimately of opinion that the grounds insisted on were sufficient to entitle the defendant to have the judgment arrested.

Subsequently a writ of error was brought, and a notice of its allowance served on the plaintiff. In this notice were set forth the two objections which had been taken on the application to arrest the judgment, as grounds on which the writ of error was brought.

An application was now made to obtain an order for issuing execution pursuant to the rules of Hilary term, 4 W. 4. notwithstanding the allowance of the writ of error, on the ground that the causes of error assigned were frivolous. It was insisted that that which could not be a good ground for arresting the judgment, could not be a good ground of reversing the judgment on a writ of error. The Court had already decided that such grounds were untenable, and therefore they must be considered frivolous, within the meaning of the rule of Hilary term, 4 W. 4.

The Court was of opinion that that rule only applied to cases where the defendant had stated grounds of error which were clearly frivolous. Here, however, it could hardly be said that these grounds were frivolous, since a rule had been granted by the Court, for the purpose of considering whether they were or not grounds for arresting the judgment. A defendant was entitled as of common right to a writ of error, and the rule in question was only made for the purpose of preventing the abuse of that right by obtaining writs of error on grounds clearly frivolous, and the sole object of which was to delay the plaintiff in obtaining the fruits of his verdict. Under these circumstances the Court did not feel itself authorized to interfere by directing execution to issue, notwithstanding the allowance of the writ of error.

Rule refused.—*Gardner v. Williams*, E. T. 1835. Excheq.

**NOTES OF THE WEEK.**

**HOUSE OF LORDS.**

*Bills for second Reading.*

<i>Title of the Bill.</i>	<i>Proposer.</i>
Residence of Clergy.	Lord Brougham.
Pluralities Prevention.	Lord Brougham.
Ecclesiastical Jurisdiction.	Lord Brougham.

Illegal Securities.  
Capital Punishments.  
Education & Charities. Lord Brougham.  
Prisoners' Counsel.

*In Select Committee.*

Highways.  
Wills Execution.  
Executors.

*In Committee.*

Certiorari.  
London Small Debts.

*Third Reading.*

Loan Societies.

*Passed.*

Law of Patents.

HOUSE OF COMMONS.

*Bills to be brought in.*

Law of Tenure.	Attorney General.
Law of Escheat.	Attorney General.
Poor Law Amendment.	Mr. Trevor.
Registration of Births, &c.	Mr. Wilks.
Tithes Commutation.	Sir R. Peel, Bart.

*Second Reading.*

Law of Libel.	Mr. O'Connell.
Bankruptcy Funds.	Master of the Rolls.
Ecclesiastical Courts.	
Clergy Discipline.	Sir F. Pollock.
Infants' Property (Ireland).	
Parish Vestries.	
Church of Ireland.	

*In Committee.*

Municipal Corporations.	Lord J. Russell.
Copyholds Enfranchisement.	Attorney General.
Registration of Voters.	Lord J. Russell.
County Coroners.	Mr. Cripps.
Durham Court of Pleas.	
Dissenters' Marriages.	
Marriage Act Amendment.	
Contempts in Equity (Ireland).	
Lunatic Acts Continuance.	
Election Expenses and Qualification of Members.	
Limitation of Real Actions Amendment.	
Landed Securities (Ireland).	

*Consideration of Report.*

Abolishing Imprisonment for Debt, &c.	Attorney General.
Limitation of Polls.	8th July.

*Passed.*

Prisoners' Counsel.  
Offences against Person.

ANSWERS TO QUERIES.

*Law of Attorneys.*

ADMISSION.—CERTIFICATE. P. 32.

It is necessary that an attorney, who has neglected to obtain his certificate for one whole year, should be re-admitted before he can practise (37 G. 3. c. 90, s. 31), although he may never have practised on his former admission. *Ex parte Nicholas*, 6 Taunt. 408. If therefore a person is admitted an attorney, he must take out his certificate within a year afterwards, to prevent the necessity of a re-admission.

I. M. C.

SIGNED BILL. P. 142.

I shall not venture to give a positive opinion on the case put by S. H.; but would suggest, that the bill of costs mentioned by him is sufficiently signed within the statute. I come to this conclusion by analogy to the case of an agreement under the Statute of Frauds; when, if the agreement commence "*A. B.* agrees to sell, &c.," and it is in *A. B.*'s own handwriting, it is considered to be a sufficient signature within that statute. *Sug. Vend. & Pur.* vol. 2, p. 100. I must observe, however, that the Statute of Frauds simply requires an agreement to be signed; while the 2 G. 2, c. 23, s. 33, requires an attorney's or solicitor's bill of costs (containing taxable items) to be delivered to the client a month before action brought, "*subscribed* with the proper hand of such attorney or solicitor respectively."

I. M. C.

*Law of Property and Conveyancing.*

WILL.—WITNESS.—TRUSTEE. P. 144.

If the trustee take no *beneficial* interest under the will, he will be a competent attesting witness, and he and his co-trustees can convey the freehold property. *Phipps v. Pücher*, 2 Marshall, 20; S. C. 6 Taunt. 220.

LECTOR.

THE EDITOR'S LETTER BOX.

We are obliged by several valuable suggestions from a foreign Subscriber, for improving "*The Legal Almanack*:" we hope to adopt them in the next edition. We have already commenced the revision of the work, and made arrangements for collecting information. We are much gratified by the approbation with which our labours have been received.

To "*A Subscriber*," we beg to say, that the articles on the Law of Contracts are not intended to comprise the whole of that large subject, but to treat of some prominent points, either of a doubtful nature or on which any recent decisions of importance have taken place. We shall continue occasionally to follow out this plan.

The inconvenience in Practice, noticed by H. P. J., shall receive early attention.

The Queries and Answers of H. C.; "*Aspiro*;" J. N.; "*Spes*;" J. B.; and "*Juvenis*," have been received.

# The Legal Observer.

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SATURDAY, JULY 25, 1835.

No. CCLXXXI.

— "Quod magis ad nos  
Pertinet, et nescire malum est, agitamus.

HORAT.

## STATUTE OF FRAUDS AND LORD TENTERDEN'S ACT.

### SALE OF GOODS.

It is our intention in the present article to shew the operation and effect of the Statute of Frauds (29 Car. 2, c. 3) on the sale of goods, wares, and merchandizes, and such other sales as have been brought by Lord Tentenden's Act (9 G. 4, c. 14) within its operation.

By the 17th section of the Statute of Frauds, no contract for the sale of goods, wares, and merchandizes for the price of 10*l.* or upwards, shall be good, except the buyer shall accept part of the goods sold and actually receive the same, or give something in earnest to bind the bargain or in part payment, or that some note or memorandum of the bargain in writing be made and signed by the parties to be charged therewith, or their agents thereunto lawfully authorized. Construing the word "goods" strictly, the Courts held the enactment to apply only to such goods as were in a complete state and ready to be delivered at the time of the bargain; and therefore not to apply to a contract for the sale of a chariot not yet made,<sup>a</sup> of oak pins not yet cut out of the slab,<sup>b</sup> of corn not yet thrashed,<sup>c</sup> and the like where work and labour were material for the completion or execution of the bargain; but Lord Tentenden supplied these omissions, by an act (9 G. 4, c. 14) providing that the Statute of Frauds should extend to all "contracts for the sale of goods of the value of 10*l.* or upwards, notwithstanding the goods may be intended to be delivered at some future time, or may not at the time of the contract be actually made, procured, or provided, or fit or ready for delivery, or some act may be required for the making or completing

thereof, or rendering the same fit for delivery." Goods of a less price or value than 10*l.* are not within either of these enactments; and though in the one enactment the word "price," and in the other "value" is used, no point arises out of this difference of expression; for the value, or so much as the goods can be proved to be worth, is the price, where no price is fixed by the bargain; and where a price is fixed, it is the value so far as the application of the statute is in question; else a purchaser might say, "True, I agreed to give less than ten pounds, but the goods were worth more," and then insist on it as a defence, that his bargain was not in writing.

It is a distinct question, which may conveniently be noticed here, whether the price or value must be expressed in the note or memorandum of the bargain; and this involves another question, whether, without any agreement as to price, there can be any bargain or contract of sale at all, and whether till the price is agreed upon there is any thing more than negotiation. *Sine pretio nulla venditio est*, is, we apprehend, the answer of the English law, as well as of the Roman, to this question; and therefore, unless either a price is agreed upon, or facts have arisen subsequently to the bargain, of force to induce the law to supply a price where none has been agreed upon, the want of an agreed price is, we apprehend, an essential defect in the bargain; and what is a defect in the bargain must equally be a defect in the note or memorandum: but if goods are accepted, or the vendee has appropriated them to himself by a part payment, or if the bargain is not strictly a sale, and therefore not within the maxim just mentioned, then the law says, so much as the goods can be proved to be worth is the price, and without any mention of any price the note will be sufficient, because without it there was a valid bargain. This distinction will be found necessary to preserve consistency in the decisions.

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<sup>a</sup> *Tower v. Osborne*, Str. 506.

<sup>b</sup> *Groves v. Buck*, 3 M. & S. 178.

<sup>c</sup> *Clayton v. Andrews*, 4 Burr. 2101.



In *Hoadly v. Maclaine*,<sup>d</sup> the action was brought for the non-acceptance of a carriage built by the plaintiff to the order of the defendant:—"Sir Archibald Maclaine orders S. Hoadly, of Oxford Street, to build him a new, fashionable and handsome landaulet, of the best materials and workmanship, with the following appointments and style: [Here followed a minute description of the intended vehicle] the whole to be finished and ready for Sir A.M.'s use on (such a day,) &c. (Signed) A. Maclaine." There was another note written after the carriage was finished, requesting it to be sent home, in which the bill of the carriage also was asked for, and that it should mention all the items. It was objected that these notes formed no sufficient note or memorandum of the bargain, because no price was mentioned in them; but the Court decided against the objection. In this case it clearly appeared that no price had been agreed upon; and upon that circumstance the Court rested their decision, holding at the same time, that where a price is agreed upon it is an essential part of the bargain, and consequently must be material in the note or memorandum:—to which effect was the case of *Elmore v. Kingscote*,<sup>e</sup> there the plaintiff sold a horse to the defendant for two hundred guineas, but the price was not mentioned in the note or memorandum: upon which the Court, on a motion to set aside a nonsuit for this cause, said, "There must be a note or memorandum in writing of the bargain: the price agreed to be paid constitutes a material part of the bargain: if it were competent to a party to prove by parol evidence the price intended to be paid, it would let in much of the mischief which it was the object of the statute to prevent:"—and to the same effect was the more recent case of *Acebal v. Levy*,<sup>f</sup> there, the action was brought for the non-acceptance of a cargo of nuts consigned by the plaintiffs to the defendants, under a written order from parties who may be considered for this purpose as the defendants' agents: the order was given in evidence; and it was silent as to the price, but it was proved that there was a price agreed upon, namely, the then shipping price at Gijon; and for this defect, in not mentioning this price, the Court held the order an insufficient note or memorandum of the bargain:—but, both these cases, our readers will observe, were cases of sale, properly speaking,—*Hoadly v. Maclaine* was not properly a case of sale, but

rather a contract for work and labour, made with a person who contracted in the character, not of merchant or seller, but of workman. The decision in that case therefore, as it seems to us, would not support the supposition, that in a proper sale of goods, like *Acebal v. Levy*, the note which was bad, there being an agreed price, would have been good if,—as in *Hoadly v. Maclaine*,—no price had been agreed upon; and indeed Lord Chief Justice Tindal has indirectly guarded against this consequence or supposition; though without shewing, as we have endeavoured to do, wherein the cases so differ as to require such apparently opposite decisions: the one is a case of sale; an agreement as to price is essential to the contract of sale so long as the case rests on the mere bargain, without any acceptance of the article: the other is not a sale properly speaking, but a contract for work to be done, and a fixed price beforehand is not essential to the bargain.

We will next endeavour to shew what is a sufficient acceptance. In *Muberley v. Shephard*,<sup>g</sup> the plaintiff made a waggon to the defendant's order; the iron-work was finished by a smith employed and paid by the defendant, and was affixed by the smith's workmen; but all the time the smith's work was being done the waggon remained in the plaintiff's possession, and when the action was brought still remained in his possession: the plaintiff relied on these facts as evidence of the defendant's having accepted the waggon; but Mr. Justice James Parke nonsuited the plaintiff, thinking it was not an acceptance, and the Court of Common Pleas confirmed the nonsuit, thinking that the merely affixing the iron-work whilst the waggon was in the course of being made, did not satisfy the statute: but the Court said, that "if the waggon had been completed and ready for delivery, and the defendant had then sent a workman of his own to perform any additional work upon it, such conduct on the part of the defendant might have amounted to an acceptance:" the Court, however, did not think the case free from doubt; but then they said, "it was the duty of the plaintiff to free the case from all doubt; and where any remains, that it is safer to adhere to the plain intelligible words of the statute, which point, as clearly as words can, to an actual delivery and an actual receiving of part or the whole of the goods." But where goods are too bulky or ponderous to admit of a manual delivery, taking pos-

<sup>d</sup> 4 Moore & Scott, 340.

<sup>e</sup> 5 B. & C. 583.

<sup>f</sup> 4 Moore & Scott, 217.

<sup>g</sup> 3 Moore & Scott, 436.

session symbolically, or accepting the control of them, is a sufficient acceptance: thus, accepting the key of the warehouse in which the goods are deposited, would be a sufficient acceptance. So, accepting from the vendor a delivery order, and serving it on the wharfinger or warehouseman who has possession of the goods, takes effect as an acceptance, as soon as the wharfinger consents to hold the goods according to the order, but not till then.<sup>h</sup> So, on the sale of a ship, the acceptance of the muniments or title deeds is said to be sufficient. So, where the purchaser of a stack of hay sold part of it whilst it was on the vendor's premises, and the sub-purchaser took away the part which he had purchased, this dealing with the stack as his own was held sufficient evidence to support the finding of the jury of an acceptance.<sup>i</sup> So, where sixteen<sup>j</sup> hogsheads of sugar were

ordered, on inspection of a bulk consisting of a much larger quantity, and the buyer accepted four hogsheads, and afterwards consented to take the twelve others, on being informed that they were ready for him; the Court held, that by his consent to the appropriation of the twelve, the sale became complete as to the whole of the sixteen, and that the actual receipt of the four was a sufficient acceptance. So, where sugars lying in the King's warehouse were sold by auction, by half-pound samples, which, according to the conditions of sale, were to be considered as included in the weighing, the retention of these samples by the buyer was held to be a sufficient acceptance.<sup>k</sup> In *Elmore v. Stone*,<sup>l</sup> the plaintiff, a horse dealer and livery stable keeper, had offered to defendant some horses for sale, and after some differences between them as to price, the defendant at length sent word that the horses were his, but that, as he had neither servant nor stable, the plaintiff must keep them for him at livery; and accordingly the plaintiff re-

<sup>h</sup> In *Bentall v. Burn*, 3 B. & C. 423, the action was brought for the price of a hogshead of wine; and the question was, whether the mere acceptance from the vendor of the delivery order, without any transfer in pursuance thereof by the wharfinger, was a sufficient acceptance to satisfy the statute; and the Court held it not; for, said they, though the Dock Company might be bound by law to hold the goods for the vendee, and might be liable to an action for refusing to do so, yet if they did refuse, it is clear there could be no actual acceptance, because the vendor had not possession.

<sup>i</sup> *Chaplin v. Rogers*, 1 East, 494. In this case Lord Kenyon said, "I do not mean to disturb the settled construction of the statute, that in order to take a contract for the sale of goods of this value out of it, there must be either a part delivery of the thing, or a part payment of the consideration, or the agreement must be reduced to writing in the manner therein specified. But I am not satisfied in this case that the jury have not done rightly in finding the fact of a delivery. Where goods are ponderous, and incapable, as here, of being handed over from one to another, there need not be an actual delivery, but it may be done by that which is tantamount, such as the delivery of the key of a warehouse in which the goods are lodged, or by delivery of other indicia of property. Now here the defendant dealt with this commodity afterwards as if it were in his actual possession; for he sold part of it to another person."

<sup>j</sup> *Rohde v. Twaites*, 9 D. & R. 293; 6 B. & C. 388. Mr. Justice Bayley there said, "Where a man sells part of a large quantity of goods, and the option is in him to select the part from the whole, he cannot, until he has made that selection, maintain an action for goods bargained and sold. But as soon as he selects part, and appropriates it for the benefit of the vendee, the property in the article passed to the vendee, although the vendor is not bound to

part with the possession until the price is paid. Now it appears that the plaintiffs did in point of fact appropriate sixteen hogsheads for the benefit of the defendant; that they communicated to the defendant that they had so appropriated them, and requested him to fetch them away; and that he adopted that act of the plaintiffs, and said that he would fetch them away as soon as he could. I am of opinion, that by means of that appropriation so made by the plaintiffs, and assented to by the defendant, the property in the sixteen hogsheads passed to the vendee; and that being so, the plaintiffs are entitled to receive the full value as for goods bargained and sold." It was also thought, as is stated in the text, that there was a part acceptance sufficient to satisfy the statute.

<sup>k</sup> *Hinde v. Whitehouse*, 7 East, 558. In this case Lord Ellenborough said, "As to the next question, inasmuch as the half-pound sample of sugar out of each hogshead, in this case, is by the terms and conditions of sale so far treated as a part of the entire bulk to be delivered, that it is considered in the original weighing as constituting a part of the bulk actually weighed out to the buyer, and to be allowed for specifically, if he should choose to have the commodity re-weighed, I cannot but consider it as part of the goods sold under the terms of the sale, accepted and actually received as such by the buyer: and although it be delivered *alio intuitu*, namely, as a sample of quality, it does not therefore prevent its operating to another consistent intent, namely, as a part delivery of the thing itself, so soon as in virtue of the bargain the buyer should be entitled to retain, and should retain accordingly."

<sup>l</sup> 1 Taunt. 458.

moved them out of his sale stable into another stable: this transfer from one stable to another, under the buyer's directions, was held to be a sufficient delivery and acceptance. So, where a horse was sold verbally, and the bargain was, that he was to be paid for in an hour,<sup>m</sup> and the buyer forthwith offered the horse for sale: so dealing with the horse as if it were his own, was held to be sufficient evidence to go to the jury, on the question whether there was an acceptance: and this case has since been recognised as resting on the ground that the bargain was not a ready money one—the payment was to be in an hour,—and that the buyer might have claimed an immediate delivery of the horse; but had it been a ready money bargain the case would have been different; for “unless there has been such a dealing on the part of the purchaser as to deprive him of any right to object to the quantity or quality of the goods, or to deprive the seller of his right of lien, there cannot be any part-acceptance:” and therefore, where a horse was sold for ready money,<sup>n</sup> and before payment, whilst the horse was still on the seller's premises, the buyer gave directions as to its treatment, and some time after the bargain took the horse out of the stable, and exercised various acts, which the jury thought were acts of ownership, amounting to an acceptance, the Court held, that the acts alluded to could not be considered as acts of ownership, because until payment the purchaser had no right to the possession. In a similar case,<sup>o</sup> where, under the purchaser's direc-

tions, the seller sent the horse to a grazing place, but sent him as his own, and had him entered in his own name, the Court held, that his compliance with those directions was no delivery, and that there was no acceptance.

The application of these decisions to the case of ordinary sales of goods is obvious. In *Phillips v. Bistolli*<sup>p</sup> it was held, that where goods are knocked down to a bidder at auction, and are handed to him, and remain in his possession for some minutes, till he refuses to take them, it is a question for the jury, whether there has been a complete delivery and acceptance. So, in *Elliott v. Pybus*,<sup>q</sup> which was an action for the price of a machine made by the plaintiff to the defendant's order, and it appeared that after the machine was finished the defendant objected to the charge for it, but admitted that it was made according to his order, and requested the plaintiff to send it home before it was paid for; this was held sufficient evidence of an assent to the appropriation of the machine to support a verdict for the plaintiff. But we must observe, that unless an appropriation of goods by a vendor is to be regarded as equivalent to a delivery<sup>r</sup> of them so soon as the vendee assents to the appropriation, this decision is very questionable.

Another mode by which the statute may be satisfied is, the giving of earnest, and also part payment. Part payment is too simple a fact to need illustration; and so entirely has earnest-money gone out of use, that there is only one case in which the question of the sufficiency of the earnest has arisen. In *Blenkinsop v. Clayton*, a case already stated, it appeared, that in the north of England there is a custom for the buyer of goods to draw the edge of a shilling over the hand of the seller, and then to return it into his pocket, which is called striking off the bargain: but the Court held this not a giving of earnest sufficient to satisfy the statute.

As to the note or memorandum, we have already shewn<sup>s</sup> in what cases the mention of a price is essential to the note: the note must shew who are both the parties, but the signature of either is binding on him who signs, though the other has not signed;<sup>t</sup> and a signature by an agent is sufficient.

unchanged from first to last; and they could not have been compelled to deliver it without the payment of the money: there was therefore no acceptance.”

<sup>p</sup> 2 B. & C. 512. <sup>q</sup> 4 Moore & Scott, 389.

<sup>r</sup> Such a doctrine would be inconsistent with most of the modern decisions. <sup>s</sup> *Supra*.

<sup>t</sup> *Allen v. Bennett*, 3 T. 169.

<sup>m</sup> *Tempest v. Fitzgerald*, 3 B. & A. 680.

<sup>n</sup> *Blenkinsop v. Clayton*, 1 J. B. Moore, 328; 7 T. 597.

<sup>o</sup> *Carter v. Tonpaint*, 5 B. & Ald. 855. *Abbott*, C. J. said, “In this case there was a verbal bargain for the horse at 30*l.*, for the payment of which no time was fixed. The seller therefore was not compellable to deliver it until the price was paid. In *Elmore v. Stone* there was a contract of a similar description; but the Court thought the circumstance of the change of the stable altered the character in which the plaintiff there held possession of the horse; for the plaintiff, thereby consenting to have the horse placed in the livery stable, ceased to keep possession as owner, and held it only in his capacity of livery stable keeper: there is no circumstance of that kind in the present case. It is quite clear that the present plaintiff kept possession of the horse as owner until it was sent to Kimpton Park. If indeed it had been sent there, and entered in the defendant's name, by his directions, I should have thought it would have amounted to an acceptance by him; but here it was entered in the plaintiff's name; and the plaintiff's character of owner remained

Sales by auction are within the statute; but where the auctioneer sues in his own name, his signature is not sufficient;<sup>a</sup> but the signature of his clerk is sufficient.<sup>b</sup>

## REVIEW.

*An Inquiry into the Origin of Copyhold Tenure.* By George Beaumont, Esq. Barrister at Law, Author of "The Law of Fire and Life Insurance" &c. London: J. & W. T. Clarke. 1835.

This is a pamphlet of considerable learning and research, and affords valuable materials for correcting the definitions, and completing the history of the Law of Copyholds. Our notice of its contents must be brief, especially as the subject is one rather of curiosity than of practical importance.

The Author, in his introductory address, states that—

"The object of these pages is not to set up one or other of the conflicting doctrines which respectively represent the suitors of the customary Court, as freemen or slaves, having estates at the will of their lord, or holding by services undefined and unlimited, as appendant to the tenement of the plough; but to satisfy doubts on certain texts which have been made the foundation of these several conflicting theories, and to pursue the inquiry so far as to prove the falsity of most of these assumptions, and to fix, with a great degree of probability, the place in the constitution of the early society of Europe, which was filled by the class of landholders."

Mr. Beaumont then proceeds to say,

"That 'reliefs' were introduced into this country at the Norman Conquest, and that prior to that period land was subject to no permanent tax, except for the short interval commencing with the eleventh century, when 'Danegelt' was universally established here, is a current opinion. A general rule is strengthened by exceptions. The first object of this inquiry will be to see whether at the Saxon era certain lands were not liable to a permanent tax, and whether the 'relief' was not in certain cases raised before the Norman Conquest. It appears from Plowden, (cited in Blackstone's Commentaries, vol. ii. chap. xxi.) that the 'fine' was in use here previously to the revolution effected by William the Conqueror. In the process of levying a *fine at common law*, we find the 'King's silver,' or *post fine*, bears to the *præ-fine* (paid at the Hanaper Office on issuing the writ) a fixed proportion, being always as much and half as much more as the *præ-fine*. The copyholder's fine, (which is also called a 'relief,') payable on a limitation for two successive lives, is in the same proportion greater than the fine payable on an estate limited for one life.

"It is well known that in the Saxon period,

<sup>a</sup> *Wright v. Dannah*, 2 Camp. 203; *Farebrother v. Simmons*, 5 B. & A. 333.

<sup>b</sup> *Bird v. Boulter*, 4 B. & Adol. 447.

and subsequently, the officer called 'comes,' or 'earl,' had one-third of the levies, or the 'third penny.' This is often instanced in the Domesday Book, as well in the Gavelkind county of Kent, as in the several manors and boroughs in other districts. If we may consider the post-fine, and the limitations of estates for more than one life, to have been respectively institutions of a later date to that in which the king and the earl divided the levies between them; then it will be apparent why the old customary payment to the king for his post-fine, and to the lord of the manor for his fine upon an estate for lives, should give an increase of one-half upon the older assessment. It would only be necessary to explain how the Baron of the Exchequer had been ousted of his perquisite in the case of the post-fine, and how in the other the lord of the manor had assumed the place of his royal master. In the latter case it will appear that we ought also to account for the count's third penny being now missing; but it will appear, in a subsequent part of this inquiry, that the protection of the neighbouring earl was, distinct from the corporate jurisdiction, generally sought by small corporate bodies, and we know that the manor was subordinate to the 'honor' and its earl. The steward, then, whose name we shall have occasion to mention hereafter, or taxor, as acting for the king, estimates the customary fine as the king's portion of the fine, on the supposition that the earl had collected his portion by his own bailiff, in the same manner as in the case of the post-fine in the Exchequer, the supposition appears to have been made that the baron had taken his third penny from the *præ-fine*. If these observations respecting the 'fine' should be disallowed, we might perhaps seek the meaning of a tax in the 'rent,' which appears to have been of the essence of customary tenements: while these tenements have distinctive properties, separating them from farms paying rent, though '*geld*,' or tax, is forgotten in the modern phrase (*geld-ing*) '*yield-ing* and paying.' (See Spelman.)"

The author thus defends the utility of his labours:

"The question will now be put, of what service will prove this guessing and arguing from analogies and scattering of other proofs in confirmation of a doctrine, that manors were originally the districts of a certain extent occupied by the subject Romans and Britons who chose, or were permitted to reside in a Saxon kingdom, in the enjoyment of their possessions, but subject to a land-tax? This, perhaps, will be better answered when the origin of all the ruling decisions in abstruse points of copyhold law shall have been satisfactorily proved to be correctly stated in our text books and reports. In that case I should answer, that there was no utility in this inquiry. But if from the position in which the doctrine here contested for places us, we are enabled to prove the falsity of some stubborn texts, and to give a more reasonable and easy solution to cases which those texts attempted to meet,

then little apology will be due for all the awkward perseverance here exhibited in handling a heavy argument. 'What, are we to be sent to the Roman law for a solution of the question, can an estate tail be limited of copyholds?' Such might be a suggestion arising upon our last remark. A moment's consideration of the premises here attempted to be established will suffice to dispel such a fear. The freedom of the Roman law, as to the limitation of estates, may have existed in the birth of this territorial custom-right. What then? The barbarian tax-gatherer, who had to exact a tax or fine once from every subject holding his ancient farms, made out his roll according to his notion of estates in land: he taxed the occupier, he taxed the heir on entry; if previous to the descent of the inheritance, a sale of any kind had taken place, he could take the tax from the stranger, but when it was the turn for the vendor's heir to enter, and that heir claimed to enter, and tendered his fine, the steward or taxer must have admitted the heir because the Saxon's allodium could only be aliened during the ancestor's life, and so he determined the copyholder's sale. (This state of ignorance appears the foundation of the rule of common law, that an estate for life is greater than any chattel interest,) and thus the custom was crippled at its birth, and the only cases of additional fines due on estates are those payable for more lives than one to the exclusion of all additional fine for remainders, to any fine on conditional surrender on mortgage, (that being the authorized doctrine by custom of many manors,) or grants of rent-charge and the like.

"The correct rule as to the limitation of estates would be, that all such are permitted as are allowed of free and common socage tenements, since the Roman law did not prescribe the quality or quantity of estates which it was allowable to limit, nor does our common law limit them, except in certain cases, referrible to public policy, which rules and statutes always have been construed applicable to copyholds, as well as lands of other tenure. But, perhaps, some questions of this kind will be deemed to depend on that of tenure. It has been asked, whether the statute, 'Quia Emptores,' prevents the creation of manors; Mr. Watkins compounds for a negative so far as manors, with estates in base fee, but not so far as manors in which copyholders are admitted in fee simple.

"Again, it has been questioned whether estates tail can be limited of copyholds. Now, if there be any soundness in the doctrine that copyholders were only held by a personal clientship, and not by tenure; (see remarks on 'Commendatio' and Defensor;') or if it be true that the copyholders were allodial occupiers, then the question of *tenure*, or that holding to which fealty and homage (according to Coke) are essential, is settled; and the statute de Donis, if it comprise only tenements or land lying on tenure, cannot apply to them, but otherwise it may. If the statute of entails do apply to copyholds, it would seem that a custom, contradictory to that statute, would be questionable; but if it do not apply, we

have, in the limitation of the 'entail,' an estate for lives in a certain succession to be dealt with on other principles. By the Roman Law, 'voluntary contracts' were rescindible at the will of the party. Limitations in tail are called 'gifts' in our law, and in the statute of entails '*Voluntas donatoris*' expresses the same idea: in a customary district, the barring or cutting off the entail, or converting the estate into a base fee, and so aliening it, would take place as a thing of ancient right: as to the reversion there would be another question, I cannot say whether the Roman Law knew of distant reversions (as this after a base fee), but any custom for barring the reversion would certainly be in the spirit of the wholesome law against perpetuities.

"A further question is, whether contingent remainders can be supported without trustees to preserve? The answer must be in the affirmative, the only obstacle being the idea of tenure, and the necessity of a tenant to answer the *præcipe* of strangers. For the proceedings in customary courts, or the Leet, are not in accordance with those of the Common Law; the old text writers, Horn, Bracton, Fitzherbert, do not pretend to define or limit the form of exercise of the jurisdiction. 'The little bill of right close' may have given the court all the facilities of an action of ejectment or a trustee's suit in Chancery. No decision is allowed in copyholds, the title is all on the rolls; if the steward or other officer refuse to read them rightly, the common courts of law and equity are open to afford relief.

"As to the destruction of Dower. The Roman law accounts these *dotalia* as voluntary, and rescindible accordingly, of which facility the customs of most manors afford instances. Questions have been sometimes proposed as to the effect of separating *fealty* by grant from the copyhold lands, whether this would destroy the manor. As long as a Court Leet is appendant to a manor, there will be in that manor some perceptible vestige of the ancient personal clientship between the farmer and his lord, ('protector,' 'defensor,') however much this protectorate has been restricted by Magna Charta, and other statutes, conferring the local jurisdiction on the King's Courts. The Lord of the Leet, however changed, will be for the time being the defensor to whom fealty is due; but the copyholders and farms, the 'common' or waste, and the tax-gatherer or steward, would comprise all the essentials of a manor, which by surrenders and admissions might be continued for ever. Whether the style of the territory should be 'Manor' or 'Reputed Manor,' would be a question for all who chose to raise it, but the corporate or quasi-corporate body of copyholders would in no respect be prejudiced.

"These are a few of many points which have induced much argument, and closed with much bold assertion, have cost large sums from suitors in the Common Law Courts, but have given few principles of decision. I have not given a bias to this inquiry so as to meet any such difficulties, nor have searched the books very recently to find the cases which appear to

require a settlement on some recognised principle.

"I have only to conclude by suggesting, that if 'tenure' have no import as respects copyholds, and if courts of civil or criminal jurisdiction, concerned with the affairs of these communities, be only casually comprised in a manor, (for they may be either 'Court Leet' within or without the manor, or the suit and service of the copyholder may be due to the Lord of the Honor,) it would be a complete dissolution of the manor if the original idea were restored,—that is to say, if the 'Lord' were removed, and his proprietorship in the 'customs' converted into a rent-charge on the community, with right of distress and escheat: and if the community were thus continued as a rural corporation or borough, under the steward, subject to a scale of rents and fines, either fixed permanently, or re-valued every thirty years, or at other interval; and the members of this corporation might be empowered to redeem this land-tax, or fines, and rents, and retain their right of common.

"Niebuhr, in his history of Rome, in describing the state of the public lands under the Roman republic, compares them, as well to the 'pfahlburger' of Germany as to the Zemindary tenures of India. Of this latter class the following notice is extracted here from Mill's British India, vol. v. p. 410. 'The possessions of the Ryots, whether individually or by villages, were hereditary possessions: so long as they continued to pay to Government the due proportion of the produce, they could not be dispossessed lawfully; they transmitted their possessions by descent, and had the power of alienation, and could sell and give away. At an early period of the Mogul history, a minute survey was made: of the land in this survey an assessment was made which was long regarded as the standard of what every field was to pay. Even when new imposts, during the progress of the difficulties and corruption of the Mogul administration were levied, the Zemindars were bound to give a written schedule, called 'Pottahs,' to the Ryots, specifying the particulars of the assessment on each individual, and those documents were registered in the government accounts, and were intended for the protection of the Ryot against the extortion of the collector.'

"It is well known, that under Lord Cornwallis's administration an unhappy ignorance of these tenures of the Ryots existed, and the Zemindars were acknowledged as lords or owners of the territory over which they were really only tax-collectors."

### PRACTICAL POINTS OF GENERAL INTEREST. No. LXXX.

#### SERVANTS WAGES.

By the 6 Geo. 4, c. 16, s. 48, it is enacted, that when any bankrupt shall have been indebted, at the time of issuing the commission against him, to any servant or clerk of such

bankrupt, in respect of the wages or salary of such servant or clerk, it shall be lawful for the Commissioners, upon proof thereof, to order so much as shall be due as aforesaid, not exceeding six-months' wages or salary, to be paid to such servant or clerk out of the estate of such bankrupt; and such servant or clerk shall be at liberty to prove under the commission for any sum exceeding such last mentioned amount.

A petitioner under this section was the over-looker or manager of a cotton mill, engaged at 33s. per week; subsequently a contract was entered into, that he should be paid 104l. per year, to be paid in weekly sums. The Commissioner had refused the six-months wages in full.—Mr. *Swanstone* objected, that the service must be yearly. *Ex parte Skinner*, Mont. & Bli. 417.

The *Chief Judge*.—That case is wrongly reported. None of the judges used any such expression as that the hiring must be yearly. All that the Court said was, that there must be some engagement of a more permanent nature than a weekly hiring. Sir *J. Cross*;—A yearly hiring is strong evidence of an engagement for continued service; a weekly hiring, very weak evidence, or none at all. Here the evidence of permanent service is strong. The Court should be cautious in extending this clause. The owner of a cotton mill might hire 1000 servants by the year, and their wages sweep away all the assets.—Sir *G. Rose* concurred, and said:—There is not any general rule on these occasions, as to what hiring is sufficient; none can safely be laid down. Ordered, with costs, out of the estate. *Ex parte Collyer*, in re *Cowell*, 2 Mont. & A. 29.

### ON THE RIGHT OF ASSIGNEES TO ACCOUNT.

We adverted to this subject in our last: we may now add the following case.

This was a petition of the bankrupt, praying that his assignees might be ordered to account for the proceeds of certain furniture and effects sold by them under the bankruptcy. It appeared, that the petitioner had been twice a bankrupt; that he obtained his certificate under the first commission, in March 1832; and that the second commission issued against him in October 1832, under which he had not obtained his certificate. The petitioner charged the assignees with having fraudulently sold the effects to a brother-in-law of one of the assignees, for less than a third of their real value; and that they were sold by private contract, instead of by public sale.

Mr. *Phillimore*, in support of the petition, said, that the object of the petitioner was to pay 15s. in the pound under the present commission, which his estate was quite sufficient to pay, if it was not sacrificed by the assignees. It was very important to the bankrupt's interest, that his estate should pay a dividend to that amount; for otherwise his certificate would only protect his person, (See 6 G. 4, c. 16, s.

127,) and not any future effects which he might acquire.

*Erskine, C. J.*—The bankrupt does not allege in his petition, that the assets would be more than sufficient to pay his debts.

*Sir G. Rose.*—The bankrupt not having obtained his certificate, cannot support this petition, for an account against his assignees, without alleging that there will be a surplus, after paying his creditors 20s. in the pound, whatever his right of action may be against them for the alleged sacrifice of his property. If the assets will pay 20s. in the pound, the petition may be amended, by inserting the necessary allegations to that effect; but if not, it is out of our jurisdiction to do anything in this matter at present between the bankrupt and his assignees.

*Sir J. Cross.*—When assignees are charged with fraudulent conduct, I think this Court is bound to inquire into the truth of the allegation, whoever may happen to be the complainant; and I, for one, must say that I am unwilling to shut my ears to such a complaint.

The Court ordered the petition to stand over for 8 days, with liberty for the bankrupt to amend; but no amendment having been made, and the bankrupt neglecting to appear, it was, on the motion of *Mr. Swannston* and *Mr. Parker*, for the respondents, ordered, that the petition be dismissed, with costs.

*Ex parte Ryley, in re Ryley, 4 Dea. & Ch. 50.*

## PETITIONS

### FOR REPEALING THE ATTORNEYS' CERTIFICATE DUTY.

HAVING been requested to print the form of a Petition to the House of Commons for repealing the Annual Certificate Duty, we have procured a copy of the Petition recently presented by *Mr. Freshfield*, on the part of the Incorporated Law Society; it is as follows:

To the Honorable the Commons of the United Kingdom of Great Britain and Ireland, in Parliament assembled.

The humble Petition of the Society of Attorneys, Solicitors, Proctors, &c. practising in the Courts of Law and Equity in the United Kingdom, incorporated by Charter of his present Majesty King William the Fourth,

Sheweth,

That by an act of parliament, 25 G. 3, c. 80, for "granting Duties on Certificates to be taken out by Solicitors, Attorneys, and others," every attorney, solicitor, and proctor was required to take out an annual certificate, on which, if he resided in London or Westminster, or within the bills of mortality, there was

charged a stamp duty of 5*l*.; and if he resided in any other part of Great Britain, a stamp duty of 3*l*.

That such annual certificate duties have by various acts, and ultimately by the act 55 G. 3, c. 184, been increased to the following amounts; namely,

Every attorney, solicitor, and proctor residing within the limits of the Twopenny Post, having been admitted for three years or upwards	£12
If he has not been admitted so long	£6
If he resides elsewhere, and has been admitted three years	£8
If he has not been admitted so long	£4

That by the last mentioned act a stamp duty of 120*l*. is also charged upon all articles of clerkship to an attorney, solicitor, or proctor; and a further stamp duty of 25*l*. is charged upon every admission of an attorney, solicitor, or proctor.

That the duties on articles of clerkship, upon an average for the last ten years, have amounted annually to	£69,960
On admissions, to	£8,330
And on certificates to	£72,187

Making a total annual sum of . £150,477

That the supposed profits of the business of an attorney, solicitor, or proctor, are greatly overrated, for his bills of costs generally contain large sums of money disbursed for stamps, counsel's fees, and otherwise, which are frequently not repaid to him for so long a time, that the mere loss of interest on the capital very much reduces, and some times wholly exhausts his profit.

That by the operation of some recent alterations in the law and the practice thereof, the profits of an attorney have been much diminished, although his disbursements continue very nearly the same as they have been for several years past.

Your petitioners submit that these duties, and particularly the duty on annual certificates, are not founded on any just and equal principle of taxation, but are a direct personal and partial tax upon persons exercising one particular branch of the legal profession only, whilst persons exercising other professions, and those engaged in the higher branch of the profession of the law, are exempt from similar taxation.

Your petitioners, therefore, most humbly pray your Honorable House that they may be relieved either wholly or in part from the payment of the annual duty on certificates, or that your Honorable House will be pleased to grant such further or other relief in the premises as to your wisdom and justice shall seem meet.

And your petitioners shall ever pray, &c.

The meetings of the Provincial Law Societies, which usually take place at the assizes, will afford a good opportunity of preparing

similar petitions; and we would suggest that those who are engaged in removing this crying grievance should take the trouble of explaining to their representatives in parliament the grounds on which the repeal is urged, otherwise the petitions will be of little avail. The Legislature must be convinced of the undeniable injustice of the tax, or the petitioners, as lawyers, can have little hope that the profession will be relieved.

## NEW BILLS IN PARLIAMENT.

### ECCLESIASTICAL COURTS.—NEW "COURT OF PROBATE."

THIS is intituled "A Bill to consolidate the Jurisdiction of the several Ecclesiastical Courts in England and Wales into one Court, and to enlarge the powers and authorities of such Court; and to alter and amend the Law in certain matters Ecclesiastical."

The preamble recites that "it is expedient that the jurisdiction of the several Ecclesiastical Courts in England and Wales should be consolidated, and that the jurisdiction of granting probates of wills and administration of the effects of deceased persons, and the contentious jurisdiction of such courts, should be exercised by *one court only*. That it is expedient that certain other alterations and amendments should be made in the laws relating to Ecclesiastical matters; and that places at present exempt from the jurisdiction of any archdeacon, bishop, or archbishop, should in future be comprised in some archdeaconry, diocese, or province."

The following is the substance of the proposed enactments:

#### *Abolition of existing Courts.*

1. No jurisdiction to be exercised, except under this act.
2. Every parish or place to form part of the diocese in which it is locally situate.
3. All Courts of Ecclesiastical jurisdiction, except those of Vicars-General, or Master of the Faculties to the Archbishop of Canterbury, to be *abolished*.
4. Not to affect the visitations of archdeacons, rural deans, &c.

#### *New Court established.*

5. *Court of Probate* to be established, and sit in London.
6. Jurisdiction of such court throughout England and Wales.

7. Court of Probate to have the same power of forcing witnesses to attend, as are given by act of parliament to Ecclesiastical Courts.

8. Judges of the Court of Probate to be appointed.

9. Oath to be taken by the Judge.

10. Judge incapable to serve in the House of Commons.

11. Registrars to be appointed.

12. Registrars to have the power of taxing bills.

13. Keepers of records to be appointed.

14. Repealing provision of 10 Geo. 4, relative to clerks of seats in Prerogative Court.

15. Surrogates of Courts of Arches may act as surrogates of the Court of Probate.

16. Sealer and appropriator to be appointed.

17. Advocates practising in Doctors' Commons may act as advocates of Court of Probate.

18. Notaries and proctors of Doctors' Commons entitled to act before Court of Probate.

19. Appointments by Judges to be by warrant.

20. In case of illness, substitutes may be appointed for a limited time.

21. Salary of Judge.

22. Retiring pension to Judge of Court of Probate.

23. Salaries to registrars, clerks of seats, &c.

24. Until salaries are paid, certain allowance to be made to officers.

25. Commissioners to be appointed to fix salaries to be paid.

26. Salaries to be paid net.

27. Powers of official principal of Court of Arches transferred to the Judge of the Court of Probate, who, with the commissioners to be appointed, is to establish fees, &c.

28. Account of fees and emoluments to be rendered yearly to commissioners of treasury.

29. If commissioners of treasury are dissatisfied with the account, they may refer it to the Judge to inquire into the same.

30. Fees to be paid over to the registrars.

31. Disposal of surplus fee fund after payment of charges, and providing for deficiency thereon.

32. Neither Judge nor officer to be entitled to fees for their benefit.

33. Compensation to certain persons whose offices are abolished.

34. Persons hereafter appointed, not to claim compensation.

#### *Jurisdiction of the New Court.*

35. All wills, &c., requiring probate to be proved before Court of Probate.

36. Wills of real estate to be registered in Court of Probate.

37. Persons applying for probate to make affidavit of death of testator, &c.

38. Notaries and proctors of Ecclesiastical Courts in England and Wales, not being registrars, may be admitted to practise before Court of Probate.

39. Saving in favour of clerks serving under articles.

40. Judges, registrars, and other officers of



peculiar, manorial, and other courts, to transmit original wills, &c., when required so to do.

41. Probates declared valid, if granted before a given day.

42. Voidable probates to be valid under this act, where another probate has been granted out of the proper court.

43. Administration bonds to be taken in the name of the Judges of the Court of Probate. Security may be divided amongst several persons.

44. Form of administration bond.

45. Form of bond on granting administration with will annexed.

46. Several surety bonds may be taken.

47. Security not obliged to be taken for administrator's share, or the share of any person waiving such security.

48. New administration not to be required where additional effects discovered.

49. Court to have power to direct inventory, and account to be made.

50. Inventory may be impeached at the suit of party interested.

51. Judge may declare bond forfeited, and enforce payment.

52. Liability of, and contribution amongst the sureties.

53. Suits now pending to be transferred to Court of Probate.

54. Act not to affect episcopal jurisdiction relating to the clergy and church discipline.

55. Suits to be summarily heard before the bishop of the diocese.

56. Repeal of 13 Edw. 1, st. 4, c. 1; 9 Edw. 2, s. 1, c. 1; 18 Edw. 3, s. 3, c. 7; 1 Ric. 2, c. 13; 1 Ric. 2, c. 14; 27 Hen. 8, c. 20; 32 Hen. 8, c. 7; 2 & 3 Edw. 6, c. 13, s. 2, 13.

#### *Tithe Suits.*

57. Suits relating to tithes, offerings, &c. now pending, to be transferred to *Court of Eschequer*.

58. *Justices of the peace* may decide cases relating to tithes, offerings, &c. *under ten pounds*.

59. Act not to extend to tithes, offerings, &c. within the city of London.

#### *Church Rates.*

60. Jurisdiction of Ecclesiastical Courts in matters of church rates to cease.

61. Appeals in matters of church rates to *quarter sessions*.

62. *Justices of the peace* may amend church rate.

63. *Justices of the peace* may issue warrant of distress to levy church rate.

64. Repeal of 5 & 6 Edw. 6; and 27 G. 3.

#### *Exceptions as to Jurisdiction.*

65. Court of Probate not to have jurisdiction in matter of incest, adultery, &c.

66. Course of proceeding in Court of Probate.

67. Judges of Court of Probate to make rules for regulation of the proceedings of the Court.

#### *Trials by Jury.*

68. Court may direct trial by jury if they think fit.

69. Form of trial of issues by juries in the common law courts.

70. Depositions already taken, may be read in evidence upon the trial of any issue.

71. Record of the issue, and the verdict to be transmitted to the proper officer after trial.

72. New trials may be ordered by the Judge of the Court of Probate.

73. Appeal to King in Council upon questions relating to granting issues.

74. Parties to have the same rights with respect to bills of exceptions, as by 10 Edw. 1, with regard to exceptions.

75. Parties to suits before Ecclesiastical Courts, to have the same right of appeal under 2 and 3 W. 4, c. 92; 3 and 4 W. 4, c. 41; 4 and 5 W. 4, as if this act had not passed.

76. Judge of Court of Probate to settle costs of issues.

#### *Sequestration.*

77. Regulation of sequestrators of ecclesiastical profits.

78. Sequestrators may enter into a composition to pay tithes.

79. Sequestrators empowered to sue for recovery of tithes.

80. Where amount to be recovered is under 10*l.*, sequestrator to have the same advantages as other parties.

81. Where spiritual person serves the cure during the sequestration of the profits of his living, the bishop may make him an allowance.

82. Bishop may remove sequestrator or curate.

83. Application of profits of living under sequestration.

84. Sequestrator to render account.

85. Bishop may question accuracy of account delivered, and examine into the same.

86. Court of Probate to take cognizance of suits impeaching accuracy of sequestrator's accounts.

87. Writs of sequestration to be filed.

88. Where a writ of sequestration has been issued, no further writ to issue until the first is returned.

#### CHANCERY OFFICES.

This bill, which is for "the improvement of the Registrar's Office, and other Offices of the Court of Chancery," amongst other recitals states, that a great increase of business in the offices of Registrar, Accountant General, Master of the Reports, and a great accumulation and increase of books, records, papers, and proceedings, belonging to these offices has taken place, and is likely to continue, so that the offices have become insufficient, and some alterations, additions, and improvements have become necessary, and it is expedient the same should be made in one year; but the same cannot be executed for 500*l.*, the amount authorized to be applied for these purposes in any one year, by the 52 G. 3:

It is therefore proposed to be enacted, that the Lord Chancellor, Lord Keeper, or Lords Commissioners, may order the improvements required to be made: the money to be laid out not to exceed 4,000*l.*, and to be paid from Suitors' Fund.

## SUPERIOR COURTS.

*Equity Exchequer.*

## PARTNERSHIP.—SOLICITORS.

A. and B., solicitors, in partnership, purchased the general professional business of C., another solicitor, who continued to be a sworn attorney or clerk in the Exchequer of Pleas, and appointed B. a side clerk in his division, for a consideration of 300*l.*, which was paid out of the partnership money. B. afterwards, in rotation, became a sworn clerk in place of C., and paid into the partnership accounts the emoluments of his office until they were exchanged, under the acts 11 G. 4, and 1 W. 4, cc. 58 and 70, and 2 & 3 W. 4, c. 110, for an annuity for life, and a salary for the regulated office continued to B. without practising as an attorney: Held, that B. was no longer liable to account for the emoluments of his office to his partners.

This bill was filed by Messrs. Clarke and Medcalf, solicitors, in partnership, against Mr. Stephen Richards, lately a partner with them, and now Clerk of the Rules on the Plea Side of the Court of Exchequer, praying for a settlement of the partnership accounts, and that Mr. Richards might bring in the receipts of his office, &c. Mr. Richards alleged that he was no longer a partner of the firm, and refused to account, or contribute any part of his present salary or emoluments of office.

The cause was argued in the Court of Equity in the Exchequer, for several days. The facts are sufficiently stated in the following judgment:

Lord Abinger, C. B.—The case made by the plaintiffs is, that Mr. Richards' situation, as side clerk first, and sworn clerk in court afterwards, was part of the partnership property, and that all profits and emoluments accruing from that situation were the subject of a joint interest between the partners; and that his present salary and income being substituted for that in which the partners had a joint interest, they were entitled by the partnership articles, or by an equity arising out of them, to a participation in his present emoluments. The question appeared to him to, rest upon these two points—*first*, as to what was the nature of the office of sworn clerk in court, or attorney of the Court of Exchequer; and, *secondly*, whether the articles of partnership in express terms, or by necessary implication, involved the profits of that office in the partnership concern? The office of clerk in court was as old as the Court itself, and was proved to have existed as early as Edward the First. The duties of that office for so many years past were so well understood, that it was not necessary to state them now. The clerk of the pleas, and sworn clerks in court, and side clerks, perform those duties in the Court of Exchequer, which in the other Courts were performed by the prothonotaries, masters, and similar officers. But connected with, though perhaps not dependant upon those duties, they

also had the privilege of acting as attorneys in that Court, and were the only persons whom the Court recognized as attorneys. Originally the jurisdiction of the Court of Exchequer in matters of common law were so very trifling in extent as not to require a larger establishment, and the Court required that all processes and proceedings requiring the intervention of an attorney should be conducted by one of these attorneys, four only in number, or some party in their names. This gave to those attorneys, in the course of time, when the business increased, a considerable monopoly, by their being the only practitioners in the Court; but it was obvious their official duties as entering clerks, &c. were not confounded with their duties as attorneys to represent clients. It happened merely by the constitution of the Court, that the attorneys who conducted the suits of the clients were the same persons who were the officers of the Court; but their duties were distinguishable and ought not to be confounded together. It became necessary to consider what was the effect of the late acts of Parliament upon the several duties of these officers: the 1 W. 4, c. 58, was passed, not for the purpose of abolishing these offices, but the policy of it was to provide means of paying the different officers of all the Courts of Justice by salaries, instead of fees, as it was considered more expedient that the emoluments of the officers should depend upon something wholly unconnected with their interest in the fees. That there might be no obstruction thrown in the way of the practice of the court, and that the officers should have no interest in the perpetuation of alleged abuses, therefore, the act appointed Commissioners to enquire into the fees and emoluments of the different officers for the then last ten years, and directed that the average of their receipts during that time should be the basis of calculation of what their salaries should be in future. This was a fair basis on which the average was to be calculated; and when ascertained the Commissioners were to certify to the Treasury what sum was equivalent to the annual value of the office. The officers were to receive the fees as before, but instead of appropriating them to themselves they were to pay them into a common fund, from which they were to take each such portion as the Commissioners should fix, and the surplus if any was to be paid into the consolidated fund, out of which also the deficiency, if any should arise, was to be made good to them. At the same time there was another act in progress through the House of Commons, viz., the 1 W. 4, c. 70, which, amongst other things, proposed to throw open the monopoly of the Court of Exchequer, by allowing the attorneys of other Courts to be admitted there, and to practise in their own names. At the time this act was passed, it produced, as might be supposed, some sensation among the officers of that Court, and a particular clause in it was the subject of much argument in the course of the discussion in Parliament. By the 10th section of this act, the Judges were directed to investigate and ascertain what proportion of

the emoluments of the sworn clerks and of the side clerks was derived from fees to which they were entitled by their office, as distinguished from the profits they derived from acting as attorneys; and by the 11th section, the Barons of that Court were to make rules for the regulation of the Court; but the Barons never acted upon the 10th section. However, the result, as appeared in evidence, was that the sworn clerks attended before the Commissioners appointed under the act, who fixed Mr. Richards's salary at 1,370*l.* a year; but although the office was nominally abolished, the sworn clerks still continued to do the duties of the Court. One clerk had to enter the proceedings of the Court, another the orders made by the Judges, another to enter up judgments, &c. The sworn clerks remained the only persons to do these things, subject to the orders of the Court, for which they had a right to receive the remuneration calculated upon the ten years previous income; but there was no distinct distribution of office among them. This supposed inconvenience gave rise to the act 2 & 3 W. 4, c. 110, which did not abolish the clerks, but gave them new names, and distributed their duties. There are by that act to be only five principal officers besides the Clerk of the Pleas; and they are not to act as attorneys, and their allowances are to be fixed by the Court; the consequence of which was that Mr. Richards, was appointed to the office of clerk of the Rules, and instead of 1000*l.* a year, the salary fixed for that office, he was to receive only 500*l.* in consequence of his receiving 1,370*l.* under the former act.

The case before the Court was, that Messrs. Clarke and Richards, being in partnership as attorneys, and disposed to increase their business, made an arrangement in 1811, with Mr. Tarrant, a sworn clerk or attorney in the Court of Exchequer, that in consideration of his receiving 700*l.* a year, and his wife 400*l.* a year for life after his death, he should assign to them his business as an attorney. Looking at the statement in the bill, and to the assignment, his Lordship did not find that Mr. Tarrant assigned his fees or emoluments as sworn clerk. This assignment was made for 21 years from the 1st June 1811. Mr. Tarrant afterwards admitted Mr. Richards to a seat in his division as his side clerk, upon a payment of 300*l.* and 10 guineas a year, as the usual fee from the side clerk to his principal. The purchase money paid for the office of side clerk came out of the partnership funds; and the question now was, whether the other partners had a right to participate in the amount of compensation awarded to Mr. Richards in lieu of the fees which he before received as side clerk. He succeeded Mr. Tarrant as sworn clerk. Mr. Medcalf, became a partner with Messrs. Clarke and Richards in 1818; and looking at the articles of partnership between the three, he did not find either in them, or in the assignment made by Mr. Tarrant, that there was any mention of the office of sworn clerk. It was very true that the emoluments received by Mr. Richards from his office were carried to the partnership

account, but he thought the partnership was amply repaid for the 300*l.*, by which the office was purchased. His Lordship, after going into the case at great length, and regretting that these respectable gentlemen, whom he had long known, did not refer their differences to some private tribunal, said it appeared to him, that the purchase of the office with partnership money by no means involved an inference that the office itself became partnership property; and if it did, a question then arose, as to the legality of such an arrangement, into which it is not necessary to enter. Taking the whole case into consideration, his Lordship felt that he was bound to decide in favour of the defendant, from the time that the partnership had actually ceased, and to dismiss the bill as to so much of the account prayed for.<sup>a</sup>

*Clarke and another v. Richards.* Sittings at Grays Inn Hall. May 20, 1835.

### Exchequer of Pleas.

MONEY PAID INTO COURT.—EQUITY.—INJUNCTION.—NEGLECT OF PLAINTIFF.—JURISDICTION.

*In a case where a defendant had been sued for a sum of money which, by order, was directed to be paid into Court to abide the result of an affidavit to the Court of Chancery for an injunction to which the plaintiff neglected to answer, this Court will not order the money to be paid to the defendant, but leave him to apply to the Court of Chancery.*

The plaintiff was an assignee of an insolvent debtor, and the defendant had received a sum of money under an order from the insolvent, to which his right was doubted, as it was contended that it passed to the assignees. The cause having been tried, the plaintiff was nonsuited; but the Court was still of opinion that he was entitled to the money, and that the defendant's only remedy was in Equity. The money was then ordered to be paid into Court, and execution to be stayed until the result of an application to the Court of Chancery should be ascertained. A bill having been filed in that Court, and all means taken to make the plaintiff enter into an appearance, but without effect, an injunction, but not on the merits, was obtained. The Court, however, had not decided upon the merits of the case, nor could the bill be taken *pro confesso*, because the defendant could not make affidavit that he (the plaintiff) was without the jurisdiction of the Court, which would be required.

An application was therefore now made for a rule to shew cause why the money paid into the Court should not be handed over to the defendant, unless the plaintiff should put in an answer to the bill filed in the Court of Equity within a reasonable time, otherwise the defendant might lose his money altogether.

The Court thought that they had done enough in the case, and could not interfere. The Court of Chancery might hold that the defendant was

<sup>a</sup> See *Gorton v. Elliot*, 6 L. O. 189.

not entitled to the money. Any further application should therefore be made to that Court.  
Rule refused.—*Best v. Argles*, T. T. 1835. Exch.

JUDGMENT AS IN CASE OF A NONSUIT.—JOINING ISSUE.—SIMILITER.—CONCLUSION TO THE COUNTRY.

*It is always necessary that the similiter should be added, before judgment as in case of a nonsuit is moved for.*

In this case a rule nisi had been obtained for judgment as in case of a nonsuit. The affidavits on which the rule had been obtained disclosed the following facts. Issue had been joined on the 24th November, but the plaintiff did not proceed to trial. It did not, however, go on to state that notice of trial had been given.

On shewing cause against this rule, it was submitted, first, that the affidavit ought to have shewn whether it was a town or country cause; and that in the event of its being the latter, and as no notice had been given, the application for judgment ought not to have been made until two assizes had elapsed.

The Court, however, held these objections to be frivolous.

Another objection was then urged, which was that issue was not joined.

In support of the rule it was contended, that the last pleading concluding to the country, the *similiter* might have been added by the plaintiff at any time.

*Per Curiam*.—That objection is fatal to the application.

Rule refused.—*Smith v. Rigby*, E. T. 1835. Excheg.

SLANDER.—COSTS.—GENERAL AND SPECIAL DAMAGE.—MASTER'S TAXATION.—JUDGE'S CERTIFICATE.

*Where, in actions of slander, a Judge has no power to grant a certificate to give a plaintiff costs.*

In this case a rule nisi had been obtained for reviewing the master's taxation, on the ground, that as the plaintiff had recovered less than 40s. he was not entitled to more costs than damages. The facts of the case seemed to be these. It was an action on the case for slander, and at the trial the plaintiff recovered a verdict for 20s. He however subsequently obtained the certificate of the Judge who tried the cause, for full costs. The general damage was alleged, that the plaintiff had lost divers large gains and profits, as laid in the declaration.

On taxation, the master had allowed the plaintiff his full costs.

It was now submitted, that the learned Judge had no authority for giving such a certificate. The 22 and 23 Car. 2, c. 9, does not apply to actions like this.

The Court was of opinion that the Judge was unauthorized to give a certificate for full costs in an action for slander, and that consequently the master must review his taxation, and disallow the plaintiff more costs than damages.

Rule absolute accordingly.—*Goodall v. Ensell*, E. T. 1835. Excheg.

BAIL.—NOTICE OF JUSTIFICATION.—HOUSE-KEEPER.—FREEHOLDER.—AMENDMENT.—COSTS.—WAIVER.

*In a notice of justification, if the hour mentioned is later than the sitting of the Court, the objection is waived by appearing to oppose.*

Bail were opposed in this case. It was a case of country bail. The first ground of opposition was that notice of justification was for eleven o'clock and the time of justification was ten.

*Per Curiam*.—As all parties appeared at ten, that objection must be overruled.

It was then objected, that the notice of bail did not mention where the bail had resided for the last six months, nor whether they were housekeepers or freeholders.

The Court said, that objection was fatal. This being a mere technical objection, we cannot allow costs.

Time to amend was refused, the bail having been put in too late.

Bail rejected.—*Beal's Bail*, E. T. 1835. Excheg.

PUTTING OFF TRIAL.—ABSENCE OF MATERIAL WITNESS.—AFFIDAVIT OF MERITS.

*The trial of a cause may be postponed without an affidavit of merits, where the ground of the postponement is the absence of a material witness.*

In this case the defendant applied to put off the trial of a cause until the sittings in Trinity term. An affidavit was produced which stated the absence of one of his principal witnesses.

Cause was shewn against this, when it was objected that there was no affidavit of merits.

The Court thought that the absence of a witness was a sufficient ground for the postponement of a trial, with an affidavit of merits.

Rule absolute.—*Hill v. Prosser*, E. T. 1835. Excheg.

SETTING ASIDE JUDGMENT.—SCIRE FACIAS.—LACHES.—WAIVER.—COSTS.

*A delay of four years in applying to set aside a judgment on which proceedings have been taken, is too much to permit the Court to interfere and set it aside.*

In this case a rule nisi had been obtained to set aside the interlocutory judgment and *scire facias* issued thereon, on payment of costs. In the year 1831 the judgment had been signed, and in 1832 an application was made at chambers to set that judgment aside on the ground of irregularity, which was unsuccessful.

On shewing cause against this rule, it was contended that this application was too late.

The Court ordered the rule to be discharged with costs, on the ground of the application being too late.

Rule discharged, with costs.—*Lewis v. Browne*, E. T. 1835. Excheg.

**JOINING ISSUE.—VERDICT.—SIMILITER.—  
IMMATERIAL OMISSION.**

*After verdict, an " &c." will be held sufficient to complete an issue, instead of a similiter.*

In this case a rule *nisi* had been obtained to set aside the verdict, and for a new trial. It was an action of assumpsit on a bill of exchange, brought by the payee against the indorser. Plea,—want of notice of the presentment, which concluded to the country. No similiter was added. On the trial of the cause a verdict was found for the plaintiff. This, it was submitted, was an irregular proceeding, inasmuch as there being no *similiter* added, issue could not be said to have been joined.

On shewing cause against this rule it was contended, that this omission was immaterial in the present instance, for the defendant's plea ended with an " &c." which was understood to include the *similiter*.

The Court thought the addition of an " &c." to the plea was sufficient after verdict.

Rule discharged.—*Swain and others v. Lewis*, E. T. 1835. Excheq.

**UNNECESSARY LENGTH OF AFFIDAVITS.—  
STAYING PROCEEDINGS ON THE BAIL-BOND.—  
MASTER'S DISCRETION.—COSTS.**

*If parties think proper to make affidavits of an unnecessary length, the Court will direct the costs of them to be disallowed.*

A rule *nisi* had in this case been obtained for staying the proceedings on the bail-bond in this case, on payment of costs.

On shewing cause against this rule, the payment of costs was objected to, on the ground that the case had been before a Judge at chambers, and that affidavits of 80 folios had been filed, the greater portion of which were useless.

*Per Curiam*.—We are of opinion that this matter should be referred to the master, in order that he may see how much of the affidavits are unnecessary. The costs of such parts of the affidavits must be paid by the party making this application.

Rule accordingly.—*Lewis v. Woolrych*, E. T. 1835. Excheq.

**DISCONTINUANCE.—DEFENDANT'S RIGHTS.—  
IRREGULARITY.—NONSUIT.—VERDICT FOR  
DEFENDANT.**

*A plaintiff has no right to give a rule to discontinue after a verdict for the plaintiff, without leave of the Court.*

In this case a rule *nisi* had been obtained to set aside a rule to discontinue. The facts appeared to be these: At the trial of the cause, a verdict had passed for the defendant, with leave for the plaintiff to move to enter a verdict for himself. The plaintiff then obtained a rule to discontinue, instead of moving for the rule, pursuant to the leave reserved.

Cause was shewn against this rule, when it was contended that the discontinuance was perfectly regular.

The Court thought, that under the circumstances the discontinuance was irregular, and therefore directed the present rule to be made absolute. The plaintiff could have no right then to interfere with the rights of the defendant.

Rule absolute.—*Goodenough v. Butler*, E. T. 1835. Excheq.

**AFFIDAVIT OF DEBT.—CERTAINTY.—MORT-  
GAGE DEED.—BAIL-BOND.**

*The allegation of "indebted," in an affidavit to hold to bail on a mortgage deed, removes the necessity of stating that the sum, &c., and had not been paid at a day now past.*

This was an application to have the bail-bond in this case delivered up to be cancelled, on entering a common appearance, on the ground that the affidavit of debt was not sufficiently positive. It stated that the defendant was indebted to the plaintiff in the sum of 500*l.* upon an indenture of mortgage, by which the defendant had agreed to pay the said sum of 500*l.* to the plaintiff, at a day now past.

This, it was submitted, was not sufficient; as it ought to have negatived the payment on the day specified in the indenture.

The Court overruled the objection, and held the affidavit to be sufficient. The rule now prayed therefore could not be granted.

Rule refused.—*Masters v. Billing*, E. T. 1835. Excheq.

**SIMILITER.—JOINDER OF ISSUE.—VERDICT.—  
ADMISSION.—LACHES.—AMENDMENT.**

*If there is in reality no issue joined, by adding a similiter on the record on which the parties proceed to trial, the record is defective, and must be amended on payment of costs.*

Cause was shewn against a rule *nisi*, which had been obtained in this case for arresting the judgment, or for a replader. The facts, as they appeared from the affidavits on which the rule was obtained, were these: It was an action of assumpsit on a bill of exchange, and the defendant pleaded want of consideration, and concluded his plea with a verification. The plaintiff did not reply in denial, but added the *similiter*. At the trial, the plaintiff obtained a verdict.

It was contended, it was now too late for the defendant to object that issue had not been properly joined; for he had admitted that fact by going to trial. If even the plaintiff had not properly joined issue, he ought to be allowed to amend, on payment of costs.

The Court said, that the record was evidently defective, but in order to save expense, permitted the plaintiff to amend on payment of costs.

Rule accordingly.—*Brown v. Wordsworth*, E. T. 1835. Excheq.

**WRIT OF SUMMONS.—ATTORNEY'S RESIDENCE.  
—UNIFORMITY OF PROCESS ACT.—DEFEND-  
ANT'S RESIDENCE.**

*What is a sufficient description of an attor-  
ney defendant's residence, pursuant to the  
Uniformity of Process Act.*

This was an application to set aside the copy and service of the writ of summons issued in this case, on the ground of a defect in the defendant's description. It appeared from the affidavit, that the defendant, who was an attorney, was described in the writ as of "Paper Buildings, Temple;" but it did not state what he was. This, it was submitted, was not sufficiently precise.

The Court thought, that under the provisions of the Uniformity of Process Act, the description was good.

Rule refused.—*Morris v. Smith*, E. T. 1835. Excheq.

**SPECIAL JURY.—JUDGE'S JURISDICTION AT  
CHAMBERS.—STATEMENT ON OATH.—  
JUDGE'S DISCRETION.**

*It is no objection to an order of a Judge,  
that he has acted on a statement not on  
oath, or that, in his discretion, he has  
rescinded a rule of Court.*

This was an application to set aside a Judge's order, which directed that a special jury should be struck. The facts were these: A rule had been obtained in full Court for a special jury; and on the application of the plaintiff's attorney to a Judge at chambers, and on a verbal statement of it, the learned Judge granted this order.

This, it was submitted, was irregular, upon two grounds; first, that the learned Judge had acted on statements not sworn; and secondly, that a Judge at chambers has no authority to rescind a rule of the full Court.

The Court said, that as to the first objection, it would be a very dangerous principle, were it to be laid down that a Judge at chambers could only act upon affidavit. As to the second objection, the learned Judge has acted quite right.

Rule refused.—*Joseph v. Perry*, E. T. 1835. Excheq.

**NOTES OF THE WEEK.**

**HOUSE OF LORDS.**

*Bills for second Reading.*

<i>Title of the Bill.</i>	<i>Proposer.</i>
Residence of Clergy.	Lord Brougham.
Pluralities Prevention.	Lord Brougham.
Ecclesiastical Jurisdiction.	Lord Brougham.
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*In Committee.*

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*Passed.*

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Poor Law Amendment.	Mr. Trevor.
Registration of Births, &c.	Mr. Wilks.

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Law of Libel.	Mr. O'Connell.
Bankruptcy Funds.	Master of the Rolls.
Ecclesiastical Courts.	Attorney-General.
Parish Vestries.	
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Letters Patent.	Mr. Tooke.
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*In Committee.*

Chancery Offices.	
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County Coroners.	Mr. Cripps.
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Marriage Act Amendment.	
Election Expenses and Qualification of Members.	
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*Consideration of Report.*

Abolishing Imprisonment for Debt, &c.	Attorney General.
Limitation of Polls.	8th July.

*Passed.*

Municipal Corporations.  
Contempts in Equity (Ireland).  
Property in Infants (Ireland).  
Lunatic Acts Continuance.

## ANSWERS TO QUERIES.

## Law of Attorneys.

## ARTICLED CLERK.—SERVICE. P. 142.

1. In answer to the query of W. W. B., I am of opinion, that an assignment of the articles of clerkship of *A. B.* to a country solicitor, is necessary; and that a certificate indorsed would not constitute a sufficient assignment, so as to entitle *A. B.* to be admitted for a service under it. The stat. 55 G. 3, c. 184, in the event of such a precedent being adopted, would be a mere nullity. With regard to the last year of service, if *C. D.* act as agent to the country practitioner, a further assignment will not be necessary. R. T. 31 G. 3; 4 T. R. 379.

T. A.

2. I think an assignment is requisite. Serving a part of the time with another attorney, even with his master's consent, and the remainder of his time with his master, will not do. *Ex parte Hill*, 7 T. Rep. 456. But, where an articulated clerk who had served under his articles two years and a half, when he was prevented by illness from giving regular attention to business during the rest of the term, but attended as his health permitted, was allowed by the Court to be admitted. *Ex parte Matthews*, 1 B. & Adol. 160.

SPES.

3. The service of a clerk to an attorney must be a *bond fide* service under articles; and he must serve his original master or his appointed agent during the whole of the time. 22 G. 2, c. 46, s. 8. It has been repeatedly decided, that no permission given by the master will justify the clerk's serving another attorney during the term. See *ex parte Hill*, 7 T. R. 456. Now if it is necessary for the clerk to serve under the articles, it is quite clear that in no other way can he transfer his services to a stranger, except by his master's absolute assignment of the articles, which consequently must be formally re-assigned to the old master when he returns to him; for the parting with any thing less than the whole interest in the articles would not be an assignment, but analogous to an underlease, which takes its effect from the second, and not the original contract, making the clerk no longer a servant under the original articles, but a kind of hired property of the master, capable of being sublet, and having all the incidents of other property, which is denied to exist in man. In *ex parte Jones*, 1 Dowl. P. C. 439, a similar case to the present, Mr. J. Patterson determined that the assignment and re-assignment must be mentioned in the notice of admission, treating it in the same way as if there had been three different masters.

J.

## NOTICE OF ADMISSION. P. 142.

1. The R. T. 31 G. 3, r. 2, requires the name of the clerk and the master to be inserted in the notice, which is given one full term previous to the term in which he applies

to be admitted. The plain meaning of the rule evidently is, that only the name of the master whom he had, or whom he then served, should be inserted; otherwise the notice must speak prophetically, or else no notice could be relied on which was fixed up prior to the expiration of the articles. If there should be any hesitation in being admitted without, there is no doubt that the Court, on application, would deem the notice good.

J.

2. Where the clerk has served part of his time with one attorney, and part with another, to whom the articles were assigned, the name of the assignee must be inserted in the notice. *Ex parte Stokes*, 1 Chit. Rep. 556; *Ex parte Jones*, 1 Dowl. Prac. Cas. 439.

SPES.

## QUERIES.

## Common Law.

## MASTER OF FREE-SCHOOL.

Is the master of a free-school removable at the pleasure of the visitor, and supposing him to be removed, what is his remedy? Z.

Z.

## MEDICAL ATTENDANCE.—APPRENTICE.

*A.*, with the consent of *B.*, his uncle and guardian, is apprenticed to *C.* *C.* covenants to maintain, &c. *A.*, and also to furnish him medical assistance in case of illness. *A.* becomes dangerously ill, and a surgeon is sent for, who accordingly attends, and sends his bill to, and demands payment of *B.*, which is refused on the ground of *C.*'s covenant. Who is liable for payment to the surgeon, he having had no previous notice of *C.*'s covenant?

W. J. B.

## THE EDITOR'S LETTER BOX.

Reviews of a Biographical Work, and a Book of Practice, are unavoidably postponed.

The last communication of M. has been received, and his request shall be attended to.

The Letters of T. A.; a Friend of Uniformity; and C. W. M., are under consideration.

The Queries and Answers of H. C.; G. W.; H. P. J.; and M. G., have been received.

The Third Part of the Quarterly Digest of all reported Cases of this year will be published early in August.

We have been favored with the Report of the Judgment of the House of Lords in *Foster v. Cockerell*, which corrects an error at p. 216, where it is stated that three out of four of the cases in dispute were decided by Lord Lyndhurst in the Court below: his Lordship delivering the judgment on appeal from these his own decisions—Lord Brougham merely concurring. The fact appears to be, that two of the original decisions were by Sir Thomas Plumer, and another by Sir John Leach. We hope to insert the report next week.

# The Legal Observer.

Vol. X.

**SUPPLEMENT  
FOR JULY, 1835.**

No. CCLXXXII.

— "Quod magis ad nos  
Pertinet, et nescire malum est, agitamus."  
HORAT.

## FINAL REPORT OF THE COMMISSIONERS ON THE LANCASTER COURT.

It is deemed necessary to state the following Report very fully, on account of the importance of the suggestions it contains on Local Courts in general, especially as coming from Lord Abinger one of the Commissioners. The plan of the new Borough Courts, contemplated under the Municipal Corporation Bill, may also be considered with reference to the improvements recommended in this Report. The remarks on the subject of arrest, contained in the Report, are also worthy of attention, as well as the discussion of the expediency of allowing causes to be removed from inferior, to superior Courts, except in particular instances, and under a Judge's order.

The report commences with the following account of the nature of the Court.

The county court of the county palatine of Lancaster has been the subject of parliamentary consideration, as will appear by reference to the statute 34 Geo. 3, c. 58. It has also been, for a considerable time, the practice of the undersheriff to avail himself of the assistance of a gentleman of the bar as assessor.

Under such regulations as the sheriffs for the time being, so aided, have established, this court has become very effective for the trial of causes to a small amount; and we think is capable of being rendered still more so by extending its jurisdiction, and in some respects improving its practice.

In the year 1828, 8,206 actions were brought in this court, of which were:

Actions for sums above 10l.	164
for sums under 10l. and above 40s.	3,292
for sums under 40s.	4,750

No. CCLXXXII.

8,206

Of those, 5,270, comprising above three fourths of the last class, were settled without other proceedings than the first process.

The jurisdiction of the Court, like that of other county courts, is limited in the amount, the subject matter, and the locality of the cause of action.

It has intrinsic jurisdiction to hold plea by commonpleint, without writ, under 40s., in personal causes of action, with some exceptions; and in replevin to any amount. By virtue of a writ of justicies, which is in the nature of a special commission, issuing out of the chancery of the county palatine, authorizing the sheriff to take cognizance of the particular cause, the court exercises jurisdiction in personal actions to any amount. Where the debt or damages are liquidated, and do not amount to 40s., if the cause of action arose, and the parties reside within the county, the plaintiff in such case must either bring his action in this court, or if he brings it in a superior court, be subject to a stay of proceedings on the defendant's application. When the cause of action does not come to 10l. the suit cannot be removed from the county court into the court of Common Pleas of the county palatine, unless the defendant enter into the recognizance prescribed by the statute 34 Geo. 3, c. 58.

This act, which was passed in order to remedy the mischiefs which had arisen from the facility of removing causes of small value from the inferior courts of the county palatine of Lancaster, enacts, that no cause, where the cause of action shall not amount to the sum of 10l. or upwards, shall be removed or removable from any court of inferior jurisdiction into the court of Common Pleas at Lancaster, unless the defendant shall, with two sureties, enter into a recognizance for payment of the debt or damages and costs, in case judgment shall pass against him. The removal of suits from the county court, where the damages are laid at less than 10l., is in consequence very unusual.

Here we may observe, that although the proceeding by writ of justicies, for a cause of

R



action below 10*l.* in amount, is thus protected from the delay and expense which would otherwise be occasioned by a removal into the court of Common Pleas, yet the costs of proceeding by writ of justices are much too great, when compared with the highest amount which can be recovered.

It appears, that the average of these costs is 10*l.*; that is, they exceed the sum recovered; and of these, the cost of the first process by writ of justices is usually two guineas, or one fifth of the whole amount which can be recovered.

We recommend, that a cheaper process should be substituted for the writ of justices, and that the jurisdiction of the county court should be extended to the sum of at least 20*l.*; perhaps it might be still further increased, with benefit to suitors.

The ordinary jurisdiction of the county court was limited in the sixth year of King Edward the First, to 40*s.*, a sum which, allowing for the change in the value of money, as well as the depreciation of the coin since that period, would exceed that proposed.

It would be difficult, probably impracticable, at this day, to ascertain very accurately the proportion which the sum of 40*s.* when fixed on as a proper limit to the jurisdiction of the court, bore to the ordinary expenses of a suit in the superior courts; nor is this material, for it is obvious, that in point of principle, the maximum to which the jurisdiction of the inferior court ought to extend, must be governed by a consideration of the expense and delay of proceeding in the superior courts as they are at present constituted. It was, as Lord Hale has observed, the wise constitution of the common law, to keep small suits from the great courts at Westminster.

A court whose proceedings are very compendious and simple, must be destitute of many provisions highly useful and necessary to insure the attainment of justice; but these provisions may be advantageously omitted where the subjects of inquiry are not complicated, and of little value, in which occasional failure may be compensated for, by the general and ordinary advantages of cheapness and expedition.

It is probable that for such reasons the legislative and judicial provisions which have from time to time been introduced, in order to prevent or remedy any failure of justice in the superior courts, have been very sparingly extended to the county courts. Rules which may be adopted with propriety for the correction of errors in law or in fact, may be attended with too much expense and delay to be usefully applied to an inferior court. Were the jurisdiction of the county court by common plaint to be extended to 20*l.*, it would be absurd to allow generally the practice of motions for new trials, and successive appeals to the higher courts. At the same time, all provisions which remove impediments and obstructions in the way of justice, and do not increase its cost, and particularly such as exclude objections founded on mere formal and technical

defects, are quite as essential to the administration of justice in the inferior, as in the superior courts; yet the Statutes of Jeofails, which were passed for the very purpose of remedying mere defects in form, have not yet been extended to the county court.

It seems to us reasonable, that the jurisdiction of the superior court ought to cease, and that of the inferior court to commence, at the point where the probable expense and delay of a suit in the superior court are so considerable, in relation to the value of the interest in dispute, as to afford no substantial remedy. It may not be easy to ascertain that point with great exactness, but it is manifest we do not go beyond it in proposing to extend the jurisdiction of the county court to 20*l.*

Creditors for debts of that, and probably a higher amount, have at present no effectual remedy. If such a creditor sue in the county court, the defendant may remove the cause as of course, without recognizance, into the court of Common Pleas at Lancaster; and thus the plaintiff has to encounter the same expense, with greater delay, than if he had sued at first in the superior Court. He cannot proceed to try the cause at the assizes, without incurring the risk of extra costs, to the amount of from 10*l.* to 15*l.* and probably more: to these he is liable whether he succeed or not; so that where he obtains a verdict, the utmost he can recover is 5*l.*, or one fourth of his debt; but he may probably lose 40*l.* or 50*l.*; possibly a much larger sum.

This occasions a defect in justice, which calls for a remedy, by extending the jurisdiction of the county court, and the power for removing causes therefrom, to 20*l.*

One third, probably, of the whole number of causes tried at Lancaster, relates to claims not exceeding 20*l.* each, and the expense of litigating these to both parties, is at least equal to four times the aggregate amount claimed; and the aggregate amount actually recovered by the plaintiffs does not equal the aggregate of expense incurred by them.

At the March assizes 1829, out of sixty county palatine causes entered for trial, forty-seven were contested, in which verdicts were given; of these forty-seven verdicts, twenty only were for sums exceeding 20*l.* each; of the remainder two were ejectments, and three cases of debt on bond, where the verdict is no measure of the demand; but leaving these out of the account, twenty-two causes would remain, in each of which the verdict did not exceed 20*l.* in amount.

At the August assizes 1829, out of eighty-four county palatine causes, sixty-one verdicts were given upon trial for plaintiffs, of which thirty-nine were for sums exceeding 20*l.* in each case; so that out of 108 verdicts given at the assizes in favour of plaintiffs, after trial of the cause, 44 were for sums not exceeding 20*l.* each. Such actions are frequently commenced in the first instance, in the expectation that the defendant will not proceed to a trial, and are afterwards prosecuted to avoid the loss and mortification on the part of

the creditor in being compelled not only to relinquish a just debt, but even to pay costs to a dishonest and fraudulent debtor. The effect is, to deprive creditors of any real remedy in respect of debts of that amount; to encourage dishonest resistance of just claims; and to occupy the time of a superior court, frequently to the exclusion of more important causes, with a class of actions which might well be disposed of by an inferior tribunal.

The Commissioners remark, on the power of arresting the defendant,

That where the debt amounts to 20*l.*, however doubtful in point of principle, except where the defendant meditates fraud, the power is so much *relied on by creditors*, that were the jurisdiction of the county court to be extended beyond this sum, it is probable that creditors would prefer the proceeding by arrest, to the less expensive proceeding by suit in the county court. Were it otherwise, and if the power of arrest were to be limited by increasing the minimum in amount at which an arrest should be permitted, or confining it to cases where the plaintiff could shew that the flight of the debtor, or some other fraud was meditated, a more considerable extension might be advisable. The probable expense of from 10*l.* to 20*l.*, in extra costs, in case of resistance by the debtor; the double risk of losing his own, or even being compelled to pay the defendant's costs, would be a large price for any prudent man to pay for the chance of recovering 20*l.*, or even a larger sum, by a suit in the superior court.

According to the ordinary rule of practice in the superior courts, a new trial is not granted, at the instance of either the plaintiff or the defendant, where the cause of action does not amount to 20*l.*, and where it can only be granted on payment of the costs of the former trial by the applicant. This is a rule founded in judicial experience, that a party had better lose a just debt, or even pay an unjust demand, to an amount less than he would have to pay for the costs of one trial, in order to encounter the hazard of paying the costs of another.

With respect to the removal of causes into a superior court, and the amount of the debt in actions which may be removed, the following are the observations of the Commissioners.

Upon the same principle that we recommend an increase of the sheriff's jurisdiction to the extent of 20*l.*, we also think it desirable that no cause, of an amount not exceeding 20*l.*, should be *removable into a Superior Court*, except in the particular instances afterwards mentioned, or by a Judge's order, and then only on condition of the defendant's entering into a recognizance for the payment of the debt or damages and costs, in case the plaintiff should ultimately succeed.

So long as a cause involves no considerations of peculiar difficulty, we think that the amount

in dispute is the proper test for deciding whether it belongs to the higher or lower jurisdiction, and that it ought not to depend on the mere will of the defendant whether it shall be contested in one court or the other. According to the same principle, a plaintiff ought not to be allowed to proceed in a higher court, where the cause, as far as amount is concerned, properly belongs to the inferior tribunal. When, therefore, a plaintiff sues for a debt or liquidated damages, in the higher court, where he might have sued in the county court, proceedings ought to be stayed with costs, on the application of the defendant, and sufficient proof of the facts, by affidavit or otherwise, according to the present practice where the amount is under 40*s.*

There seems, however, no reason why a plaintiff, having a cause of action to a larger amount than 20*l.*, should not, for the sake of the more cheap and expeditious remedy, be allowed to sue in the county court by common process, laying his debt or damages at a sum not exceeding 20*l.* But in such a case a recovery in the county court, or verdict against him, ought to be a bar to any further claim, in order to prevent the vexation which might otherwise be occasioned by a plaintiff splitting an entire claim, for the purpose of bringing several suits. Neither does there seem to be any objection to the allowing parties who are mutually disposed to avail themselves of the aid of the inferior tribunal for settling their disputes, to litigate causes of action there to any amount, which might be accomplished by allowing the plaintiff to commence his action in the county court to any amount, subject to the power of the defendant to remove it, as a matter of course, where it exceeded 20*l.*

The actions which are within the jurisdiction of the court, with the exceptions thereto, and the alterations suggested, are as follow:

Subject to the ancient limit in respect of the amount of the cause of action, which must be less than 40*s.*, the county court has intrinsic jurisdiction, with some exceptions, in all personal causes of action.

The principal *exceptions* are trespasses *vi et armis*; actions of account, where the sheriff cannot hold plea because the court is not a court of record; trespass for taking away charters concerning the inheritance; wounds and mayhems; debts due on record and specialty; case for deceit and maintenance; forgery of deeds, and plaints concerning the freehold.

But the sheriff may hold plea to any amount in replevin, either by virtue of the writ of replevin, which is in the nature of a special commission, or even without writ, by virtue of the Statute of Marlbridge.

As the reason for excluding the jurisdiction of the court in the excepted cases, especially in respect of *vi et armis*, is merely technical, there seems to be no objection to extending the jurisdiction of all personal causes of action to the amount of 20*l.*, subject to a provision for

enabling the defendant to remove the suit in cases of difficulty. But that a party may not be confined in his choice of a court, where the cause of action involves any considerable legal difficulty, or where the immediate cause of action, though of small amount, involves the decision of any right of greater value and importance, it would, we think, be proper to provide that the defendant should be entitled, as of course, to remove the suit into a superior court, in all cases, on an affidavit made that the claim involves a question of title to any lands, freehold or copyhold, or to any lease of lands, or to any tithes, tolls, fair, or market, or any other franchises or liberties, or any right of way or waters, or any right whatsoever lying in grant, or any question on any of the requisites of bankruptcy, requiring any other proof than by the commission, or production of the proceedings under the commission, and also on entering into a recognizance for the payment of the debt, damages, and costs, in case the plaintiff shall succeed; but that it should be lawful, in all cases whatsoever, for any judge of a superior court, after hearing the parties in a summary way by affidavit, to order a removal of any such cause into a superior Court, upon such terms as he should think fit.

As the sheriff has jurisdiction in replevin at present, where the damages amount to 40s. or more, by common plaint, without writ; and as this mode of proceeding is of a peculiar nature, it appears to be desirable that the sheriff's jurisdiction as to replevin suits, should remain as at present, except that it would, we think, be advisable, where the distress was for rent arrear, not exceeding that the provisions of the statute 17 C. 2, c. 7, should be extended to the county court, to enable the defendant in replevin to have execution for the rent found to be in arrear.

It frequently happens that actions are brought in the county court for matters of a slight and trivial nature, especially for slander, which produce great inconvenience and vexation. It would however probably consist better with justice and sound policy to entertain such suits, than to exclude them from the county court. We believe nothing tends more to preserve public peace and good order than the inducing men to seek legal redress rather than to return personal affront with violence; and that the surest and most effectual mode of bringing this about is by making some legal remedy easily accessible.

The recommendations regarding the extent of the jurisdiction, in reference to the *residence* of the parties, are as follow:

The jurisdiction, as in the case of other county courts, is local, extending to such causes of action only as have arisen within the limits of the county.

For the sake of conferring a more cheap and expeditious remedy when the cause of action is of a mere transitory nature, and also for the avoiding the difficulties which frequently occur upon the question, whether in particular cases

the cause of action arose within the limits of the county, we recommend that, so far as the question of local jurisdiction is concerned, every transitory cause of action shall be deemed to have arisen at the place where the defendant resided within the county when he was served with process.

This appears to be a rule which would be well warranted by convenience, for excluding a mere formal and technical objection, foreign from the real merits of the case. It would operate to the advantage of the debtor, as well as the creditor, in superseding the necessity of resorting to a more expensive tribunal. At present, where a debt has been contracted beyond the limits of the county, a creditor, even though both parties may reside in the county, is wholly excluded from the county court, and cannot sue in the superior court, if his debt be under 20*l.*, but at an expense and risk unwarranted by any reasonable expectation of ultimate advantage. Such a provision would be supported by the rule of law which makes a debt *bona notabilia* where the debtor resides at the time of the testator's death.

It would be desirable that in the southern and populous parts of the county, the courts should be held at such convenient places that suitors, parties, and witnesses, should not be obliged to travel more than twelve or fourteen miles from home, for the purpose of attending on trials.

For some years past courts have been held, not only at Preston, but also by adjournment, at Manchester, an arrangement which has been attended with great convenience to the public. We think that other adjournments might be made with advantage, and that it might be advisable that courts should be held within each of the several hundreds of Salford, West-Derby, Blackburn, Leyland, and Amounderness. But as it might be attended with hardship to a plaintiff to compel him to try a cause within that district of the county where the defendant resides, or in case of several defendants, where one of them resides, it would, we think, be desirable that the plaintiff should have the option of trying his cause either in the *district within which any one of the defendants may reside, or in that in which he himself resides.*

The following are the recommendations as to the Judge of the Local Court:

We recommend it as essential to the expeditious and effectual administration of justice in the county court, that its judicial functions should be discharged by a barrister permanently appointed to the office. However well qualified gentlemen who act as under-sheriffs may be, and undoubtedly generally are, for the discharge of their duties, the very circumstance of a new appointment taking place every year, is in itself an objection to the exercise of judicial functions; and the increase of business consequent on the increase of wealth and population, and on the improvements we have suggested in the jurisdiction and practice of the court, we think it would not only justify, but require the appearance of a gentleman in the

higher branch of the profession. We consider it to be highly desirable that such appointment should be permanent; that the party appointed, in order that he may yield undivided attention to his judicial duties, should cease to practise as an advocate; and that an adequate salary should be paid from the fees of the court, provided such moderate fees as might fairly be imposed on suitors were sufficient for the purpose, and if not, that the deficiency should be supplied from the county-rates.

Then follow the suggestions as to the power of the Judge or Assessor, and the mode of proceeding.

We recommend that the Assessor should have power to make such orders in the course of every cause as shall be necessary for the purpose of preventing and correcting of irregularity, mistake, and fraud, and carrying into effect the several objects of the extended jurisdiction; and that every such order should be enforced by staying proceedings, or giving judgment *nisi* for either party, or by disallowance of costs. At present, whether the proceedings be by writ of justices, or by the entry of a common plaint, the first notice to a defendant is by a seizure of his goods and chattels, under an attachment to compel an appearance.

We think that this process, which is termed a county arrest, should be abolished; and that in all cases a simple summons, in the form afterwards suggested, should be substituted.

A seizure of the property is unnecessary, where the sole object is to give notice to the defendant that he is summoned by a court of competent authority, to appear to answer the plaintiff's claim; it is further objectionable, because it must under any circumstances be attended with an appearance of force, calculated to create unnecessary annoyance to the defendant and his family; and in consequence of the duty being usually executed, not by regular bailiffs, but by casual agents of the lowest description, it is in fact frequently exercised in a violent and oppressive manner.

The goods so seized are restored to the defendant by the bailiff on defendant's payment of appearance money, that is, 2s. 4d. where the proceeding is by justices, and 8d. where the proceeding is by common plaint; but if the appearance money be not paid, the bailiff detains the goods seized, returns a schedule of them, and they are afterwards sold under a precept of *venditioni exponens* from the Court; and in cases where the sale of the goods so seized is insufficient to satisfy the debt, renewed process issues.

According to the present practice of the county court, the payment of appearance money to the bailiff on executing the first process, is considered to be an authority to him for entering an appearance; and without any further notice, or any actual appearance by the defendant, a declaration is filed, and an appearance is entered at the foot of the declaration; and unless a plea be filed by the defendant, the plaintiff is entitled to judgment by default.

This practice seems to require alteration: the

first process does not sufficiently apprise the party of either the object and effect of the process, or of the consequence of neglect: the appearance thus entered is a mere fiction, which is not only unnecessary, but objectionable, as it subjects the party to an expense of a declaration, even though he allow judgment to go by default.

With respect to the execution of process, and other proceedings, the Commissioners recommend:

1st. That all processes be served and executed by messengers or bailiffs, appointed for the respective districts by the sheriffs, and responsible to the Court.

2nd. That process, where the cause of action exceeds 5l. shall consist merely in a summons with plaint and particulars annexed, notice of defence, and levy.

3rd. That the summons shall, in ordinary cases, contain a brief notice of a plaint with the particulars annexed, and of the time allowed for giving notice of defence, and the time and place of trial.

4th. That such summons, with plaint and particulars annexed, shall be served as follows: viz., that the plaintiff shall deliver duplicates signed by him, to a district messenger or bailiff, who shall sign and serve one, and transmit the duplicate signed by him, with the date of the service of the other indorsed, to the undersheriff's office.

5th. That the defendant shall be at liberty to pay into court, such sum as he shall think fit, in all cases whatsoever.

6th. That the defendant shall in like manner deliver to the messenger or bailiff of the district, within a time to be limited, duplicate notices of his intention to defend, signed by him, with a brief notice of any collateral grounds of defence; that such messenger or bailiff shall serve one of such notices, and transmit the other to be filed in the sheriff's office.

7th. That on the court-day the causes shall be called on in the order of date, when, if notice of trial has been given, and both parties appear, they shall proceed to trial.

But that if the plaintiff shall appear, and no notice of defence shall have been given, on proof of the service of summonses by the oath of the messenger or bailiff, damages shall be assessed for the plaintiff:

But that if he do not appear, and the defendant prove service of notice of defence, then he shall have judgment of nonsuit.

8th. That every levy upon a judgment shall be executed by such district messengers or bailiffs.

We deem it of great importance to the administration of justice in this court, that all its ministerial duties shall be performed by known and respectable agents of the court.

It is also to be observed, that if the suggestions which we have made for the delivery of the process of summons, and transmitting a duplicate to the sheriff's office, be adopted, the appointment of messengers or bailiffs to serve

such processes within their respective districts would be essential. Much would depend on the attention and regularity of these officers in the execution of process, transmitting duplicates, and attendances on court-days for the purpose of proof. These might be remunerated by moderate fees for the services of processes and execution of levies, proportioned to the distance which they had to travel for the purpose of executing such processes. We think one at least ought to be appointed in each of the large towns of the district for which he is appointed.

We conceive that the service of a summons, with a brief note of the cause of complaint, and particulars, a duplicate being transmitted to the sheriff's office, would constitute at once a cheap and commodious mode of giving all the information to a defendant which is necessary to enable him to make his defence, and which is now done by three several steps: first, the service of an arrest by seizure of the defendant's goods, which, for the reasons already given, we think objectionable; secondly, the filing of the declaration, of which the defendant takes a copy; thirdly, the obtaining an order for and delivery of a bill of particulars.

The declarations, even where the proceeding is by justices, are at present of the ordinary kind, such as in debt or *indebitatus assumpsit*, for goods sold and delivered. In one year, out of 1,618 declarations, by justices, 1,456, that is, nearly nine-tenths, were ordinary declarations in debt, or *indebitatus assumpsit* for goods sold and delivered, use and occupation, trover, &c.

In all such cases the declaration is mere form, and all the information that is essential is derived from the bill of particulars, that is, a mere list of the items in respect of which the plaintiff sues, divested of formal technicality. In all such cases no plaint or declaration is necessary beyond the mere statement that the plaintiff sues for a debt of \_\_\_\_\_, the particulars of which are annexed. In these cases, and indeed in many which are of a special description, printed forms, with the exception of the dates and particulars, may be used, to be obtained from the messengers or bailiffs, or other persons employed to sell them. Where the cause of action is of a more special description, as where the plaintiff sues for slander, or other special cause of action, a general form cannot be used, and the bill of particulars would not give further information than the plaint or declaration itself. But in those, as well as in all other cases, we recommend that the process should be the same, by the delivery of duplicates to the messenger, one to be served on the defendant, and the other transmitted to the sheriff's office. We also recommend that the summons should contain a notice to the defendant, of the time and place of trial, of the time within which notice of defence must be given in case he means to defend the suit, of the amount of debt or damages and costs which will be accepted in satisfaction of the claim, provided that sum be paid on or before a day specified, such order to be without prejudice.

For the purpose of inducing parties to compromise such disputes with the least possible delay and expense; the Commissioners consider it desirable, that the summons should specify (without prejudice) the particular sum, on receiving which the plaintiff would be willing to acknowledge satisfaction, and the amount of costs then incurred.

It is probable, they say, that such a provision would greatly tend to prevent unnecessary litigation, in a manner beneficial to both litigant parties; for not unfrequently it may be more advantageous to the plaintiff to receive even a smaller sum, without further delay, expense, and risk, than to proceed in expectation of a verdict for a larger amount; and it would be a double advantage to the defendant, that he should pay a smaller sum as the debt or damages, and also avoid further costs; and thus in a great number of cases, the parties would be materially benefited by such an offer, and useless litigation would be avoided. It is probable that a greater number of disputes would be terminated by such compromises, where the attention of the parties themselves was drawn to the subject in the ordinary course of process, at the earliest opportunity, than if the matter were left to chance or accident, or to the intervention and management of agents.

It is however essential to justice, that such an offer should, in all cases whatsoever, be deemed an offer for the sake of purchasing peace, by which the plaintiff ought not afterwards, either upon the trial, or any other stage of the cause, to be in any manner limited or prejudiced.

With a view to the same object, it is desirable that the summons should state the amount of the costs then incurred, in order that the party summoned may with certainty, and without incurring the labour and expense of inquiry, know the extent of his liability, and that he may, by payment of the amount specified, terminate the suit. In order to render such notice the more effectual, the costs of the summons ought to be moderate. It is to be apprehended, that the resistance to just claims is not unfrequently excited by vexation on the part of the debtor, occasioned by his being called on to pay considerable costs in addition to the debt.

The following are the recommendations as to allowing money to be paid by the defendant into Court:

As a further inducement to parties to terminate their disputes at a small expense in an early stage of the proceeding, and in order to restrain trivial and vexatious suits, we think it expedient that the defendant should be at liberty in all cases, except assault, battery, libel, slander, seduction, and crim. con., whatsoever be the nature of the claim, to pay money into Court, to be taken, if the plaintiff think proper, together with the costs then incurred, in

satisfaction of his claim; and that, after money so paid into court, but not accepted by the plaintiff, the latter should not be entitled to a verdict, unless it be given for a greater amount, and then that the verdict should be entered for the excess; but that if he recovered only to the amount paid into court, or a smaller sum, then the verdict should be entered for the defendant; and if the verdict should be for a less sum than that paid into court, the plaintiff should be entitled to so much only out of the money so paid into court as should equal the amount of the verdict; for as the defendant may, especially where the damages are unliquidated, have paid into court a larger sum than the plaintiff was entitled to, for the purpose of buying peace and to put an end to litigation, it would be unjust that the plaintiff, who was not in truth entitled to the excess, should be benefited by it; and it is obvious that the risk which the plaintiff would thus incur, if ultimately recovering less than was offered him, would operate as an inducement to take what was offered, when it was really sufficient.

In furtherance of these principles, we think it advisable that the defendant should have the earliest opportunity afforded him of paying money into court, at a stage of the proceeding when no greater expense had been incurred than of the summons.

Finally, it seems to be a matter of obvious policy and convenience, that a considerable space (e. g. ten days) should intervene between the service of the summons and the time for the defendant's notice of defence, in order to enable him, where the claim is just, either wholly or in part, to avail himself of the opportunity thus offered, of paying the debt or damages and costs, which he would then be enabled to do, without incurring the expense of employing a professional agent, or of paying money into court.

Forms of summonses are given, as applicable to the several kinds of action.

It is then recommended that the plaintiff should in his particulars specify—

The date of the bill or note.

The amount and time of payment.

The names of the drawer, drawee, and payee.

That the plaintiff sues as payee and first indorsee, &c.

That the defendant is sued as acceptor, indorsee, &c.

As to special declarations for defamation, nuisances, or consequential injuries, and amending the proceedings, the following observations are made:

It is not easy to prescribe any brief and general form, which shall fit circumstances capable of infinite variety; but though the length of a declaration cannot be limited with certainty, the expense to the defendant may, by providing that no greater sum than £ shall be allowed in costs to the plaintiff, in respect of such plaint or declaration, when he succeeds.

For remedying mere formal defects, which are beside the real merits of the case, we recommend that it should be provided, that no objection whatsoever should be allowed in respect of any defect in form, nor by motion in arrest of judgment, by reason of any defect in substance, where such defect was supplied by proof at the trial, and the defendant had sufficient notice of the real cause of action by means of the particulars delivered or otherwise; but that every such defect should be amendable in a summary manner on the application of either party, and that no proceedings, after verdict, should by any process be removable into any superior court, except as afterwards mentioned.

It has been found necessary to obviate by several statutes, defects of a mere formal and technical nature, which may occur in proceedings in the superior courts; and the principles on which these statutes are founded, of preferring justice to form, the substance to the shadow, is beyond all exception. But if such provisions be desirable in courts whose proceedings are likely to be formed with a degree of legal accuracy and technical propriety which cannot be had without cost, *à fortiori*, ought they to be applied to the proceedings of inferior courts, where such petty impediments to the course of justice are more likely to occur?

To prevent expense, and delay from the misjoinder of different causes of action, and the non-joinder or mis-joinder of plaintiffs and defendants, which may be expected to occur in proceedings for the most part not submitted to any legal advice, we recommend the following provisions.

The plaintiff in the county court should be allowed to join several causes of action in the same suit, although the same could not have been joined in one of the same actions in the superior court. Such a provision would stand on the obvious principle of economy, in superseding the necessity of a multiplicity of plaints or writs where one would suffice. It is one which was recognized by the ancient and simple rule of common law.

That neither the non-joinder of one or more other plaintiffs, nor any non joinder or mis-joinder of defendants, should be allowed to prevent the plaintiff from recovering at the trial, provided it appeared upon the evidence that he or they were entitled, either by himself or themselves, or conjointly with one or more others, to recover against any one of the defendants, or against any one of the defendants conjointly with one or more others, not defendants; but that in such case the verdict should be entered as against the defendant or defendants against whom it was found, and for the rest; but that in such cases the defendant or defendants so obtaining a verdict should be entitled to their costs.

The statute of Queen Anne, which enables a defendant, by leave of a superior court in which an action is brought, to plead several pleas in bar, does not extend to the county court; and defendants there are still in strictness limited in their defence to a single plea,

even in a replevin suit, although in practice, we believe that this rule is not observed.

We recommend that special pleas in bar be excluded from the practice of the Court, because, in reference to the causes of action usually litigated in the county court, they are for the most part unnecessary, and would, if allowed, be productive of a degree of expense and delay, wholly inconsistent with cheapness and expedition. If the defendant were, as now, to be limited to a single plea in cases where, by the practice of the superior courts, a special plea was necessary, injustice would frequently be occasioned by confining him to one single ground of defence, and a hardship would remain, which was at one time much felt in the superior courts of Common Law, and has long been remedied by the legislature. On the other hand, to permit a multiplicity of special pleas, would be to open a door to a practice which occasions great abuse and great expense in the superior courts, where it not unfrequently happens, that every allegation in a declaration is put in issue by a multiplicity of special pleas.

Such pleas are not required in a great majority of cases which occur, even in the superior courts; and not unfrequently, the most difficult questions of law, as well as fact, arise where the pleadings are most general, as in actions of ejectment, trover, and *indebitatus assumpsit*, where the parties proceed to trial without deriving from the plea any notice of the defence really intended.

The same generality of pleading is allowed in the superior courts in all actions against magistrates; and it has become the usual practice to insert in local acts of parliament a clause to enable the defendants, who justify under the powers of the act, to give any special defence in evidence under the general issue, without any special plea.

This, however, cannot but be regarded as a defect in the process of judicial inquiry, and it is one which is most of all to be deprecated, where the proceeding is in an inferior court, for a cause of action of small amount: it is desirable that the plaintiff should not, on the one hand, be put to unnecessary expense in the proof of matters which the defendant does not mean to dispute; on the other, that he should not be kept in ignorance of the defence which he is really to meet.

It appears to us, that economy, expedition, and certainty, will be best attained by excluding all formal pleas, and enabling the defendant to give all matters of defence in evidence of a general notice of defence, requiring him, however, to notify to the plaintiff on what collateral grounds of defence he means to insist on the trial, giving him the opportunity of formally signifying that he admits any part of the claim, or any facts which the plaintiff would be bound to prove, which he does not mean to dispute.

It is then proposed that the defendant, in all cases where he means to defend the suit, should

deliver duplicates to a messenger or bailiff of the court, in the general form afterwards given.

That the messenger or bailiff, having signed both, shall serve one on the plaintiff, or at his place of residence, as described in the summons, and transmit the other, with the date of service indorsed, to the office.

That after such service of notice of defence, the suit should be considered as at issue between the parties, without any *similiter* entered, or further notice; and that under such notice the plaintiff should be put on proof of his cause of action, as stated in his plaint and particulars of claim. But that if the defendant, in any suit to recover a debt, mean to insist that the debt, though it once existed, has since been in any manner satisfied or otherwise barred, he shall shortly notify such his intention, by signifying that he insists on,

The Statute of Limitations.

Discharge under the Bankrupt or Insolvent acts.

Payment.

Accord and satisfaction.

And that, whenever notice of set-off shall be given, particulars of set-off shall be endorsed and annexed.

And that in all actions of trespass to the person, lands, or goods, the defendant, if he mean to insist on any other ground than a simple denial of the trespass, shall notify his intention to insist on any matter either in justification, excuse, or discharge,—as, that he means to insist, that he acted

In self-defence, or in defence of his dwelling house, or goods.

On a release.

Leave and license.

Right of way, &c. &c.

And that in all actions of slander or libel, if the defendant mean to rely on any matter of justification or excuse, notice of his intention shall be given with notice of defence: as that he means to insist that the words or supposed libel are true. But that in this, as in all other cases where notice of any special defence shall be given, such particulars of the defence as the plaintiff shall require shall be furnished by the defendant within days after request made in writing; but that the defendant should not be prejudiced by any variance between such particulars and the proof on the trial, where they communicated substantial information of the grounds of defence.

Considering the peculiar nature of the proceeding by replevin, and that such suits are not frequently brought to trial in the county court, we do not think it advisable to interfere further with the present practice as to the declaration and subsequent pleadings, than to provide that the replevin suits, like all others, shall be commenced by the service of a summons and declaration; and that in like manner duplicate copies of pleas and replications shall be served and filed; pleas within days of the service of the summons; replications within days after service of pleas, and so on.

That the issue shall be considered as complete on a traverse concluding to the country, without any similiter, and that the trial shall take place, in the absence of a countermand by the plaintiff, or assessor's order, to the contrary, at the court for the district, within which the premises are situated next after the expiration of full days after issue joined, by the service of the last traverse concluding to the country.

We think that in replevin suits the parties ought not to be restricted as to the number of avowries, cognizances, or pleas, provided that each should be allowed in costs no more than for one avowry, and one plea to each avowry. We also recommend that the provisions of the statute 17 Car. 2, c. 7, shall be extended to the county court, so as to enable the defendant, where he succeeds, to obtain judgment and execution for the arrears of rent.

With a view to save unnecessary expense in proof, we think it desirable that the defendant should be at liberty also to give notice to the plaintiff, that he will admit on the trial of the cause, any part of the plaintiff's claim, or any facts which he would otherwise be bound to prove; and that after such notice given, the plaintiff should not be allowed any expenses incurred for the purpose of such proof.

A defendant cannot in any case be called upon to admit any part of the plaintiff's claim, for the whole of the demand may possibly be unfounded, and therefore a defendant must usually be left at liberty to put the plaintiff on proof of his case, by a simple denial of his claim, either alone or in addition to the other defence alleged; but at all events, it seems to be desirable that a defendant should have the opportunity given of placing his defence on its true grounds, and of saving the expenses which would be incurred, by putting the plaintiff to unnecessary proof.

The compelling a defendant to give notice of the collateral grounds of his defence, seems to be a provision, not of mere convenience, but of essential justice in all courts. It is desirable, for the sake of avoiding unnecessary trouble and fruitless expense, that the parties should know, before the trial, what questions they are going to try. The necessity is still more urgent in the case of an inferior court, where cheapness is a great recommendation, and many of those provisions are wanting, which would afford a partial remedy against the misconceptions which may arise from the generality of pleading allowed in the superior courts. The remedy against these in the higher courts would be sought by the application for a new trial, on the ground of surprise, and thus a case of fraud would be investigated by means of affidavits and doubts removed by one, or, if necessary, successive new trials, aided by the powers which such courts possess of enforcing the production or inspection of documentary evidence. As a remedy could be applied but imperfectly, if at all, in any inferior court, it is the more essential to guard against such evils by more simple and less expensive means.

In some cases where the defendant meant to

insist on a collateral ground of defence, as where he meant to rely on the Statute of Limitations, a justification of the truth in an action of defamation, or under legal process in an action for false imprisonment, or on the ground of a discharge under the Bankrupt Act, or an Insolvent Act, or under some particular local statute, it would scarcely be disputed, that notice of the intended defence, either by plea or otherwise, would be necessary for the purpose of preventing surprise. But though in many other instances the necessity may not be so urgent as in these, it is desirable that notice should be given in all, for the purpose of effectually excluding uncertainty and surprise.

Where the defendant meditates the setting up a collateral defence at the trial, it can impose neither difficulty nor hardship upon him to state briefly what the ground of defence is, in general terms, without involving either the defendant or the plaintiff in the technicalities of special pleading. It would suffice for all practical and substantial purposes, that the defendant should state generally that he meant to rely on the Statute of Limitations, on payment, on a release, on record and satisfaction, &c. In a few special instances, as in the case of notice of set-off, or notice of justification in slander, it might be requisite that the notice should specify the particulars; but for the most part, a general notice would be sufficient, and particulars might be required, under an order for the purpose, where, under the peculiar circumstances of the case, they appeared necessary.

Then follow the form of notice of defence in the County Court, and the following are the recommendations as to witnesses and jurors:

At present the attendance of a witness resident beyond the limits of the county, to give evidence in the county court, cannot be enforced; but it is obviously essential to the purposes of justice, and the necessity will be still more urgent if the jurisdiction of the court be increased in point of amount, that the power of compelling attendance of such non-resident witnesses should be extended.

This might be done by means of a summons signed by the sheriff, under-sheriff, or assessor, with or without a clause of *duces tecum*. Such a provision, we may observe, would not be attended with any increased hardship or inconvenience to witnesses; frequently with less than they would be subject to, if the action were brought in a superior court, and the trial were to be had at the assizes.

Such process is indispensably necessary, in order to prevent a failure of justice in all cases where the party who requires the testimony is obliged to prosecute or defend his suit in the county court. Obedience to such process might be enforced, either by means of an action at the suit of the party injured, or by imposing a specific penalty in case of disobedience, to be recoverable on proof of due service of the summons and tender of expenses, and in default of



proof on the part of the defendant of a sufficient legal cause of absence.

We recommend that all persons whose names are on the sheriff's list, as liable to serve on assize juries, should be deemed to be suitors of the court, and should be bound to attend on reasonable summons, provided that no suitor should be bound to serve who resided more than twelve miles from the place of trial.

But in order that such service might not, in addition to their attendance at the assizes, be too burthensome upon jurors, it should be provided that twelve attendances at the county court should be deemed equivalent to service at one assizes, and entitle a juror to the same exemption as if he had served as a juror at the assizes next preceding the last of such attendances at the county court. That every juror should be liable to a fine of £., to be levied in a summary manner, for every omission to attend.

The following remarks relate to *new trials* and *appeals* :

Upon the question whether it would be advisable that the Judge should have the power of directing a new trial, where it appeared that the jury had given an erroneous verdict, and whether misdirections, mistakes, or erroneous judgments on the part of the assessor, should be subject to revision upon an appeal to a superior court, we have felt considerable difficulty.

It cannot be doubted, that even where actions are brought in the superior courts, if mistakes in point, both of law and fact, were not to be subject to revision and correction, the trial by jury would constitute a very imperfect and uncertain institution for the purposes of justice. On the other hand, it is plain that to extend generally to an inferior court, the power of granting new trials, and the establishment generally of a court of appeal from the judgment of the sheriff or his assessor, would be to expose suitors to costs and delay, burthensome and prejudicial to the litigant parties, and inconsistent with the principles of economy and expedition, by which all the proceedings of such a court ought to be regulated.

We think that either to exclude the power of appeal altogether, or to admit it without restraint, would be attended with considerable inconvenience, and that the ends of justice would be best attained by permitting an appeal under restrictions, which, whilst they excluded any abuse of the power for the purpose of vexation and delay, might afford an opportunity for remedying palpable errors, and thus obviate the objections which must always attach to a court which is not subject to controul from the salutary apprehension of an appeal.

We recommend that the assessor should have power to grant a new trial, at the instance of either party, on the ground of any palpable mistake or error on the part of the jury, upon the payment of the costs of the former trial, and giving security for the general costs of suit, and, if defendant, also for the debt or damages for which the verdict is given. And that in case of any

supposed false judgment, or misdirection on the part of the assessor, either upon demurrer, or upon the trial, or final judgment, the party thinking himself aggrieved should, on entering into recognizance with sufficient sureties for the costs of suit, and of the appeal, and, if defendant, also for the amount of the debt or damages for which a verdict may have been given, appeal to the justices of the Court of Common Pleas of the county palatine, who should have power in their discretion to call on the assessor to report in the whole, or any particular part of the case, and to make such order as should to them seem lawful and just as to the further proceeding in the suit.

Under such restrictions, applications for new trials, on the ground of mistake on the part of the jury, would rarely be made without foundation; and even where that was the case, the only consequence would be delay to the successful party, which, considering the frequency with which courts are held, would not be an inconvenience which could well be compared with the hardship and injustice which might result from excluding the power of granting a new trial in a case of palpable error. To allow an appeal, under such restrictions, from the judgment of the assessor, would occasion less inconvenience than the removal of a cause by writ of false judgment; and such an appeal would be far more beneficial to the suitor, inasmuch as it would admit objections on the ground of misdirection by the assessor, which do not appear on the record, and in respect of which no remedy could be obtained by the present writ of false judgment.

With respect to writs of inquiry and executions, the following are the recommendations :

According to the present practice of the court, a plaintiff by default may have a levy to the amount of 19s. 11d. in actions of assumpsit or debt, without any affidavit or proof whatever; but he cannot have greater damages, without the execution of a writ of inquiry, and proof by witnesses. This practice is frequently productive of unnecessary expense; for avoiding which we recommend, that in all actions, whether for liquidated sums or uncertain damages, where the defendant suffers judgment by default, a levy should issue for the amount of debt or damages shewn by affidavit to be due, unless the defendant gave notice within that he required such damages to be assessed on an inquiry by a jury; and that in all cases where such notice was given, they should be so assessed accordingly.

There seems to be no reason why the expense of an inquiry should be incurred by the defendant, when he is willing to dispense with one, even in cases of unliquidated damages, more especially as he will have had previous notice of the amount the plaintiff was willing to take. It seems to be sufficient in all cases to allow the defendant the opportunity of having the amount of the debt or damages so assessed when he requires it.

When the defendant usually resides within the jurisdiction, and cannot be personally

served, it would, we think, be proper to provide that the summons should be served, at his usual place of abode, on his wife, or an adult member of his family, servant, or person having the care of his house; and that the service should be indorsed by the bailiff or messenger accordingly; and that on default made by the defendant, and oath being made by the plaintiff of the amount of the debt or damages, a levy should be issued to the amount of not more than 20s. in the first instance, and that on affidavit made by the defendant that he had not received notice of the service of summons, he should be allowed, on such terms as the assessor deemed reasonable, to give notice of defence, and try the cause; and that in default of such application being made, a levy should then issue for the sum sworn to.

The county court has no power to issue execution, but against the goods of the defendant, by means of a *levari facias*. In order to obtain execution against the person of the debtor, it is necessary to bring another action on the judgment in a superior court.

The expediency of permitting a judgment creditor to imprison the body of a debtor, must depend on general principles, by which the law of debtor and creditor is regulated, rather than on the constitution and practice of the particular court.

If the imprisonment of the debtor be essential to the ends of justice as a mode of enforcing payment of the debt, it ought, on principle, to be allowed whenever the right of the creditor is established by the judgment of competent jurisdiction; and if the law allow this to be done indirectly, by means of an action in a superior court on a judgment in the inferior court; it would, we think, be more reasonable and consistent to allow the same object to be attained directly, without unnecessarily putting both parties to the expense of an additional suit in the superior court.

We therefore recommend that, upon certifying the judgment of the county court into the Court of Common Pleas of the county palatine, process should issue against the person in the same manner as on a judgment in the Common Pleas of the county palatine.

In order to prevent a defendant from cheating his judgment creditor, by fraudulently removing his goods beyond the sheriff's jurisdiction, we recommend that upon affidavit made and filed, that a party against whom judgment has been obtained, has no goods within the county of Lancaster upon which an execution can be levied, that he has goods within another county in England or in Wales, the sheriff of the county of Lancaster shall grant a certificate, briefly stating the amount of the judgment and costs, and the time when the same was signed; and that on delivering the same at the office of the sheriff of the county to which such certificate shall be directed, he shall issue execution in the same manner as if such judgment had been duly obtained in the county court of the latter county.

And that when such defendant has goods in an adjoining county, within the distance of

miles from the borders of the county of Lancaster, it shall be lawful to execute a levy on such goods, duly issued by the sheriff of the county of Lancaster, on procuring the same to be indorsed by a justice of the peace acting for and residing within the hundred of the county in which such goods are found.

We find that great inconvenience has resulted from the employment of bailiffs in the service of process, particularly final process, who are not appointed by the sheriff, but employed for the particular turn only, at the discretion of the plaintiff or his attorney. The agents so employed, being for the most part men of neither respectability nor property, are frequently guilty of the most scandalous misconduct and oppression, for which the sheriff is not responsible, as they are not appointed by him. The proceeding by indictment in such cases is both expensive and dilatory, and is productive of no satisfaction to the injured party.

As a remedy against such mal-practices, which have been attended with great oppression and suffering to the lower classes of society in the county palatine of Lancaster, we recommend that no process should be executed but by the messengers or bailiffs of the court, whose appointment and duties have already been adverted to, and that further provision be made for the summary punishment of any such messenger or bailiff guilty of any extortion or other misconduct in the execution of his office, and for compelling satisfaction to the injured party by a summary conviction before a justice of the peace of the county of Lancaster, or before the sheriff's assessor in open court.

In suits for debts not exceeding the sum of 5*l*. we think that even still less of machinery may suffice, and that the process should consist merely in service of a summons served in the manner already stated, giving notice to appear at the next Court held at \_\_\_\_\_, on \_\_\_\_\_, in case \_\_\_\_\_ for the debt, and \_\_\_\_\_ for the costs, were not in the mean time paid.

That on the appearance of the parties the assessor should, upon examination of the parties themselves, and their witnesses, decide in a summary way, without a jury, and with power to adjourn the case, according to his discretion, for further hearing, and with power to stay the execution, and give time for payment of the debt by instalments, according to his discretion.

And that on default made by the defendant, on proof of the service of such summons, the plaintiff should be entitled to have execution for the sum sworn to be due.

The Commissioners conclude with the following observations relative to fees and costs.

The professional fees at present allowed on taxation appear to be moderate. Should such changes as we have suggested be made in the practice of the Court, it would be desirable that the table of fees should be revised under the direction of the Justices of his Majesty's Common Pleas at Lancaster.

In the arrangement of costs, it is necessary to guard against two extremes, each of which would be attended with mischief to the suitor; for whilst the practice of an inferior court must be regulated by a principle of strict economy, it is of importance to guard against the mischief which would result from such a reduction of costs as would necessarily exclude the more respectable members of the profession from managing suits, and throw the business in the hands of needy and unprincipled practitioners, who, for want of better business, would undertake that which others rejected, and make themselves amends for legal parsimony, by oppression, unfair and corrupt dealings.

We cannot but state emphatically on the subject, our conviction that it would be impossible to provide an adequate remedy for protecting poor persons against oppressive costs in suits below 40*l.*, without making general provisions which would include other inferior courts, such as Wapentake Courts, Borough Courts, and Manor Courts, the proceedings in which are much complained of as being oppressive and expensive.

If a remedy were to be provided which affected causes to a small amount in the County Court only, it is to be apprehended that resort would be had to other inferior courts, where the allowance of costs was more considerable.

The costs in the Wapentake Courts are frequently greater than those allowed in the County Courts, the stewards in those courts being usually permanent officers, possessing an interest in increasing the practice. But as these and the inferior courts are neither peculiar to the county palatine, nor in any respect, that we are aware of, modified by its peculiar judicature, we apprehend it is not within the scope of the commission with which we are invested, further to advert to them.

The report is signed, "J. Scarlett;" "Henry;" "Thomas Starkie."

## ANCIENT RECORDS.

### SURNAMES.

In a former volume (vol. 9, p. 503) I have adduced several opinions of eminent Judges, and offered, in addition, some few arguments, to shew that surnames arose from parties assuming them, and that even the wife's taking her husband's name was nothing more. I am now indebted to a valuable compilation by Sir F. Palgrave, *Rotuli Curie Regie*,—from 6th Richard 3d to 1st John—for the following extracts; and as these are public records, it is but reasonable to suppose that the description of people in them would be the most correct which could be given at the time. My object in giving them is to shew how persons distinguished one another when so many similar Christian names existed.

"Pless of the Crowe, held at Stratford, be-

fore Geffry Fitz Peter and his associates, in the 12 year of King Richard."

This Peter, we may presume, was some noted person, otherwise it might be open to doubt what Peter it was of whom Geffry was the son; and this may again lead us on to the supposition, that when there became many of the same name, then it became requisite to add a distinguishing mark to the Christian name.

"The jury declare that Robert son of Randalph, was found dead in the fields of Badow, through want. Judgement—Murder.

"Woolward the Weaver, John son of Robert, Osbert Franc Turb de Padue, near neighbours, were summoned and did not appear, and many others, among them John the younger and William, son of Godwin: they were amerced.

"The heirs of Maurice de Badow and his wife, are in custody of Robert de Treagox, and his land is worth 20*l.* and in the fief of the Earl of Boulogne (the estates of the Earls of B. comprehended great part of Essex)."

Here again we have several new ways of distinguishing parties; as by trades, as "Woolward the Weaver;" by the name of the village or township from whence they come, as "Maurice de Badow," Badow being above named as such—"de Padue," "de Treagox," seem used in the same way as villages, townships, or manors. Also, we have "John the younger" and "William son of Godwin:" the latter being, apparently, a name known as well, if not better, than his Christian name.

"Ralph Mareschal holds 10*l.* land in Badow, by serjeantry of keeping the King's palfreys, and be fined half a mark."

"William de Cheveli holds in Borham 10*l.* land, in serjeantry of the butler, but there is no other fine."

No one can read the first of these latter sections without reading it as "*Ralph the general* holds lands by serjeantry, by reason of his office of *Master of the Horse*." Serjeanty being also confined to the King's nobles, speaks for the surname of Mareschal being derived from the party's profession.

The second section may possibly be construed as "William of the Knighthood (Cheveli being, I think, a contraction for Chevalier) holds in serjeantry, as butler." (*Of* is here, I think, a misprint, as lands in great or petit serjeanty could only be holden from the King.)

I shall now add a few more extracts from the Rolls of the Assize held at Clerkenwell, also before Geffry Fitz Peter and his associates, for Middlesex.

"In the wood of Stanmore a certain man was found murdered, and before his burial Maud de ——— recognized him as her son; Gilbert the Cooper, is suspected of his death.

"Godsune has fled away, being of bad character, and is now remaining near Hggesw beyond franc pledge upon Gilbert's land."

"Jordan de Hormel appeals Walter Hacun that, contrary to the peace of the King, he wickedly and feloniously attacked him in the house of Strangie, near Skenton, and wounded

him in the head and hand, and he showed his wounds, and offered to prove it by his body."

"Robert de Walur appealed Brien le Carver and Baldwin Littleboy that by force, and contrary to the peace of the King, they assaulted him and cut off his thumb, and robbed him of his cloak, value 5s., and apparel belonging to his mistress, to the value of 40s."

Here we have further instances of names arising from the trade, profession, or place of residence or birth; and also we see that the linking word "de" is occasionally dropped, as in "Walter Hacun"—one instance apparently from the stature, as "Baldwin Littleboy."

If time and space allowed, I have no doubt that illustrations might here be found of names taking their origin (as before mentioned in the extract from Camden) from the colour, quality, stature, learning, &c. of the party. Enough, however, I think, has been given to shew that the extract given from Camden has relation to quite as early a period as the present extracts; and that they go to prove that the utmost use that ever has been made of surnames is for the better identifying parties; and that where no fraud is intended, and no particular ceremony required, a person may assume what name he likes.

In illustration of the still prevailing practice in Scotland of women keeping their maiden names, I give an extract of deaths, cut from a Glasgow paper; and Glasgow being next to the Metropolis in size and refinement, if any change had taken place, one would think it would have shewn itself there.

"At Gourrock, on the 14th instant, Mrs. Elizabeth Thomson, relict of the late Dr. John Baird, Glasgow.

"At Rothesay, on the 18th instant, Mrs. Mary Sharp, wife of Mr. James Macfie, portioner there, in the 58th year of her age.

"At Lochgollhead, Argyllshire, on the 1st inst., in the 97th year of her age, highly respected, and deeply regretted, Janet Clark, spouse to the late Alexander Campbell, Esq.

"At Greenock, on the 5th inst., in the 86th year of her age, Mrs. Agnes Cuthbert, relict of the late Walter Ritchie, Esq."

M.

## PARLIAMENTARY RETURNS.

### LORD CHANCELLORS.

Returns to an Order of the Honorable the House of Commons, dated 14th May, 1836; for

An Account of the names of the several Ex-Lord Chancellors of England and Ireland, who now receive, or are entitled to receive Pensions, as having been Lord Chancellors; stating the date of appointment, or several appointments, as Chancellors; the time each actually held office; the dates of resignation or loss of office; the dates from which they respectively re-

ceived, or are entitled to receive, their pensions; the amount of such yearly pensions, and from what fund paid; stating also the acts of parliament under which they respectively receive their pensions.

### England.

Earl of Eldon, appointed 14th April, 1801, and 1st April, 1807. Held office from 14th April, 1801, to 7th February, 1806; and from the 1st of April, 1807, to 30th April, 1827; being 24 years and 329 days. Pension of 4000*l.* commenced 7th Feb. 1806, and again on the 30th April 1827, which is paid out of the Consolidated Fund, per 39 G. 3, c. 110.

Lord Lyndhurst, appointed 30th April, 1827, and 21st Nov. 1834. Held office from 30th April, 1827, to 22d Nov. 1830; and again from 21st Nov. 1834, to 23d April, 1835, being 4 years. Entitled to 4000*l.* pension, per 39 Geo. 3, c. 110, and to 1000*l.* per 2 & 3 W. 4, c. 111, payable out of the Consolidated Fund.

Lord Brougham and Vaux, appointed 22d Nov. 1830, and held office till 21st Nov. 1834, being 4 years. Pension 4000*l.*, per 39 G. 3, c. 110, and 1000*l.* per 2 & 3 W. 4, c. 111.

### ASH. BULLER.

Office of Comptroller General,  
Exchequer, 20th May, 1835.

### Ireland.

Thomas Lord Mannors, appointed 1st May 1807, and held office till 1st Nov. 1827, being 20½ years. Pension, 3692*l.* 6s. 4d., per 40 G. 3, c. 69, payable out of the Consolidated Fund.

Sir Edward B. Sugden, appointed 6th Jan. 1835, and held office till 30th April, 1835, being one quarter and twenty-four days. Pension of 3692*l.* 6s. 4d., paid out of the Consolidated Fund, per 40 G. 3, c. 69.

The pension granted to Lord Plunkett is suspended, in consequence of his now holding the office of Lord Chancellor of Ireland.

JOHN SMITH.

Vice Treasurer's Office, Dublin Castle,  
18th May, 1835.

F. BARING.

Whitehall, Treasury Chambers,  
21st May, 1835.

## INCORPORATED LAW SOCIETY.

### ANNUAL MEETING.

THE Annual General Meeting of this Society was held on the 30th June, and was numerously attended.—Mr. Freshfield, M. P., in the Chair.

The Report of the Committee of Management having been read, great satisfaction was expressed by the meeting on the state of the

Society. It appeared that the present number of members amounts to 1015, and that there was a surplus of income over expenditure of nearly 10000.—That the library is considerably increased by numerous donations from the Judges, Barristers, and the Members of the Society, as well as from Authors; and the legal department being now nearly completed, the Committee were directing their attention to books of County History and Topography.—That a regulation has been made for the production of any scarce works which may be required in any of the Courts of Law or Equity in London or Westminster. The Lectures for the last season appear to have been well attended by the members, and their articulated clerks and others.

The Report detailed the various measures adopted by the Committee for the benefit of the Profession in general, as well as the Society in particular, and the proceedings which had been taken against persons for mal-practice, and in opposing the admission of improper persons. The usual elections took place, and the following is the List of the

#### COMMITTEE OF MANAGEMENT.

Mr. Frere, *Chairman.*

Mr. Tooke, M. P., *Deputy Chairman.*

Mr. Adlington.	Mr. W. Lowe.
Mr. Amory.	Mr. Martineau.
Mr. B. Austen.	Mr. Metcalfe.
Mr. R. R. Bayley.	Mr. Iltid Nicholl.
Mr. Brundrett.	Mr. E. R. Pickering.
Mr. M. Clayton.	Mr. C. Ranken.
Mr. Foss.	Mr. Shadwell.
Mr. Freshfield, M. P.	Mr. Sweet.
Mr. J. Hall.	Mr. Teesdale.
Mr. R. Harrison.	Mr. R. White.
Mr. Holme.	Mr. Wilde.

#### MEMBERS ADMITTED.

*July, 1835.*

Smith, William Henry, 69, Chancery Lane.  
 Davenport, John Marriott, Oxford.  
 Field, Benjamin, Lincoln's Inn Fields.  
 Kilgour, George Alexander, Red Lion Square.  
 Wilton, George Pleydell, Gray's Inn.  
 Hay, George Gun, Sloane Street.  
 Williams, William, Alfred Place, Bedford Square.  
 Ommanney, Francis, Garden Court, Temple.

#### BARRISTERS CALLED.

*Trinity Term, 1835.*

#### LINCOLN'S INN.

John Horne, Esq.  
 Digby Latimer, Esq.  
 William Grave, Esq.  
 John Hooper, Esq.  
 John Osborne, Esq.  
 Samuel Raymond, Esq.  
 Edward James, Esq.  
 John Bell, Esq.

#### INNER TEMPLE.

Richard Ogle, Esq.  
 Thomas Watinsley, Esq.  
 William Hull Terrell, Esq.  
 Charles Alexander Wood, Esq.  
 Robert Emilius Wilson, Esq.  
 Thomas Hull Terrell, Esq.  
 William Hopkins Harrison, Esq.  
 Charles Wilkins, Esq.  
 Thomas Henry Travis, Esq.  
 John Hubback, Esq.  
 Charles Houbton Grove, Esq.  
 William Cooper Cooper, Esq.

#### MIDDLE TEMPLE.

Bernard Hale, Esq.  
 John Alleyne Beckles, Esq.  
 Philip Henry Roake, Esq.  
 John Hardy, Esq.  
 David Deady Keane, Esq.

#### GRAY'S INN.

James M'Auley, Esq.  
 John Morland, Esq.  
 William Beetham, Esq.  
 Edmund Walker, Esq.  
 Simon Ansley Ferrall, Esq.  
 Thomas Sydney Smyth, Esq.

#### MASTERS EXTRAORDINARY IN CHANCERY.

*From June 19, to July 17, 1835, both inclusive, with Dates when gazetted.*

Benn, Thomas, Rugby, Warwick. June 23.  
 Carter, Frederick Roger, Exeter. June 30.  
 Davis, Valentine, Haverfordwest. June 23.  
 Freer, Edward Major, Leicester. June 30.  
 Hamel, Felix John, Tamworth, Stafford. July 3.  
 Hookins, John, Devizes. July 3.  
 Howard, James, Preston. July 7.

#### DISSOLUTIONS OF PROFESSIONAL PARTNERSHIPS.

*From June 19, to July 17, 1835, both inclusive, with dates when Gazetted.*

\*• The partners appointed to receive and pay debts, are printed in *Italics*.

Daggers, Wm., and Wm. Winstanley, jun., Liverpool, Attorneys. July 7.  
 Dimes, Wm., and Richard Boyman Boyman, Austin Friars, Solicitors. June 26.  
 Lane, Michael, and Robert Driver Thurgood, Saffron Walden, Essex, Conveyancers. June 19.  
 Seymour, Edward, and William Hayter, Salisbury, Wilts, Solicitors. June 23.  
 Shield, Hugh, and Edward Hall, Poultry, London, Attorneys and Solicitors. Messrs. Shield and Harwood, Poultry. July 3.

Stevens, Christopher, and Charles Beare Longcroft, Havant, Southampton, Attorneys and Solicitors. June 30.

West, Thomas, and James Morris, Crescent, Minorities, Attorneys and Solicitors. June 26.

## LIST OF NEW PUBLICATIONS.

A Digest of the Law of Evidence in Criminal Cases. By H. Roscoe, Esq. Price 1*l.* 1*s.* boards.

A Treatise on the Practice of the Court of Chancery, with an Appendix of Forms and Precedents of Costs, adapted to the last New Orders, and an Index to both Volumes. By J. S. Smith, of the Six Clerks' Office. Vol. II. Price 1*6s.* boards.

The Equity Pleader; comprising all usual Forms of Bills, Answers, Pleas, Demurrers, Interrogatories, &c. By a Chancery Barrister. Price 4*s.* 6*d.* boards.

Reports of Cases in Bankruptcy, in the Court of Review, &c. By E. E. Deacon and E. Chitty, Esqrs. Vol. IV. Part I. Price 9*s.* 6*d.*

Reports of Cases in the Vice Chancellor's Court. By N. Simone, Esq. Vol. VI. Part I. Price 8*s.* 6*d.*

A Manual of the Law and Practice of Registration of Voters in England and Wales, under 2 W. 4. c. 45; more especially adapted to the use of Local Committees, &c. By R. C. Sewell, Esq. Price 4*s.* boards.

Tomlin's Law Dictionary, explaining the Rise, Progress, and present State of the British Law. Fourth edition, embodying the whole of the recent Alterations in the Law. By T. C. Granger, Esq. 2 Vols. 4to. Price 4*l.* 4*s.* bds.

## BANKRUPTCIES SUPERSEDED.

From June 19, to July 17, 1835, both inclusive, with Dates when gazetted.

Gray, Samuel Forfeit, New Bond Street, Chemist & Druggist. June 30.

## BANKRUPTS.

From June 19, to July 17, 1835, both inclusive, with Dates when gazetted.

Andrews, Wm. Henry, Piccadilly, Bookseller, Stationer & Printer. Gibson, Off. Ass.: Reilly, Clements Inn. July 14.

Addison, Wm., Taunton, Somerset, Tea Dealer & Grocer. Fox, Finsbury Circus: Whitmore, Off. Ass. July 17.

Bellinger, Wm., Millbank Street, Westminster, Butcher. Abbott, Off. Ass.: Ford, Great Queen Street, Lincoln's Inn Fields. June 19.

Braddock, John, & Sam. Barnes, Oldham, Lancaster, Machine Makers. Stables & Co., Birmingham: Norton & Co., Gray's Inn: Rowley & Co., Manchester. June 19.

Brittain, James, Kingston-upon-Hull, Hop & Seed Merchant. Shaw, Ely Place, Holborn: Richardson, Hull. June 19.

Bell, John, & Wm. Stewart, Fort Street, Spitalfields, Silk Manufacturers. Hudson, King Street, Cheapside: Lockington, Off. Ass. June 26.

Brown, John, Jesse Taylor, & Solomon Briggs, Huddersfield, York, Fancy Cloth Manufacturers. Richards &

Co., Lincoln's Inn Fields: Clough, Huddersfield. June 26.

Bestian, James, Truro, Cornwall, Merchant. Brooking & Co., Lombard Street: Nicholas, Truro. June 26.

Burnley, John, Wetherby, Spothorth, York, Wood Merchant. Wiglesworth & Co., Gray's Inn: Garnt, Leeds. June 26.

Barton, Wm., Stewart Street, Spitalfields, Silk Manufacturer. Crowder & Co., Mansion House Place: Lockington, Off. Ass. June 30.

Burrows, Isaac, and John Burrows, Piccadilly, Cork Cutters. Edwards & Co., Park Place, St. James's: Richards, Staines, Middlesex: Tarquand, Off. Ass. June 30.

Bayliss, Joseph, Daventry, Northampton, Builder. Hall & Co., Great James Street, Bedford Row: Wardle & Co., Daventry. July 3.

Benson, Tho., York, Chain Maker & Smith. Smith, jun., York: Rushworth, York. July 14.

Carter, Tho., Berwick Street, Soho, Tailor. Green, Off. Ass.: King, Lyon's Inn. June 19.

Corthorn, John, Murkin, March, Isle of Ely, Cambridge, Sheep Salesman. Gem & Co., Carey Street, Lincoln's Inn: Fisher, St. Ives, Huntingdon. June 19.

Clark, Wm., Kingston-upon-Hull, Hop Merchant. Wilkinson, Hull: Meredith & Co., Lincoln's Inn. June 23.

Clishby, Geo., Hungerford Market, Middlesex, Corn Dealer & Seedsman. Gibson, Off. Ass.: M'Leod & Co., London Street, Fenchurch Street. June 26.

Chawner, Wm., Hiuclley, Leicester, Tea Dealer & Grocer. Stone, Leicester: Messrs. Baxter, Lincoln's Inn Fields: Messrs. Cowdell & Co., Hinkley. July 3.

Cates, John, jun., Margaret Street, Cavendish Square, Surgeon & Apothecary. A'Beckett, Golden Square: Clark, Off. Ass. July 7.

Coats, John, Carlisle, Basinghall Street, Man Milliner. Robinson, Queen Street Place: Tarquand, Off. Ass. July 14.

Chennells, Jonathan, Limehouse Hole, Wine Merchant. Barker & Co., Mark Lane: Goldmid, Off. Ass. July 17.

Compees, Francis, & Wm. Compees, Luton, Bedford, Straw Hat Manufacturers. Turner, Clifford's Lane: Johnson, Off. Ass. July 17.

Corbett, Tho., West Ham, Essex, Nurseryman, Seedsman, & Florist. Green, Off. Ass.: Bolton, Austin Friars. July 17.

Cole, Wm., & Henry Goodman, Northampton, Tailors & Drapers. Asstes & Co., Raymond Buildings, Gray's Inn: House, Northampton. July 17.

Deacon, John, Berners Street, Oxford Street, Upholsterer. Gibson, Off. Ass.: Bishop, Serjeants' Inn, Chancery Lane. July 7.

Daniel, Jeremiah, Bath, Coal, Wood, & Timber Merchant. Messrs. Bayfoot, Temple: Stallard, Bath. July 10.

Farbrother, Edmund, Oxford, Wine Merchant. Barker & Co., Mark Lane: Johnson, Off. Ass. July 10.

Fairclough, Rob., Farrington, Lancaster, Tanner. Chester, Staple Inn: Armstrong, Preston. July 14.

Fenwick, Nicholas, North Shields, Northumberland, Common Brewer. Owen & Co., Mincing Lane: Dale, North Shields. July 17.

Gray, Wm., Lambeth New Market, & Lambeth Marsh, Surrey, Cheesemonger & Baker. Freeman & Co., Coleman Street: Goldmid, Off. Ass. June 19.

Gough, Rob., Congressbury, Somerset, Land Surveyor. Clarke & Co., Lincoln's Inn Fields: Phillips, Bristol. June 19.

Gage, John, Dulverton, Somerset, Carpenter. Bennett, Featherstone Buildings, Holborn: Goveat, Tiverton. June 19.

Greenway, James, Plymouth, Devon, Merchant. Tacher, Exeter: Shaw, Ely Place. June 23.

Grace, Wm., Langley, Eastcheap, London, Orange Merchant. Abbott, Off. Ass.: Martin, Vintners' Hall, Upper Thames Street. June 30.

Goodwin, John, Baitle, near Hastings, Sussex, Innkeeper. Green, Off. Ass.: Turner & Co., Basing Lane. July 7.

Grant, Patrick, & John Bell, Strand, Printers. Becher, Off. Ass.: Hodgson & Co., Salisbury Street, Strand. July 14.

Garratt, Rich., Woodstock Street, Oxford Street, Lead Merchant. Gibson, Off. Ass.: Carlton, Chancery Lane. July 17.

Hewes, Philip, Bury St. Edmunds, Suffolk, Grocer and Tallow Chandler. Weymouth, Lower John Street, Golden Square. June 19.

Hancock, Ebenezer, Sheffield, York, Hackneyman. Baily & Co., Chancery Lane: Sainsbury, Sheffield. June 23.

Hopewell, Wm., Middleton Place, Lenton, Nottingham, Joiner & Builder. Cartwright, Nottingham: Owen, Raymond Buildings, Gray's Inn. July 7.

Hoode, Joseph, Englefield Green, Egham, Surrey, Grocer, Corn Chandler, & General Dealer. Spinks, Temple: Lockington, Off. Ass. July 10.

Hunt, Rob., Spitalfields, Silk Manufacturer. Crowder & Co., Mansion House Place: Clark, Off. Ass. July 17.

Inman, Wm., Birmingham, Warwick, Wire Worker. Newton, South Square, Gray's Inn: Harrison, Birmingham. June 19.

Imeson, Henry, Tooley Street, Southwark, Ironmonger. Becher, Off. Ass.: Oliver, Cheapside. July 17.

James, Joseph Gilling, Bucklersbury, London, Wine Merchant. Turner & Co., Basing Lane, Cheapside: Whitmore, Off. Ass. June 26.

- Jones, George, Leicester Street, Leicester Square, Auctioneer & Picture Dealer. *Evans*, Took's Court, Curator Street: *Goldmid*, Off. Ass. June 30.
- Knowles, Francis, Lawrence Lane, London, Innkeeper and Wine Merchant. *Abbott*, Off. Ass.: *Barker & Co.*, Mark Lane. July 14.
- Lea, Charles, Haighton, Flint, Miller & Corn Dealer. *Blackstock & Co.*, Temple: *Harper*, Whitchurch, Salop. June 19.
- Lee, Peter, Winchester, Scrivener. *Calgar*, Winchester: *Bridger*, Finsbury Circus. June 23.
- Lyndon, Geo. Wm., Gerrard Street, Soho, Wholesale Jeweller. *Hopwood & Co.*, Chancery Lane: *Graham*, Off. Ass. June 26.
- Lyness, Wm. Henry, St. Helens, Lancaster, Surgeon and Apothecary. *Edwardsell*, Liverpool: *Blackstock & Co.*, Temple. June 30.
- Lloyd, Robert, Birmingham, Victualler. *Norton & Co.*, Gray's Inn Square: *Harrison*, Birmingham. June 30.
- Livesey, Tho., sen., George Livesey, & Tho. Livesey, jun., Cowpe, Burry, Lancaster, Woollen Manufacturers. *Norris & Co.*, Great Ormond Street: *Heaton*, Rochdale. June 30.
- Lowe, Geo. John, Stourbridge, Worcester, and of the City of Worcester, Mail Contractor & Horse Dealer. *Smith*, Chancery Lane: *Hill*, Kidderminster & Worcester. July 3.
- Largie, John, Liverpool, Broker. *Thompson*, Liverpool: *Cookey & Co.*, Southampton, Buildings, Chancery Lane. July 3.
- Mealey, John, Cranbourn Street, Leicester Square, Fringe Manufacturer. *Oliver*, Cheapside: *Cannan*, Off. Ass. June 30.
- M'Coy, Edward, Well Court, Queen Street, London, and of Irony's Place, Hackney, Middlesex, Stationer. *Wise*, St. Swithin's Lane, Lombard Street. *Graham*, Off. Ass. July 3.
- Maine, Sam., St. John Street, Clerkenwell, Carrier. *Hewitt*, Tokenhouse Yard. *Johnson*, Off. Ass. July 3.
- Minton, Tho., Beak Street, Regent Street, Grocer & Tea Dealer. *Tribe*, Great Russell Street, Bloomsbury: *Cannan*, Off. Ass. July 7.
- Macknight, James, Dawley, Salop, Draper & Grocer. *Clarke & Co.*, Lincoln's Inn Fields: *Bennett*, Wolverhampton. July 7.
- MacKellar, Daniel, Broad Street Buildings, Merchant. *Pelle*, Old Broad Street: *Goldmid*, Off. Ass. July 10.
- Musciwhite, Tho., Devizes, Wilts, Saddler. *White*, Pewsey, Wilts: *Hutler & Co.*, Raymond Buildings, Gray's Inn. July 17.
- Nicks, John, Warwick, Carpenter & Builder. *Burbury & Co.*, Warwick & Leamington: *Meyrick & Co.*, Red Lion Square. July 17.
- Powell, Henry, Newington Butts, Surrey, Linen Draper. *Bell & Co.*, Bow Churchyard: *Clark*, Off. Ass. June 19.
- Pickford, Tho., Whitechapel, Rectifier. *Bennett & Co.*, Scott's Yard, Lombard Street: *Johnson*, Off. Ass. June 19.
- Farker, Henry, Chichester, Wine and Spirit Merchant. *Sewton & Co.*, Chichester: *Sewton*, Great James Street, Bedford Row. June 19.
- Priestley, Charles, Fishergate, York, Glass Manufacturer. *Williamson & Co.*, Verulam Buildings, Gray's Inn: *Blanchard & Co.*, York. June 19.
- Pearson, Charles, Greenwich, Kent, Manufacturing Chemist. *Pearce & Co.*, St. Swithin's Lane: *Cannan*, Off. Ass. June 23.
- Price, Alfred, Priest Court, Foster Lane, Cheapside, Straw Bonnet Maker. *Grimaldi & Co.*, Capthall Court, Throgmorton Street: *Johnson*, Off. Ass. June 26.
- Pownall, John, Manchester, Innkeeper. *Denison & Co.*, Manchester: *Walsley & Co.*, Chancery Lane. June 30.
- Parry, Tho., Green Street, Theobald's Road, Tailor and Victualler. *Walker & Co.*, King's Road, Bedford Row: *Goldmid*, Off. Ass. July 10.
- Restell, Wm. Tho., Budge Row, Watling Street, and of Bromley, Middlesex, India Rubber Manufacturer, and Dealer in India Rubber. *Tribe*, Great Russell Street, Bloomsbury: *Goldmid*, Off. Ass. June 26.
- Ravencroft, John, jun., Manchester, Wine and Spirit Merchant. *Adlington & Co.*, Bedford Row: *Makinson*, Manchester. June 26.
- Richardson, Walter, King Street, Covent Garden, Wine Merchant. *Green*, Off. Ass.: *Recke & Co.*, Charles Street, Covent Garden. July 7.
- Rhodes, Henry, Manchester, Spirit Dealer & Victualler. *Ware*, Southwark: *Morris & Co.*, Manchester. July 7.
- Rutter, Obadiah Newell, Lymington, Southampton, Wine & Brandy Merchant. *Thomson*, Rolls Buildings, Chancery Lane: *Brown*, Lymington. July 14.
- Stable, Samuel Montague, Fenchurch Street, Wine Merchant. *Groom*, Off. Ass.: *Tribe*, Great Russell Street, Bloomsbury. June 19.
- Smith, Robert, Gravesend, Kent, Bricklayer and Builder. *Groom*, Off. Ass.: *Smith & Co.*, Serle Street, Lincoln's Inn. June 23.
- Simmons, George, King's Cross, St. Pancras, Middlesex, Surgeon & Apothecary. *Becher*, Off. Ass.: *Billing*, King Street, Cheapside. June 23.
- Somers, James, Oxford Street, Cheesemonger & Pork Butcher. *Becher*, Off. Ass.: *Goderd*, Fumival's Inn. June 30.
- Shepley, Frederick, Farnham, Surrey, Hop Dealer. *Abbott*, Off. Ass.: *Phillips*, Walbrook. June 30.
- Serjeant, John, Liverpool, Window Blind Manufacturer. *Dean*, Plagsrave Place, Temple Bar: *Gregory*, Liverpool. July 3.
- Solloway, John, Leamington Priors, Warwick, Innkeeper. *Porter & Co.*, New Court, Temple: *Morris*, Warwick. July 3.
- Sievers, Ernest George Frederick, Carpenter Street, Mount Street, Grosvenor Square, & Upper Ranelagh Street, Belgrave Square, Coal Merchant. *Gore*, South Molton Street: *Clark*, Off. Ass. July 7.
- Sternberg, Geo., Coleman Street, Merchant. *Platts*, Southampton Buildings, Chancery Lane: *Turquand*, Off. Ass. July 7.
- Southern, Rich. Pollitt, Heaton Norris, Lancaster, Wheelwright. *Coppock & Co.*, Stockport: *Coppock*, Furnival's Inn. July 7.
- Solloway, John, Leamington Priors, Warwick, Innkeeper. *Porter & Co.*, Temple: *Morris*, Warwick. July 14.
- Tapscott, Geo., Ottery St. Mary, Devon, Carrier. *Messrs. Burford*, Temple: *Gidley & Co.*, Exeter. June 19.
- Turner, Geo. Exton, Cheltenham, Gloucester, Auctioneer & Commission Agent. *Mentle*, Great Surrey Street: *Hardy*, Bath. June 23.
- Turley, Wm., Coseley, Sedgley, Stafford, Canal Carrier. *Whitehouse*, Castle Street, Holborn: *Holland*, West Bromwich. July 7.
- Tufnell, Nathaniel, & Sam. Tufnell, York Street, Middlesex Hospital, Meitern & Tallow Chandlers. *Tribe*, Great Russell Street: *Graham*, Off. Ass. July 10.
- Thompson, Rich., Star Court, Broad Street, London, Warehouseman. *Stevens & Co.*, Little St. Thomas Apostle. *Johnson*, Off. Ass. July 17.
- Wilson, Tho., Barnard's Inn, Holborn, Money Scrivener & Builder. *Carlow*, Chancery Lane: *Cannan*, Off. Ass. June 19.
- White, Tho., Kingston-upon-Hall, Grocer. *Lightfoot & Co.*, Hull: *Walsley & Co.*, Chancery Lane. June 19.
- Wood, John Martin, Norwich, Painter, Glasier, Plumber, & Paper Hanger. *Taylor*, Featherstone Buildings, Holborn: *Skipper*, Norwich. June 19.
- Wrigley, Joseph Knowl, Saddleworth, York, Woollen Cloth Merchant & Manufacturer. *Fox & Adam*, Old Jewry: *Jacob & Co.*, Huddersfield. June 23.
- Wallis, John, Tooley Street, Surrey, Linen Draper. *Gross*, Off. Ass.: *Jones*, Sise Lane. June 26.
- Whitelocks, James, Watnall, Nottingham, Bricklayer and Builder. *Austin & Co.*, Raymond Buildings, Gray's Inn: *Percy & Co.*, Nottingham. June 26.
- Watton, John, Upper Bedford Place, Surgeon & Apothecary. *Gibson*, Off. Ass.: *Weston & Co.*, Great James Street, Bedford Row. July 3.
- White, Benj., Reading, Berks, Printer, Bookseller, and Stationer. *Ford*, Great Queen Street, Lincoln's Inn Fields: *Whitmore*, Off. Ass. July 7.
- Whittington, Geo. Thomas, New London Street, Merchant. *Abbott*, Off. Ass.: *Fremas & Co.*, Coleman Street. July 17.
- Young, Tho., Newcastle-upon-Tyne, Grocer. *Gibson*, Newcastle-upon-Tyne: *Bosnie & Co.*, Frederick's Place, Old Jewry. June 26.

# The Legal Observer.

Vol. X. SATURDAY, AUGUST 1, 1835. No. CCLXXXIII.

— "Quod magis ad Nos  
Pertinet, et nescire malum est, agitamus.

HORAT.

## ON LIMITATIONS TO THE SEPARATE USE OF A WOMAN.

THE subject of limiting property to the separate use of married women has repeatedly occupied our attention of late. The cases of *Newton v. Reid*,<sup>a</sup> *Woodmeston v. Walker*,<sup>b</sup> and the more recent case of *Massey v. Parker*,<sup>c</sup> have almost entirely altered the former law on this head; and we have therefore taken every opportunity to state all the cases at length, and to consider their effect on the practice of Conveyancing.<sup>d</sup> Two cases have just been reported, both decided by the present Vice Chancellor, which it is now our duty to consider; and it will be seen that that learned Judge does not seem disposed to alter or qualify his opinion, already expressed in *Newton v. Reid*, but rather to adhere, not only to that, but to the opinions expressed by Lord Brougham, L. C., in *Woodmeston v. Walker*, and by Sir C. Pepys, M. R., in *Massey v. Parker*. We shall make no apology for stating these cases fully, considering the importance of the subject.

In the first,<sup>e</sup> which was heard on the 16th of April, 1834, the circumstances were as follows:

By the settlement made in contemplation of the marriage between Robert Giveen and Caroline Lambert, dated the 26th of July 1824, the lady assigned and transferred to trustees, a messuage in Wimpole Street, and certain sums of money and stock, in trust, after the marriage, to receive the income of the trust property during her life, and pay the same into her hands, for her own sole and separate use and benefit, or as she should by writing under her hand.

*notwithstanding her coverture*, direct or appoint, but no payment to be made by anticipation, or before the same should become due. And it was declared that the said income should not be subject or liable to the power, control, debts, forfeiture, intermeddling, engagements, or incumbrances of Robert Giveen her intended husband, in any manner whatsoever, and that the receipt or receipts of Caroline Lambert, signed with her own hand, or of such person or persons as she should appoint in writing, should, from time to time, be a good and sufficient discharge or discharges for the same; and from and immediately after her decease, in case Robert Giveen should survive her, in trust to permit and suffer him to receive and take such income, for his life, and, from and after the decease of the survivor of them, in trust for the benefit of all and every the children or child of Caroline Lambert by Robert Giveen or any future husband, after his decease, in manner following: (that is to say) in casethere should be but one such child of Caroline Lambert by Robert Giveen, or any future husband as aforesaid, the whole of such trust premises, and the income thereof, to belong to such child, and to be vested in him or her at the usual periods, and to be transferred or assigned to him or her, at the same time, if the same should happen after the decease of the survivor of them the said Robert Giveen and Caroline Lambert; but if the same should happen in the life-time of them or the survivor of them, then immediately after the decease of such survivor: and if there should be two or more children of Caroline Lambert by Robert Giveen her intended husband, or any future husband, then the whole of such trust premises, and the income thereof, to be for the portions of such two or more children, and to be divided between or among them in equal shares, and the shares to be vested in them respectively at the usual times, and to be transferred or as-

<sup>a</sup> 4 Sim. 141.

<sup>b</sup> 2 Russ. & Myl. 197.

<sup>c</sup> 2 Myl. & K. 181.

<sup>d</sup> See 5 L. O. 491; 7 L. O. 113; 9 L. O. 228. 290; and *ante*, 122.

<sup>e</sup> *Knight v. Knight*, 6 Sim. 121.



signed to them at the same times, if the same should happen after the decease of the survivor of Robert Giveen and Caroline Lambert, but if not, then immediately after the death of the survivor : and in case there should be no child or issue of Caroline Lambert who, under the trusts thereinbefore declared, should become entitled to a vested interest in the trust premises, then in trust that the trustees should, after the decease of the survivor of Robert Giveen and Caroline Lambert, his intended wife, stand possessed of the trust premises, in trust for such persons, &c. as Caroline Lambert, notwithstanding her coverture, by her will (which notwithstanding her coverture, she was thereby, and by the said Robert Giveen, her intended husband, authorized and empowered to make) should bequeath the same, and in default of such bequest, in trust for the next of kin of Caroline Lambert, as if she had died a *feme sole*, or had not been married, according to the statute of distributions. Mrs. Giveen having survived her first husband, married Mr. Knight, who filed his bill to obtain possession of the trust premises.

The Vice Chancellor said :—" The settlement does not contain any declaration of trust in favor of this lady, in case her intended husband should die in her life-time. The first limitation is to the trustees, in trust, during the life of Caroline Lambert, to receive the interest, dividends, and annual produce of the trust property, monies, stocks, funds, and securities, and pay the same into the hands of the said Caroline Lambert; and the trust next declared is to take effect from and immediately after the decease of the said Caroline Lambert. So that there is no expression of trust for her, during that part of her life that might endure beyond the life of her intended husband. Consequently we must look at the first words in the settlement as constituting a trust for the whole of her life. Then words of modification and restriction are added : " To and for her own sole and separate use, or as she shall, by writing under her hand, notwithstanding her coverture, appoint, but no payment to be made in anticipation, or before the same shall become due." The words, " notwithstanding her coverture," must mean the coverture then in contemplation : and then it is declared that, " the said income, interest, dividends, and annual produce, shall not be subject or liable to the power, control, debts, intermeddling, or engagements of the said Robert Giveen, her intended husband." That

clause, manifestly alludes to the intended coverture. It appears to me, therefore, on the face of this instrument, that all the machinery by which the income of the trust property is secured for the separate use of this lady, without anticipation, was introduced into the settlement with reference to to that marriage only, which she was then about to contract. *Whatever may be thought of Newton v. Reid, it is supported by the decision of the Lord Chancellor in Woodmeston v. Walker.* In my opinion, this is the case of a trust created for the life of this lady, with limitations and restrictions which were binding during her marriage with her first husband, but not beyond it; and, consequently, her present husband is entitled to receive and dispose of the trust property during the coverture."

It will be seen that his Honour did not advert to the expressions in the settlement to children by a future husband, but dwelt only on the portion of the settlement which applied to the interest of the wife in the income of the trust property. It will also be noticed, that he mentioned the cases of *Newton v. Reid*, and *Woodmeston v. Walker*, without disapprobation.

The second case<sup>1</sup> was heard as late as the 20th of January. In that case the testator charged his lands with the payment of 10,000*l.*, Barbadoes currency, at lawful interest from the time of his death, to the use that the actual interest to accrue thereon, should be for the sole and separate use of his daughter, Jane Abel Lane, the wife of John Bradford Lane, for her life, free and independently of the debts, control, or engagements of *her husband*, and for which her receipt alone should be a discharge. Mr. Lane survived the testator, but died leaving his widow surviving, who afterwards intermarried with the plaintiff, who filed a bill praying that the sum of 10,000*l.*, Barbadoes currency, might be paid to him; to which a demurrer was put in.

Mr. Knight and Mr. Blenman, in support of the demurrer.

There is no case that decides that an enduring trust may not be created for the separate use of a married woman. There is a *dictum* to that effect in *Massey v. Parker*, 2 M. & K. 174; but it was extra-judicial: the point decided was, that the language of the will did not create a trust for the separate use of the testatrix's granddaughter. *Woodmeston v. Walker*, 2 Russ. & M. 197, merely decides, that where a

<sup>1</sup> *Benson v. Benson*, 6 Sim. 126.

trust is created for the separate use of a single woman, with a clause against anticipation, she may alienate the property before marriage. In *Barton v. Briscoe*, Jac. Rep. 603, it was decided, that the clause restraining a married woman from anticipating her separate property, operates during the continuance of the coverture only. That clause is of modern invention; and trusts for the separate use of married women, and restraints on alienation by them, are wholly independent of each other. *Acton v. White*, 1 Sim. & Stu. 429; *Adamson v. Armitage*, 19 Ves. 416; — *v. Lyne*, 1 Yo. 562; and *Anderson v. Anderson*, 2 M. & K. 427; are all of them cases in which the clause against anticipation would have been inoperative; but effect was given to the trust for separate use.

Mr. Kindersley and Mr. Chandless for the will. There are two points in this case, on either of which, if we are right, this demurrer must be overruled: 1st. by the language of the will, the exclusion of the marital right is confined to J. B. Lane, and is not extended to a second husband. The dicta in *Massey v. Parker*; and the decisions in *Tyler v. Lake*, 4 Sim. 144, and 2 Russ. & M. 183; and *Knight v. Knight*, 6 Sim. 121; show, that in order to exclude the marital right, the intention must be clear. Here the testator charges his plantation, called Windsor, with the payment of 10,000*l.*, “the interest to be for the sole, separate, and exclusive use and benefit of my daughter, Jane Abel Lane, the wife of John B. Lane, for and during her natural life, totally free and independent of the debts, control, or engagements of her husband.” This plainly excludes the marital right of that husband only whom the testator has just named. 2dly. Supposing that there was an intention apparent on the face of the will, to exclude the marital right, not only of J. B. Lane, but of all future husbands of this lady, that intention could not prevail. The two decisive cases on this point, are *Woodmeston v. Walker*, and *Massey v. Parker*. The reasoning of the Master of the Rolls in the latter case, is extremely important. See 2 M. & K. 182. And though it was said that the opinion expressed by that learned Judge was extra-judicial, because the words of the will were not sufficient to exclude the marital right; yet his Honor held, that if the intention to give the income of the property for the separate use of the grand-daughter had been sufficiently expressed, still, upon principle, he should have had no doubt that the right of the husband

was not excluded. In *Adamson v. Armitage*, *Anderson v. Anderson*, and — *v. Lyne*, the question was not brought to the attention of the Court. The law was taken to be settled, and the point here raised was not discussed.

After further argument (to which we shall hereafter advert,) the Vice Chancellor said: “I should be extremely unwilling to decide upon the second point, unless I were obliged to do so. The language of the will in this case relieves me from that necessity: for I think that the words of the will must be taken to create a gift for the separate use of this lady, during the life of her first husband only. The testator, after charging his plantation with the 10,000*l.*, directs the annual interest to be to and for the separate use of his daughter Jane, the wife of John Branford Lane, for her life, totally free and independent of the debts, control, or engagements of her husband. This means, according to the plain sense of the words, her husband, J. B. Lane, and no other person. The will then proceeds as follows: “And from and after the death of my said daughter, Jane Abel Lane, I do give and bequeath and dispose of the said sum of 10,000*l.* unto and amongst all and every the children of my said daughter by her said husband, the said J. B. Lane.” That fixes the testator’s meaning to be, the husband whom he had before spoken of. The will then goes on thus: “Save and except the child who shall be entitled to and become possessed of Castle Grant plantation, situate in the parish of St. Joseph in this island, and of which the said John Branford Lane is now seised and possessed for the term of his natural life, to be equally divided between and amongst them, share and share alike, at the age of twenty-four years, if sons, and at the said age of twenty-four years or day or days of marriage, if daughters, whichever event shall first happen; and should any or either of the children of my said daughter, being a son or sons, depart this life under the said age of twenty-four years, or, being a daughter or daughters, shall depart this life under the said age of twenty-four years and unmarried, then and in such case the part, share, and proportion of him, her, or them so dying, shall go to and be equally divided amongst his, her, or their surviving brothers and sisters, and be paid at the same time with his, her, or their original part, share, and proportion. Provided always, and my will and meaning is, that in such survivorship, the child taking, or being entitled to

take the said Castle Grant plantation, shall not be included or participate therein: and should it so happen that all the children of the said Jane Abel Lane shall depart this life, being sons, under the age of twenty-four years, or daughters, under that age and unmarried, then I do direct that the said sum of 10,000*l.* shall sink in my said plantation called Windsor, for the benefit of my son Thomas; or should it happen that there should be survivor of the children of my said daughter, and such survivor should take or be entitled to take the said Castle Grant plantation, in such case the said sum of 10,000*l.* shall not go or belong to such survivor, but the same shall, in manner as aforesaid, sink in the said plantation for the benefit of my said son Thomas and his heirs. And I do direct, and my will and meaning is that, should any or either of the children of my said daughter attain the age of twenty-four years, being a son or sons, or being a daughter or daughters, attain that age or be married in her lifetime, that his, her, or their part, share, and proportion in the said sum of 10,000*l.*, shall be a vested interest, although the payment thereof be postponed until after her death, save and except the child who shall take or be entitled to take the Castle Grant plantation, who, as I have hereinbefore declared, is not to participate in the said sum of 10,000*l.*; but if, at the time of the death of my said daughter, any or either of her children entitled as hereinbefore directed, to a part, share, or proportion of the said sum of 10,000*l.*, shall not be of the age of twenty-four years, if sons, and shall not be of the like age or married, if daughters, then I do direct that, until those events shall happen, the annual interest to accrue on the said sum of 10,000*l.* shall be paid, applied, and disposed of for and towards their maintenance and education, in the proportion of their respective shares of and in the said principal sum of 10,000*l.*” It seems, therefore, that the testator took it for granted that the husband would outlive his daughter, and that it never occurred to his mind that his daughter might survive her husband. I am not, therefore, under the necessity of deciding the second point, for I am of opinion that, by the words of this will, no trust was created for the separate use of this lady, except during her marriage with J. B. Lane.

In the argument of the case the question was discussed, whether an unmarried woman could be protected in equity by creating a trust for her separate use; and the Vice-

Chancellor seemed rather inclined to consider that she could be so protected, and said that *Newton v. Reid* did not interfere with that question; however this point was not decided. It would certainly be contrary to all former opinions on the subject, to hold that she could not.

We now leave this very important subject, with the hope that it may come before a higher tribunal, and that rules may be laid down which will enable practitioners to advise their clients with some certainty. At present the state of the law is such that it is very difficult to know what limitations would be supported by the Courts.

## REVIEW.

*A Treatise on the Practice of the Court of Chancery. With an Appendix of Forms and Precedents of Costs, adapted to the last New Orders; and an Index to both Volumes.* By John Sidney Smith, of the Six Clerks' Office. London: Saunders and Benning.

WE noticed the first volume of Mr. Sidney Smith's *Chancery Practice* some time ago (see vol. 7, p. 185). The second volume has just been published, and completes the work. We think Mr. Smith has executed his task with care and ability. He has stated the practice in the various points which we have had an opportunity of examining, with accuracy and clearness; and has furnished many practical directions of a valuable nature which we do not recollect to have seen in any other work. It would be out of place to give any lengthened extracts, but it is due to the Author to state the following from his preface:

“In the first volume, I have traced the progress of a Chancery suit, from its commencement to a decree, noticing such interlocutory matters as usually arise during that period of a cause. The present volume explains the manner in which a decree is varied or corrected, and the several proceedings necessary to satisfy the inquiries directed by it, and to bring the suit to a conclusion. In investigating these subjects, I have been led to consider the course of proceeding on a petition of appeal; or of rehearing; on an appeal to the House of Lords; on a bill of review; or on a bill in the nature of a bill of review; also the steps necessary to be taken where an issue, a case, or an action has been directed, and the proceedings of the most frequent occurrence in the master's office, together with the manner in which a master's report may be accepted to, or confirmed; and the suit heard on further directions. To these I have added a chapter on the practical part of the subject of an award.”

"The original plan of this work has been extended, by the addition of an appendix of Forms, and precedents of Bills of Costs, adapted to the alterations made by the New Orders. I have been induced thus to extend my treatise, at the request of several of my professional friends, as well as in consideration of the importance of technical accuracy, in many of the formal proceedings of a suit. An apparently trifling mistake often involves most serious results, as, for example, by an error in an affidavit of service, a party may escape an attachment, while an irregularity in the caption of an answer may expose a defendant to the consequences of a contempt. In selecting the forms, I have confined myself chiefly to those where accuracy is of paramount importance, and where the adaptation of such forms to ordinary cases is simple, and have preferred those which are required by solicitors in the country, as their facilities for information are abridged by their distance from the courts. With this view I have inserted the forms of the different captions to answers sworn before commissioners in the country; the returns to commissions to assign a guardian, or for the examination of witnesses, or to take the examination of a party; the headings of depositions and examinations; the forms of affidavits of services of process, and the returns to writs issuing out of Chancery. To secure accuracy in these forms I have submitted them to the different officers of the Court whose duty it is to examine into their correctness, before they are acted upon. The bills of costs have been prepared with a view of assisting the junior members of the profession in making out their charges, and for that purpose are accompanied with explanatory notes. The kindness of my professional friends has enabled me to publish several recent unreported cases, the fidelity of which may be relied upon, as they have been abstracted from the papers in the cause, or from the registrar's book."

We think Mr. Smith, has here faithfully represented the nature of his labours; and we shall now present a short analysis of the contents of the volume, which, along with the former publication, will shew our readers that no part of the duties of the Chancery Practitioner has been left untouched.

1. Introductory matter. 2. Enrolment of a Decree or Order. 3. Proceedings to correct or vary a Decree or a Decretal Order. 4. Rehearing and Appeal to the Lord Chancellor. 5. Appeal to the Lords. 6. Bill of Review. Staying proceedings under a Decree or Decretal Order. 7. Proceedings by a party coming within the jurisdiction after the Decree. 8 Issues from the Court of Chancery. 9. Action at Law. 10. Case at Law. 11. Proceedings in the Master's Office. 12. The manner of taking Accounts in the Master's Office. 13. Interrogatories for the examination of a party. 14. Exa-

mination of a party in the Master's Office. 15. The manner of taking Evidence in the Master's Office. 16. General proceedings in the Master's Office. 17. Sales before the Master. 18. Substituted Purchaser. 19. Proceedings to compel the Completion of a Purchase. 20. Re-sale. 21. Sale by Private Contract. 22. Sale of old Materials. 23. Sale of Timber. 24. Sale of Chambers. 25. Purchase with Trust Property. 26. Opening the Biddings. 27. Lease granted under the sanction of the Master. 28. Administration of Assets. 29. Legacies and Annuities. 30. Interest. 31. Inquiries before the Master. 32. Filing Report. 33. Confirming Report. 34. Exceptions to the Master's Report. 35. Payment of Money into Court after the Decree. 36. Further Directions. 37. Award.

Such is the general scope of the work, to which is appended all the requisite practical forms. Several useful observations are interspersed amongst the precedents of Bills of Costs. We shall conclude with the following extracts from the introduction to that part of the volume.

"There are three leading modes of taxing costs: the first, as between party and party; the second, as between solicitor and client, when the costs are paid out of a general fund; and the third, as between solicitor and client, when the costs are paid by the client, or out of his own fund.

"If the order is simply for the master to tax the costs of the suit, it is always construed to mean as between party and party; and it is not competent for the master to put a different construction upon the order, because the party happens to fill a character which usually entitles him to costs as between solicitor and client. It is very commonly supposed that an executor or trustee will be allowed his costs as between solicitor and client, although the order contains no direction to that effect; but this is an error, the masters being governed by the order, and not being at liberty to extend it. A solicitor, therefore, acting for an executor or trustee, must see that the costs are directed to be taxed, as between solicitor and client."

"The plaintiffs in a suit in Chancery, however numerous, can have but one bill of costs; and the same rule applies to defendants appearing by the same solicitor, however large their number, or however diversified their interests. Thus if one solicitor is concerned for any number of defendants, whatever their interests may be, he is only entitled to one bill of costs for them all, although he may in that bill charge for any separate answers of any of them, or for the employment of separate counsel, for any of them at the hearing. In such cases he can, however, charge only one term fee, and one attendance in Court for all of them. If a town solicitor happens to be concerned for

two different solicitors in the country, or if he himself is properly concerned for some defendants, and as agent for others, the case is different, and he will be allowed to bring in two bills of costs; but he must from the beginning of the suit keep the defences separate, and take double copies of the bill of complaint, &c. as if two solicitors were employed. If he does otherwise, he will be allowed only one bill of costs, and the two solicitors in the country must divide the fees between them. If one or more of several defendants defending by the same solicitor present a petition, and the rest having a different interest to the petitioners cannot join in the petition, but appear upon it to consent or to submit to the order of the Court, and all are ordered to have their costs of that petition, the solicitor can only be allowed one bill of costs, nor can he be allowed for separate attendances in Court, but only for separate briefs, and separate fees to, and attendances upon counsel."

#### PROPOSED AMENDMENT OF THE PRISONERS' COUNSEL BILL.

WE noticed this bill at p. 225, and have now to call attention to the clause by which barristers and attorneys are allowed to assist the accused, on hearings where the magistrates have power *summarily to convict*. It appears to be intended that professional assistance should not be allowed in cases where the magistrates send the party accused for trial. Now it may be expedient, though not strictly right, that the magistrate should be empowered to take preliminary examinations in private; but before the accused is committed to prison to take his trial, he is surely entitled to have professional assistance for the purpose of cross-examining the witnesses, and addressing such observations to the magistrates as may be deemed necessary. A summary conviction, in which legal assistance is intended to be allowed, may end in a mere pecuniary fine of small amount; whilst a commitment to prison may be the ruin of an innocent person, whom no damages can afterwards reinstate in his former situation. It appears that some exertions have been made with a view to correcting this omission; and it may aid the object if we state the substance of a petition, which we are informed has been sent up for presentation to the House of Lords, from the inhabitants of Leeds. The petitioners ably state their case, as follows:

That in the metropolis, and in many other parts of the kingdom, parties have long been permitted to avail themselves of such professional assistance as they pleased, at the hearing of charges or complaints before Magistrates, without any inconvenience having resulted from the practice; but that in other

places, no general rule exists on the subject, such permission being granted or refused according to the discretion of the sitting Magistrates; and that the refusal has frequently occasioned great dissatisfaction, and the imminent risk, if not the actual occurrence, of positive injustice.

That both for the purpose of ensuring the pure and correct administration of justice, and for the satisfaction of the public (an object not much inferior in importance to justice itself,) it is essential that every party, whose interests or liberty are in jeopardy, should have the right to avail himself of such legal assistance as he may desire.

That to deny such assistance is in many cases equivalent to a denial of the protection of the law to those who stand most in need of it, viz. the aged, the infirm, and the illiterate portion of the community; and in other cases gives to those of strong intellect an overwhelming advantage over less able, though more honest opponents.

That magistrates are now authorized to decide, in a summary manner, many questions materially affecting the property, the character, and the liberty of the subject; that their powers have during late years been considerably extended; that many of the cases which come before the Courts of Law, are of less importance and difficulty than some which are summarily decided by magistrates; and that while the Judges of the Superior Courts, (men eminent for learning and ability, and with all the advantages of long experience,) never decide any question, however trifling, without giving both parties the opportunity of availing themselves of professional assistance, magistrates may, and frequently do, determine nice and difficult questions, affecting the dearest interests of the parties, without permitting them to avail themselves of such assistance, though it may be within their reach.

That where the magistrates have not, as a body, established a general rule allowing professional men to act in every case in which they are retained, the permission for them to act in any particular case becomes a personal favour from the sitting magistrates, either to the parties interested in that case, or to the professional men retained in it, which is incompatible with the functions, and inconsistent with the dignity, of gentlemen acting in judicial situations; that the practice exposes magistrates to the suspicion of partiality where professional assistance is permitted, and of prejudice where it is refused; that it has a strong tendency to prevent professional men, (who are permitted to act only as a matter of favour, and are sometimes uncertain up to the time of the hearing of the case whether they will be permitted to act at all,) from efficiently performing their duty to their clients; and that in order to render their assistance really useful to the parties, or to the magistrates themselves, it is essential that the option of resorting to it or not should be left wholly with the parties.

The petitioners therefore pray, that provision may be made in the Prisoners' Counsel Bill,

for securing to all parties prosecuting or defending charges or complaints before magistrates, the right to be heard by their counsel, or by their attorney, at their own option.

# PRACTICAL POINTS OF GENERAL INTEREST. No. LXXXI.

## WHO ARE MENIAL SERVANTS.

In our third volume, we mentioned some of the cases relating to the right to dismiss a servant, and the wages to which he was entitled on such dismissal. See 3 L. O. 206. We now add the following case.

The plaintiff agreed to enter the defendant's service as head gardener, and to have the management and superintendence of the defendant's hot-houses, pineries, &c. at the wages of 100*l*. The plaintiff resided in a house belonging to the defendant, in his domain, but apart from the defendant's house. The plaintiff had the privilege of taking in apprentices, and had taken in two, at 15*l*. per annum premium. The plaintiff remained with the defendant in the capacity above-mentioned, about four years; when the defendant gave him a month's warning. In an action, brought by the plaintiff to recover a quarter's wages, as being a yearly servant; the jury found for the defendant: and Sir *W. Follett* moved for a new trial, on the ground of mis-direction, and that the verdict was against the evidence. The question in this case is, whether the plaintiff was hired by the year, or as a menial servant only. If the plaintiff was a menial servant, the master was, according to the usage and customs, entitled to turn him away on giving a month's notice. That rule applies only to menial servants, and does not extend further; for in the case of all other servants, where no stipulation is entered into, the hiring has always been considered to be a hiring for a year, as in the case of servants in husbandry. [*Bolland, B.*—I pointed out to the jury several cases where the party would be entitled to a whole year's wages, and stated the facts to them, and left it to them to say whether the plaintiff came within the class I had mentioned, or whether, as being a gardener, they considered him as a menial and domestic servant; that although he was a gardener, he lived out of his master's house, but in a house which was his master's property, and near his residence.] It is submitted, that that was a question for the Court to decide, and not for the jury. [*Alderson, B.*—Where is the rule as to domesticity to stop? A groom is a domestic servant.] The groom generally lives in his master's house. [*Lord Abinger, C. B.*—If the gardener were to sleep in his master's house, and dine with the servants, would he not be a menial servant?] The plaintiff relies on the general rule, to which the custom of domestic servants is an exception. Persons must be taken to be hired for a year where no

stipulation is made as to notice, or unless there is some usage to control the general rule of law. There is no question about labourers in husbandry being annual servants, and yet they live in the house. A gardener has more analogy to a servant in husbandry than to a domestic servant. In *Beeston v. Collyer*, 12 B. Moore, 552; 4 Bing. 309, S. C., where the plaintiff was clerk to an army agent, and had lived with him many years in that capacity, and had been paid monthly, it was held, that there was an implied yearly hiring, and that the defendant having dismissed the plaintiff in December 1826, without assigning any reason, he must pay the plaintiff his salary till the March following, which was the period of the year when the plaintiff entered into the defendant's service. In *Turner v. Robinson*, 5 B. & Ad. 789; 2 Nev. & M. 829, S. C., where a servant who had been dismissed for misconduct, brought an action for wages, it appeared, that he was to have wages at the rate of 80*l*. a year, and it was held, that the presumption was that the hiring was for a year and, that having been rightfully dismissed for misconduct before the year was expired, he was not entitled to recover wages *pro rata*. Again, in *Fawcett v. Cash*, 5 B. & Ad. 904; 3 N. & M. 177, S. C., where on the 5th of March 1832, the plaintiff entered into the defendant's service as warehouseman at the rate of 12*l*. 10*s*. for the first year, and to advance 10*l*. per annum until the salary was 180*l*.; it was held, that this was a contract by the defendant to employ the plaintiff for a year; and *Denman, C. J.*, there said, "The general rule is, that if a master hire a servant without mentioning the time, that is a general hiring, and, in point of law, a hiring for a year. Then, assuming that the agreement in this case does not specify the period for which the service or employment was to continue, it must be taken to be a contract for a year's service." And *Littledale, J.*, says, "In the case of domestic servants, the rule is well established, that the contract may be determined by a month's notice or a month's wages; but that depends upon custom. Here, no custom having been proved, the contract must be taken to be a hiring for a year." It is submitted, that in this case, if the defendant seeks to shew that there was any custom which entitled the defendant to discharge the plaintiff, on giving him a month's notice, the *onus* lay on the defendant to shew that this case was within such custom.

*Lord Abinger, C. B.*—Did you ever know that done? If a footman were discharged on a month's notice, and he afterwards brought an action for wages, would it be necessary to prove that there was any custom as to domestic servants, and that he came within that custom? I should have told the jury, that the plaintiff was a menial servant; for though he did not live at the defendant's house, or within the curtilage, (*intra mœnia*.) he lived in the grounds within the domain. I think the verdict was right.

The rest of the Court concurred.—Rule refused. *Noulan v. Ablett*, 2 C. M. & R. 54.

## NEW BILLS IN PARLIAMENT.

## LONDON SMALL DEBTS.

THIS is another attempt to institute Local Courts, and has been brought forward at the instance of a small majority of the Common Council of London. It is intended to extend the recovery of debts to 10*l*.

The preamble recites that before the passing of 1 James 1, c. 14, the Lord Mayor and Aldermen of the City of London, by virtue of divers acts of Common Council for the relief of poor debtors dwelling within the said city, were accustomed monthly to assign two aldermen and twelve discreet commoners to be Commissioners, and sit in the Court of Requests in Guildhall, to hear and determine all matters of debt, not amounting to the sum of forty shillings, to be brought before them.

The Bill also recites the 1 James 1, c. 14; 3 James 1, c. 15; 14 G. 2, c. 10; 25 G. 3, c. 45; 39 & 40 G. 3, c. 104. These acts are repealed, so far as they relate to the Courts of Requests of the City of London, and Liberties.

The following are the proposed new enactments.

1. Acts done in pursuance of former acts to be valid.

2. Appointment of Commissioners. Twenty inhabitant householders.

3. Three commissioners to be present, when debt under 40*s*.; five, when above 40*s*. and under 5*l*.; and seven, when exceeding 5*l*.

4. In default of a sufficient number of commissioners attending, the assistance of other commissioners, not in rotation, to be called for.

5. In case sufficient number of commissioners do not attend, Court may be adjourned.

6. Qualification of commissioners. Acts of commissioners good before conviction.

7. Commissioners to take the oath prescribed in the act.

8. Commissioners not to act when interested.

9. No commissioner to be concerned in the supply of any articles for the use of the Court.

10. Commissioners to enter their proceedings in a book.

11. Present officers to continue until removed.

12. Power to remove clerks, &c.

13. Power to appoint additional clerks, &c.

14. Power to remove beadles or serjeants.

15. Appointment of new clerks, in case of death, &c.

16. Appointment of new beadles or serjeants, in case of death, &c.

17. The clerk of the Court and his assistants are to issue all summonses, warrants, precepts, and executions, and to register all or-

ders, decrees, and judgments of the Court, and to do all such acts, matters, and things as are directed or required to be done by the said clerks by virtue of this act.

18. Duty of beadles, serjeants, &c.

19. Actions for debts not exceeding 10*l*. shall be decided by commissioners.

20. The jurisdiction of the Court is not to extend to determine the right or title to any lands, tenements or hereditaments, or real estate whatsoever, or to judge, determine, or decide on any debt, where the title of the freehold or lease for years, not being a lease by parol, of any lands, tenements or hereditaments, or of any chattels real whatsoever, shall be brought or come in question; or to judge, determine, or decide on any debt, which shall arise by reason of the occupation of lands, tenements, or hereditaments, situate elsewhere than within the jurisdiction of the said Court; nor to any other debt which shall arise by reason of any cause concerning testament or matrimony; or any concerning or properly belonging to the Ecclesiastical Court; or for or concerning any agreement by way of composition, or by way of retainer of tithes; or for or by reason of any bye-law; or to any debt for tolls or customs due to any corporation or company, or in anywise relating to the franchises, privileged or chartered rights of the mayor and commonalty and citizens of the city of London, or other bodies politic or corporate; or any premium or any policy of insurance.

21. Statute of Limitations may be pleaded.

22. Power to sue infants in the Court of Requests, for debts contracted for necessities.

23. When debts are sued for in other Courts, which ought to be recovered in this Court, defendant to be entitled to costs, provided he gives notice to the plaintiff (before he pleads) that the debt is recoverable in this Court.

24. This act not to prevent any distress or action for rent.

25. For preventing the splitting or dividing of debts.

26. For empowering plaintiffs to reduce their demand to 10*l*., provided they receive the same in full for their respective debts.

27. Debtors within jurisdiction may be summoned before Commissioners, who shall adjudge between parties.

28. *No action removable by Certiorari.*

29. How persons may be summoned from whom debts shall be justly due.

30. *Attorneys not exempt from the jurisdiction of the Court.*

31. For compelling the attendances of witnesses within the jurisdiction of the Court, or the bills of mortality.

32. For adjourning the determination of any cause to a future day.

33. For punishing persons guilty of perjury.

34. If any debtor does not appear when summoned, commissioners may proceed.

35. Clerk not to issue summons until deposit is made.

36. Commissioners may suspend proceedings, in cases where debtors are ill, or unable to pay the debt.

37. Commissioners may award execution against the goods.

38. For regulating the sale of goods taken in execution.

39. Costs of distresses not to exceed amount in 57 G. 3, c. 93.

40. Execution against the body may issue after execution against the goods.

41. In case parties shall secrete their goods, or abscond.

42. Process not to issue against the body and goods and chattels of the same person at the same time.

43. *If defendants remove out of the jurisdiction of the Court to avoid execution, a justice of the peace may indorse the precept, &c.*

44. Clerk to insert or indorse debt and costs on precepts, and if paid to the clerk of court before sale, execution to be superseded.

45. Defendants, who shall be committed to gaol by order of the Court, shall not be kept or continued in custody (except in the cases hereinafter otherwise provided for) for any longer space of time than the following: viz. where the debt, exclusive of costs, shall amount to 20s. and no more, then he, she, or they shall be kept or continued in custody 8 days; and where the debt, exclusive of costs, shall be more than 20s., he, she, or they, shall be kept or continued in custody as many days as shall be equal to the number of sums of *two shillings and sixpence* in the amount of such debt, unless the plaintiff shall be sooner satisfied.

46. If any debtor conceal money or goods, the time of his imprisonment shall be extended.

47. To be imprisoned the limited time for the first execution, and afterwards the limited time.

48. Fees to be taken.

49. Penalty on keeper of prison neglecting his duty.

50. Penalty on serjeant neglecting his duty.

51. Officers taking any fee, besides the fees allowed, to be discharged, and forfeit.

52. A list to be made out of unclaimed money.

53. For supporting the dignity of the Court, and preventing insults.

54. Offices of Clerk and Treasurer not to be held by the same person.

55. Recovery and application of penalties.

56. Justices may proceed by summons in the recovery of penalties.

57. Form of conviction.

58. Distress not unlawful for want of form.

59. Proceedings not to be quashed for want of form.

60. Plaintiffs not to recover without notice, or after tender of amends.

61. Limitation of actions.

62. Expenses of obtaining and passing this act, how to be paid.

63. Commencement of this act.

64. This act to cease on the passing of any general act.

65. This to be a public act.

## PRIORITY OF INCUMBRANCERS.—NOTICE.

ON appeal to the House of Lords, it has been decided, that where there are two incumbrancers of an equitable interest, and the latter gave notice, and the former neglected to do so, the second incumbrancer shall have a prior right. The following is a report of the judgment.

*Lord Lyndhurst.*—My Lords, I move your Lordships for judgment in the case of *Foster v. Cockerell*, which was argued some time since at your Lordships' bar, and your Lordships at that time had pretty well made up your minds upon the subject; but it turned out that the decree was not enrolled. The parties have since enrolled the decree; and therefore the cause is now in such a situation that your Lordships may proceed to give judgment upon it.

The question in the cause was this. It was a question of priority between two incumbrancers: the question was, whether the subsequent incumbrancer of the equity, having given notice to the trustees, was entitled to priority over the former incumbrancer.

Now that question has been settled, after much deliberate discussion, in two cases:—in the case of *Dearle* against *Hall*, and in the case of *Loveridge* against *Cooper*. Those two cases were argued before Sir *Thomas Plumer*, as Master of the Rolls, with great learning and attention to the subject. The Master of the Rolls, after considering the question, pronounced a very elaborate judgment, deciding that in cases of this description, the party who gave notice to the trustees was entitled to the priority; and without adverting to the particular facts of those cases, the principle upon which those decisions were founded was this—that in fact, if a contrary doctrine were to prevail, it would enable a *cestui que trust* to commit a fraud: he would assign his interest, and might afterwards assign his interest to a second incumbrancer, and that second incumbrancer would have no opportunity by any communication with the trustees, of ascertaining whether or not there had been a prior assignment of the interest.

There was another principle upon which he decided that case also, which was this; that a party, till he gives notice to the trustees, has not done every thing that is necessary to complete his title. In this case it is necessary to do every thing in the party's power. Further than that, he assigns as an additional reason, that till notice was given to the trustees, the trustees did not in fact become trustees for the assignee. It was upon these distinct grounds that he laid down as a general principle, that in the case of an equitable assignment, the party giving notice to the trustees, although he was the second incumbrancer, was entitled to priority, if the former incumbrancer had given no such notice.



My Lords, these cases *afterwards* came before me, when I had the honor of presiding in the Court of Chancery, and they were again argued before me with great ability, and great attention to the subject. I took time to consider the judgment upon those occasions, and I was satisfied, after deliberate consideration, that the judgment pronounced in each of those cases was a correct judgment, and that it was my duty to affirm those judgments.

Now, the principle of those cases applies directly to the present case. Here are two incumbrancers of an equitable interest. The latter gave notice to the trustees: the former neglected to do so till long afterwards. The Master of the Rolls (Sir *John Leach*), when this case came before him, was of opinion, in conformity with the decisions already pronounced, that that gave to the second incumbrancer a prior right; and under those circumstances, therefore, I think your Lordships will be of opinion, that that decision, so pronounced upon these principles by the Master of the Rolls, was a correct decision, and your Lordships will be disposed to affirm the judgment. I think, as the case has already been decided after deliberate argument, your Lordships will also be of opinion that this judgment ought to be affirmed with costs.

Lord Brougham.—I entirely agree with my noble and learned friend in this case. It stood over to supply a defect in point of form, which has now been cured; and I entirely agree in the opinion which has now been given by the noble and learned Lord. I think it was said that you must understand this case to be decided upon the principle of the two former cases in the Rolls, and that the discussion of this case brought under the view of your Lordships the case of *Dearle v. Hall*, and *Loveridge v. Cooper*. Now it is not only my opinion that this case ought to be decided, because the principle of those two cases applies to this case, and because there is nothing in the facts whereby to differ this case from those; but I am of opinion that if those cases of *Dearle v. Hall* and *Loveridge v. Cooper*, were now before your Lordships by appeal, I should be of opinion that they were well decided, and that they ought to be affirmed. That the true principle was taken in those cases, according to the analogy of established decisions, and indeed according to such principles as have formerly been laid down, and which make those cases, cases not of the first impression, but cases which have clearly been well decided. The principle which has been stated by my noble and learned friend, I entirely agree in,—that this judgment of the Master of the Rolls should be affirmed, and that there was not such reasonable ground for appeal here as to entitle the appellant to escape without paying the costs.

Decree affirmed.—*Foster v. Cockerell*, House of Lords, June 22, 1835.

## EQUITABLE ASSIGNMENTS.—NOTICE.

Sir,

In your No. for July 25, appears the following remark: "We have been favored with the Report of the judgment of the House of Lords in *Foster v. Cockerell*, which corrects an error at p. 216, where it is stated that three out of four of the cases in dispute were decided by Lord Lyndhurst in the Court below: his Lordship delivering the judgment on appeal from these his own decisions—Lord Brougham merely concurring. The fact appears to be, that two of the original decisions were by Sir Thomas Plumer, and another by Sir John Leach."

On further reference to the cases, it will be found, I submit, that the statement at 216 is not incorrect. Let me ask this question:—Suppose a case to have been decided by the Court of Chancery, or any other Court, and subsequently reversed by the House of Lords: which decision would be relied upon? I do not think any body will contend for the decision of the inferior Court. In the same way, the decision of the Chancellor, until reversed, controls that of the Vice Chancellor and the Master of the Rolls. How stand the cases here, then? The cases of *Dearle v. Hall* and *Loveridge v. Cooper*, were before Sir Thomas Plumer in 1823, and subsequently, on appeal, on the 8th May, 1827, and 9th Nov. 1827 (see 3 Russ. 1, 38, 48), before Lord Lyndhurst. Thus, therefore, these cases were those of Lord Lyndhurst's. The third case of Lord Lyndhurst's was that of *Smith v. Smith*, 2 Cr. & Mee. 231. The fourth case alluded to was that of *Cooper v. Fynmore*, 3 Russ. 60, before Sir Thomas Plumer. If we compare the case of *Cooper v. Fynmore* with those of *Dearle v. Hall* and *Loveridge v. Cooper*, we shall find that the opinion of Sir Thomas Plumer is neutralized, as there are direct contrary opinions upon the identical same facts. This makes stronger in favour of the position that three out of four of the decisions are Lord Lyndhurst's own. The decision alluded to, of Sir John Leach's, is noticed at p. 215, *supra*, as being the decision from which the appeal was lodged; and in reference to the reported case, as it appears in My. & K. 306, it will be seen that Sir J. Leach scarcely dwelt upon the point; at any rate, he did not take any notice of the cases, but rather treated the doctrine as settled. Such being the case, his opinion can scarcely be put in competition with those given under a full discussion of the cases; and from what I have already stated, regarding the contradictory decisions of Sir Thomas Plumer, it certainly leaves the doctrine resting on Lord Lyndhurst's own cases, and fully justifies, as a general remark, what I have above stated, and leaves it as a case of a judge sitting in judgment on himself.

M.

# SUGGESTIONS FOR IMPROVING THE LAW.

## No. IX.

### ORDERS FOR RETURNING WRITS.

To the Editor of the *Legal Observer*.  
Sir,

I beg to call your attention to the inconvenience occasioned in practice by the Judges' clerks, requiring an affidavit of a writ of *capias* having been executed, previous to their granting an order for the sheriff to return it.

Certainly the party in making an affidavit for such purpose, need only swear as to his *belief*; but this is bad, as whatever a person may choose to believe he may swear to, and thus do away with the sacred character of an oath.—In term time, as a matter of course, you can obtain a rule for the return of the writ, upon producing a mere *præcipe*; and I see no reason why a judge's order should not be obtained in the same way.

By the 15th. section of the uniformity of process act, power is given to the Court in term time, and to a Judge in vacation, to make orders for the return of any writ issued in pursuance of that act, as well as certain other writs therein named; and every such order, it is by the same section enacted, shall be of the same force and effect as a rule of Court for the like purpose; and by reference to the form of the *capias* given in the schedule to the act, after directing the *immediate return* of it *if executed*, the sheriff, if the writ remains *unexecuted*, is commanded *so to return the same* at the expiration of four calendar months from the date thereof, or *sooner* if he shall be thereunto required *by order* of the said court, or any judge thereof; thus clearly giving a power to the judges or any of them to make an order for the return of the writ *if unexecuted*; and this being the case, I cannot see under what authority the judges' clerks are acting, in requiring an affidavit that the writ is *executed*.

A conscientious person will not swear as to his belief of a fact when he knows the fact is otherwise, and he is quite at the mercy of the sheriff's officer, and that person having four months' time allowed him to arrest the defendant, will take his own time about it.—If any variation (other than provided for by the act) is to be made between term and vacation as to this matter, I beg to suggest the making a rule of court that no sheriff should be required to return the writ in vacation until the expiration of a certain number of days after the same has been in his hands, unless an affidavit be made that *it is executed*; but after that period that the sheriff may be ordered to return it without such an affidavit.

If a person chooses to believe and swear to that belief, can he be indicted for perjury? If not, what is the use of requiring an affidavit.—There is certainly a moral as well as a legal obligation attendant on an oath, but if the oath does not subject the party making it, to the legal consequences of a false one, if such, you will find many who will not care much

about the moral part of it; and in fact by the requisition at the Judges' chambers, you must either forget it, or else sit down quietly under the laziness and perhaps the venality of the sheriff's officer, and wait till his interest, or some motive for exertion, induces him to do his duty.  
H. P. J.

### REMUNERATION TO CLERKS OF THE PEACE FOR PARLIAMENTARY RETURNS.

It appears to have been the practice of Clerks of the Peace, who are frequently called upon to make very elaborate Returns to Parliament, to charge the County with the expense of such Returns; and they have been accustomed to receive the charge in their general account, from the county rates. A late instance occurred in Sussex, where the Clerk of the Peace and four of his clerks had been engaged at an expense of 70*l.* in preparing Returns to the House of Commons, for which he had not been able to obtain remuneration, as the magistrates in Quarter Sessions refused to sanction the payment.

It seems that the Attorney General stated that the magistrates had no power to order payment for such Returns out of the county rates, and if they did so, the order would be illegal.

In consequence of a report of this proceeding in the county of Sussex, Mr. Poole, the Clerk of the Peace for the county of Carnarvon, deemed it right, on presenting to the Quarter Sessions an account in which several charges for parliamentary returns were made, to point out the objection that had been taken in Sussex, and consequently the Carnarvon magistrates disallowed the charge.

Subsequently to this, Mr. Poole, in order to bring the matter before the House, has declined to present the Returns, and contends, that he has a lien upon them, which cannot be superseded by a resolution of the House, and that the Law of Lien will protect him from being considered as acting in contempt of the order of the House. He has stated his readiness to make the returns, which are complete and ready for delivery, upon being properly remunerated.

We understand the Chancellor of the Exchequer has given notice of a motion that the Clerk of the Peace do attend the Bar of the House. We hope the members of both branches of the Profession who are in Parliament, will take the trouble to attend on this occasion, and prevent the working of any injustice as far as lies in their power.

## SUPERIOR COURTS.

## Vice Chancellor's Court.

LANDLORD AND TENANT.—EQUITABLE ASSIGNMENT.—CHOSE IN ACTION.—PARTIES.

*A lease is deposited to secure the repayment of money advanced, and the lessee becomes insolvent: Held, that the depository, being an assignee in equity of the lease, is liable to the lessor, or his assignee, for the rent.*

*The lessor having become bankrupt, the purchaser of his interest under the commission must, in order to entitle himself to rent due before the purchase by him, join the bankrupt's assignees as parties to the suit.*

The bill was filed to enforce a landlord's right for the recovery of his rent against a person with whom the tenant's lease had been deposited by way of security, and who claimed a lien upon it. The facts were these: In July 1832, the plaintiff Flight purchased from the assignees of one Nelson, a bankrupt, and the landlord of the premises in question, all Nelson's interest. Nelson had made a lease to one Postlethwaite, which, at the time of the sale, had two years and a half to run, and which expired at Christmas, 1834. This lease Postlethwaite deposited, in 1830, with the defendants, Bentley, Dawson, and Woolmer, to secure a floating balance of 200*l*. for two years. Postlethwaite became insolvent. Flight immediately upon his purchase applied to Bentley and Co to deliver up the lease, which they refused, unless paid what they claimed upon it. They were then informed that the plaintiff would look to them for the rent. At a subsequent period they offered to abandon their claim; but the plaintiff insisted that they were too late, and that he had a right to bind them to the rent as assignees in equity.

Mr. Knight and Mr. Stuart, for the plaintiffs.—A court of equity must regard a man who takes an equitable right in the same position as if he had taken a legal right. In the case of a legal title, it has been held, that if a party takes a legal assignment of a lease by way of mortgage, as a security for money lent, the whole interest passes to him, and he becomes liable on the covenant for payment of the rent, though he has never occupied or become possessed in fact, the mere acceptance of the assignment being sufficient for that purpose. The same point has been decided in equity, in the case of *Lucas v. Camerford*.<sup>a</sup> There a bill was filed by the executors of the lessor against the depository of a lease, to enforce specific performance of a covenant to re-build, and it was decided that it was no matter whether the defendant took the lease as a pledge or a purchase: he could not take the estate and refuse the burden. The Court, it was true, refused spe-

cific performance of the covenant, but it compelled the defendant to take an assignment, in order to enable the plaintiff to bring an action; and the Court doubted whether it was in the option of the defendant to abandon the deposit. It was in the election of the plaintiffs to make him keep it.

Mr. Rogers, for the defendants, insisted that the doctrine now contended for would be a surprise on innumerable persons in the city, who were accustomed to take deposits of leases as securities. They had a right to demand in equity an underlease, instead of an assignment, according to the modern practice of mortgaging leaseholds; and that would protect them against such claims as the present. In the case cited, the party was in possession, which was not the fact in this case. The plaintiff could not by this bill entitle himself to the rent due before his purchase, that being a mere *chose in action*, and not assignable.

The Vice Chancellor said, the case of *Lucas v. Camerford* was much to the point, and he saw no authority for saying he was not bound by it. The consequence was, the defendants, the equitable depositories of the lease, must be considered as answerable to the plaintiff, owner of the reversion, for all rent accruing due from the time of the plaintiff's purchase up to the termination of the lease. As the plaintiff took possession of the premises without prejudice, there must be an account of any rent he had since received, which must be deducted from the two years and a half rent which the defendants have to pay; and as the latter have rendered the suit necessary by their refusal at first to deliver up the lease, they must pay the costs. With respect to the rent which was due at the time of the assignment, his Honor said he would take time to consider that point.

His Honor, on a subsequent day, gave his judgment on the point reserved. The assignment bore date the 20th July, 1832, and purported to convey the Midsummer rent, which was then due. Of this rent, as well as of rent subsequently become due, the bill sought payment; and an objection was taken for want of parties, on the ground that the assignee of a reversion is not entitled at law to sue for rent due before his assignment, and that the assignees of Nelson ought to have been parties. The rent already due, at the date of the assignment, became severed from the inheritance; it was a mere *chose in action*, and so far as the bill sought payment of that antecedent rent, the assignees of the bankrupt ought to have been parties.

*Flight v. Bentley and others*, at Westminster, May 13, June 9, 1835.

## Exchequer of Pleas.

EJECTMENT.—PROPERTY UNTENANTED AND UNFINISHED.—SERVICE OF DECLARATION.

*In an action of ejectment, where the property consists of unfinished houses, the service of*

<sup>a</sup> 1 Ves. 235.

*the declaration by sticking it against the outer door of one of them, is not good.*

This was an action of ejectment. The property consisted of several houses, a part of which were unfinished, and uninhabited. In this case, the copy of the declaration was served by sticking it against the outer door; and it was contended, that this was a good service, or at any rate, sufficient to obtain a rule to shew cause why it should not be considered so.

The Court, however, thought it would be better that the usual course where the possession was vacant should be pursued.

Rule refused.—*Doe d. Schuvel v. Roe*, T. T. 1835. Excheq.

SHERIFF.—EXECUTION.—FALSE CLAIMANT.—  
COSTS.

*Goods having been seized by the sheriff, and claimed by another person, the latter, upon application, receives permission to proceed to trial upon paying a certain sum into Court. Neglecting to do so, however, he is liable to pay the whole amount of costs incurred on his false claim.*

In this case some goods, the property of the defendants, had been seized by the sheriff, which were subsequently claimed by another person. The latter obtained permission from the Court to prosecute his claim, upon paying a certain sum of money into Court, to cover the amount of costs which might be incurred. He neglected to do so, and

A rule nisi had in consequence been obtained, calling upon him to shew cause why the goods should not be sold, and the money appropriated to the use of the creditors, and why he should not pay the costs incurred in consequence of his false claim.

No objection was made to pay the costs, with the exception of those attending the present application; and it was stated that the claimant was prevented only by his poverty from complying with the order made by the Court.

The Court made the rule absolute.—*Scales v. Sargeson*, T. T. 1835. Excheq.

REVENUE CAUSE.—DEMURRER.—MATTER OF  
LAW.—MARGIN.—SIGNATURE OF ATTORNEY-  
GENERAL.

*It is not necessary that a matter of law, intended to be argued, should be set forth in the margin of a demurrer, in a revenue cause. It must be signed by the Attorney-General, however, before delivery.*

In this cause, which was on the revenue side of the court, a rule nisi had been obtained to set aside the demurrer to a plea to an information, on the ground that there appeared to be no note on the margin of the cause of demurrer, according to the rule of court, which directed that some point of law, which it was intended should be argued, should be specified in the margin. Without this, the demurrer might be set aside. A second ground of objection was,

that the demurrer was not signed by the Attorney-General.

Cause was now shewn, when it was contended that the rule alluded to was made under the authority of the act of parliament, which empowered the Judges jointly, or any eight of them, to make such rules for regulating the courts over which they had jurisdiction, as to them seemed fit. This being a revenue cause, could not come within the meaning of the act. With regard to the second objection, there was no authority to shew that the rule requiring signature by counsel, applied also to the Attorney-General. Besides, there was an affidavit shewing that the demurrer was now properly signed.

In support of the rule it was submitted, that the signature of the Attorney-General having been affixed after the rule had been obtained, it was of no use. The proper course was to deliver all pleadings directed to be signed by the Attorney-General, properly signed by him, to the clerk of the court.

The Court thought that all pleadings should be properly signed before delivery. The rule must therefore be absolute on this point. The second objection, however, could not stand, as the rule requiring a point of law to be set forth in the margin, was founded on an act which directed that the Judges should make general rules applicable to all the courts, in such matters on which they had common jurisdiction.

Rule absolute.—*Rex v. Woollet*, T. T. 1835. Excheq.

RULE NISI TO CANCEL BAIL BOND.—DEFECT  
IN AFFIDAVIT OF DEBT.—CONSENT OF  
PLAINTIFF.

*It was held, that notwithstanding the plaintiff should have offered to consent to a Judge's order to cancel a bail-bond after a rule nisi had been obtained for that purpose, on the ground of a defect of the affidavit of debt, the costs to be costs in the cause, and no action to be brought, the rule may be absolute, with costs.*

A rule nisi had been obtained to shew cause why the bail-bond should not be given up to be cancelled, with costs, on the ground that the affidavit to hold to bail did not sufficiently specify the amount of the debt for which the action was brought.

Cause was now shewn, when it was contended, that after the rule was obtained, the plaintiff's attorney had offered to consent to a Judge's order to the same effect as that contained in the rule. The costs to be costs in the cause, and no action brought. Admitting the defect in the affidavit, it was submitted, that the Court would not make the rule absolute with costs.

The Court said, that as they had not offered to pay the costs of the rule nisi, the rule must be absolute.

Rule absolute, with costs.—*Clarke v. Crocksford*, T. T. 1835. Excheq.

**DEMURRER.—POINT TO BE ARGUED.**

*The point intended to be raised not being set forth in the margin of the demurrer, is not a sufficient objection to its being argued. It may afterwards, however, be set aside on the ground of irregularity.*

This was a case of a demurrer to a plea, where the point to be mooted was not set forth in the margin; and it was contended, that according to the new rules, the demurrer could not be argued.

The Court, thought there was no objection to its being argued. The demurrer, however, might be set aside as irregular.

*Lucy v. Umber, T. T. 1835. Excheq.*

**PROMISSORY NOTE.—PLEA NO CONSIDERATION.  
—PREVIOUS DEBT.—PROOF.**

*In an action on a promissory note for 500*l.* by the indorsee, against the indorser, the latter pleaded no consideration as to 300*l.* and that the note was only indorsed for the accommodation of the drawer, and the security of the plaintiffs, who were his bankers. The plaintiffs, in reply, alleged that they had already given the drawer consideration for the full amount of the note; and it was held, that it was not necessary for them, upon this issue, to give proof that they were entitled to the full amount.*

This was an action on a promissory note for 500*l.* brought by the indorsee against the indorser. The note was drawn by a third party, and it was made payable by the defendant, and by him indorsed to the plaintiffs.

In the plea it was alleged, that there was no consideration except as to 200*l.*, and that the drawer delivered the note to the defendant to be indorsed to the plaintiffs, as security for sums to be subsequently advanced. A sum of 200*l.* was afterwards paid over to the drawer, which was all he had received.

The replication stated, that the plaintiffs were holders of the note for a valuable consideration given by them to the drawer, in respect of their being holders of the note for 500*l.* The action had been tried at the London Sittings, Guildhall, when it was contended, that there was no necessity to give any evidence of consideration; but a witness was examined, who was clerk to the plaintiffs, who were the bankers to the drawer of the note, and who stated, that the plaintiffs discounted the note, and placed the amount to the drawer's credit, debiting him with discount and expenses. That he was at that time indebted to the plaintiffs in a sum exceeding the amount of the note, and that advances to the amount of nearly 200*l.* had also since been made. The note had in point of fact, been placed towards the liquidation of the drawer's original debt.

It was, on this, contended that there was no consideration for the note except the 200*l.*

The Court, however, overruled the objection, and a verdict for 500*l.* was returned for the plaintiffs.

A new trial was now moved for, on the

ground of mis-direction, and the objection before taken was renewed. It was now contended, that as it was clear the defendant had indorsed the note only for the accommodation of the drawer, it was the duty of the plaintiffs to prove the consideration they had given him. They had as yet, produced no evidence to shew that they had given more consideration than the 200*l.* and they were therefore only entitled to recover that sum. The presumption at law was, that the indorser, instead of the drawer, had received the consideration for the note.

The Court saw no reason to grant a new trial. In a case of fraud there might be some grounds for calling for proof of consideration; but where it was only shewn the bill was for accommodation, there existed no such grounds. Under the circumstances, as there was no notice given to the plaintiffs, that the bill was given for sums only to be advanced at a future period, the account already due must be held to be good consideration.

Rule refused.—*Perceval and others v. Framplin, T. T. 1835. Excheq.*

## NOTES OF THE WEEK.

### HOUSE OF LORDS.

#### *Bills for second Reading.*

<i>Title of the Bill.</i>	<i>Proposer.</i>
Residence of Clergy.	Lord Brougham.
Pluralities Prevention.	Lord Brougham.
Ecclesiastical Jurisdiction.	Lord Brougham.
Illegal Securities.	
Capital Punishments.	
Education & Charities.	Lord Brougham.

#### *In Select Committee.*

Highways.  
Wills Execution.  
Executors.  
Prisoners' Counsel.

#### *In Committee.*

London Small Debts.  
Sinecure Church Preferment.  
Municipal Corporations.

#### *Third Reading.*

Certiorari. 5th Aug.  
Lunatic Acts Continuance.

### HOUSE OF COMMONS.

#### *Bills to be brought in.*

Law of Tenure.	Attorney General.
Law of Escheat.	Attorney General.
Poor Law Amendment.	Mr. Trevor.
Registration of Births, &c.	Mr. Wilks.
Abolishing useless Law Offices,	Mr. Baring.

*Second Reading.*

Law of Libel.	Mr. O'Connell.
Ecclesiastical Courts.	Attorney-General.
Parish Vestries.	
Letters Patent.	Mr. Tooke.
Prisons Regulation.	
Turnpike Trusts Consolidation.	

*In Committee.*

Church of Ireland.	
Chancery Offices.	
Copyholds Enfranchisement.	Attorney General.
Registration of Voters.	Lord J. Russell.
County Coroners.	Mr. Cripps.
Durham Court of Pleas.	
Dissenters' Marriages.	
Marriage Act Amendment.	
Election Expenses and Qualification of Members.	
Limitation of Real Actions Amendment.	
Landed Securities (Ireland).	

*To be reported.*

Imprisonment for Debt.	
Limitation of Polls.	
Bankruptcy Funds.	Master of the Rolls.

ARRANGEMENTS OF THE VACATION MASTERS IN CHANCERY.

OUR readers are aware that matters in Chancery of an urgent nature, were accustomed to be referred to the Vacation Master, and that such Master took the whole business of the vacation, and, we understand, received the fees for his own use. Under the Chancery Regulation Act, all fees to the Masters being abolished, and a specific salary substituted, the additional labor of the Vacation Master is not now remunerated. It can scarcely be expected, therefore, that any one of the Masters will be disposed to give up the whole of the vacation for the convenience of his brethren. If the duty were taken in rotation, it would fall to each one in ten years; but we have heard that it is under discussion, whether the labor should not be equally divided every year among the whole. This, however, would require an attendance of each Master for about a week only, and would be very inconvenient in practice. The matters referred are generally of an urgent nature;

and unless completed within the short sitting of one Master, there would be much delay in re-opening and discussing the business before the next in rotation; and the inconvenience might be increased perhaps by a want of uniformity in the course pursued. It has been suggested, that the period of each Master's sitting should not be less than a month; but that the old practice of the same Master sitting on certain days during the whole vacation, would be preferable. The suggestion having thus been respectfully made, we have no doubt it will be taken into consideration, and such conclusion come to as may be deemed most expedient.

ANSWERS TO QUERIES.

*Law of Property and Conveyancing.*

DOWER. P. 143.

1. The case of *Ray v. Pung*, 5 B. & Ald. 561, seems to me to be decisive of the question. The title of the purchaser is anterior to the title of dower; he taking by the execution of the power, takes by the deed creating the power. Lord *Tenterden*, in *Doe d. Higan v. Jones*, 10 B. & C. 468, says, "It has been established since the time of Lord *Coke*, that where a power is executed, the person taking under it takes under him who created the power, and not under him who executes it."

SPEES.

2. The case here put seems to be identical with the one cited, of *Ray v. Pung*, 5 Barn. & Ald. 561, which has been since repeatedly quoted as good law in the very words of the proposition. See *Watkins's Conveyancing*, p. 54, last edition.

J.

STOCK.—WIFE.—TENANT FOR LIFE. P. 64.

A husband surviving his wife, is entitled, on taking out administration to her effects, to her *choses in action*, which were not reduced into possession during the coverture. 29 Car. 2, c. 3, s. 25. If he dies without having reduced such property into possession, his representatives, and not the next of kin of the wife, are entitled thereto. Until very lately, the latter were legally entitled to take out administration, though they were considered in Chancery only as trustees for the former: but now, by a late decision in the Ecclesiastical Court, reported in the last volume of *Haggard*, the right to the administration will in future follow the beneficial estate; and the representatives of the husband will therefore be entitled thereto.

I. M. C.

## COVENANT.—UNDERLEASE. P. 143.

The covenant by *A.* in a lease from *B.* that he will not "alien, sell, or assign the premises or any other part thereof without the license of *B.*, the lessor," will not prevent *A.* from granting an underlease of such premises. That clauses restrictive of alienation generally do not extend to underleases, has been determined in several cases. Thus, where the lessee was not to "assign, transfer, or set over, or otherwise do or put away" the lease or premises, an underlease was held to be no breach of the proviso. *Crusoe d. Bleacoe v. Bugley*, Blackst. 766; S. C. 3 Wils. 234. See also *Kinnerley v. Orpe*, Doug. 58; 15 Ves. 265. But *contra*, where the condition was not to "set, let, or assign over" the premises. *Roe d. Gregson v. Harrison*, 2 D. & E. 425. So a proviso for re-entry, if the lessee, his executors or administrators, assigned or otherwise parted with the lease or premises for the whole or any part of the term, was held to be broken by an underlease. *Doe d. Holland v. Worsley*, 1 Camp. 20. A. S.

## Law of Landlord and Tenant.

## NOTICE TO QUIT. P. 80.

There appears to be no decision distinguishing "a half year" from "six months" notice to quit. No doubt can exist that a notice given on the 24th of December, to quit on the 24th of June following, is a sufficient notice. See *Doe d. Lord Huntington v. Culliford*, 4 D. & R. 249, where the notice was held to be good, although 178 days only were given.

N. G.

## HUSBAND AND WIFE.—DISTRESS. P. 144.

It may be laid down as a general rule, that for all rents due in right of the wife, the husband may distrain alone. See *Petersdorff's Abridgment*, tit. Distress; *Woodfall's Land. & Ten.* 345; *Osborne v. Wickenden*, 2 Saund. 195. The warrant of distress need of course only be signed by the husband, that being good enough when only signed by one joint tenant. 1 *Moore & Payne*, 474. J.

## Practice.

## PLAINTIFF'S DEATH.—SECOND ARREST. P. 144.

It is plain that *A.*'s executor can hold *B.* to bail for the same cause of action that his testator had, without the leave of the Court, and it would seem, without payment of costs of the former suit. See *Mellin v. Evans*, 1 C. & J. 82. J.

## QUERIES.

## Common Law.

## DIVORCE.—ISSUE BASTARDIZED

Where an act of parliament has been obtained to dissolve a marriage (say upon the ground of the wife's adultery), is the dissolution *ab initio*, or merely prospective? And are the issue, by the effect of such act having been obtained, bastardized, or is there usually a clause saving their legitimacy? The principal point is, whether a dissolution by act of parliament is of the same nature in its effects as a divorce *a vinculo matrimonii*? Z.

## Law of Landlord and Tenant.

## BOARD AND LODGING.—NOTICE TO QUIT.

Is a gentleman residing in a lodging-house, partially boarding with the family, and paying a regular sum quarterly, bound to give any and what notice of his intention to leave? I believe there has been a decision on the subject, which perhaps some of your correspondents can point out. W. C. J.

## Law of Property and Conveyancing.

## APPORTIONMENT ACT.—ANNUITY.

By the Apportionment Act, 4 W. 4, c. 22, s. 2, it is enacted, *inter alia*, that all rents-charge and other rents, annuities, pensions, dividends, &c. made payable or coming due at fixed periods, under any instrument that shall be executed after the passing of the act, or being a will or testamentary instrument, that shall come into operation after the passing of the act, shall be apportioned in manner therein mentioned. A testator, whose will was proved three years before the act was passed, bequeathed an annuity to his wife for life, who has lately died. Is her representative entitled to an apportionment of the annuity under the above act? C. M. W.

## THE EDITOR'S LETTER BOX.

The Quarterly Digest of all reported cases in all the Courts, from the 9th of May last, will be published on the 8th of August.

We thank J. S. for the trouble he has taken.

The Letter of "Legalis" is under consideration.

The Paper on the Liability of Attorneys is acceptable.

The Queries and Answers of W. B. W.; Z. A.; T. W. H.; and Aspiro, have been received.

We are aware that conflicting Answers to Queries are sometimes given by different Correspondents: the same uncertainty happens in all branches of the profession. These opinions are chiefly useful by referring to cases.

# The Legal Observer.

Vol. X. SATURDAY, AUGUST 8, 1835. No. CCLXXXIV.

— "Quod magis ad nos  
Pertinet, et nescire malum est, agitamus.

HORAT.

## THE GRANDEUR OF THE LAW.

It is our intention occasionally to take a retrospective review of our elder legal writers; and we hope thereby to conduce as well to the amusement as the instruction of our readers. There are many works which now lie neglected, and which are not usually to be found in law libraries, that do not deserve to be entirely forgotten; and we shall from time to time bring them under our readers' notice.

In pursuance of this design, the first work to which we shall advert is, "The Grandeur of the Law; or an Exact Collection of the Nobility and Gentry of this Kingdom, whose Honours and Estates have by some of their Ancestors been acquired or considerably augmented by the Practice of the Law, or Offices and Dignities relating thereunto; the Name of such Ancestor, together with the Time in which he flourished, the Society in which he was a Member, and to what Degree in the Law he arrived, being particularly expressed." Two editions of this work have been printed: the first in 1684; the second, from which we quote, in the following year. Its object is sufficiently explained by its title; and we think the author proves very satisfactorily, that many of our great families have been founded or greatly assisted, by lawyers. Some of the names he mentions have now lost their interest; but we shall proceed to quote some few of those enumerated, which are still "familiar in our mouths as household words."

"The first who laid the foundation of that noble and flourishing family of the Howards, was William Howard, one of the Chief Justices of the Court of Common Pleas in the reigns of the two first Edwards. From which William are directly descended Howard, Duke of Norfolk, Earl

of Arundel, Surrey, Norfolk, and Norwich, and Earl Marshal of England;

"James Howard, Earl of Suffolk and Baron Howard of Walden;

"Charles Howard, Earl of Carlisle, Viscount Morpeth, and Baron Davis of the North;

"Henry, Lord Stafford;

"Francis Howard, Baron of Effingham."

"William Cavendish, Earl of Devonshire, and Baron Cavendish of Hardwick, is descended from Sir John Cavendish, Lord Chief Justice of the King's Bench in the reign of King Edward the Third."

"John Sheffield, Earl of Mulgrave and Baron of Buttermack, is directly descended from Sir John Sheffield, of the Inner Temple, Knight, Recorder of London, and Speaker in the House of Commons in the reign of King Henry the Seventh."

"Anthony Cooper, Earl of Shaftesbury, Baron Ashley of Wimbourne, St. Giles, and Lord Cooper of Paulett, is the son and heir to Anthony, late Earl of Shaftesbury, *who, though I cannot say he ever made it his business to study the law*, yet was he of the Society of Lincoln's Inn, and by the profits arising out of such offices as he enjoyed, relating to the law, did he greatly augment his estate, being first Chancellor of the Exchequer, and afterwards Lord High Chancellor of England."

"William Pagett, Lord Pagett and Baron of Beaudesert in Staffordshire, is descended by many noble peers of this realm, in a direct course of succession, from Sir William Pagett, Knight, a gentleman deeply learned in the laws, by means whereof he was made one of the Clerks of the Council, and Chancellor of the Duchy of Lancaster, in the several reigns of King Henry the Eighth and Edward the Sixth; and afterwards, having greatly advanced himself in estate and riches, he was created a baron of this kingdom, being at first but a student in the Inns of Court."



These are some of the peers who at the time the book was written, owed the origin of their greatness to the law. How the number has been increased since that period we need not remind the reader. Let us pass on to the Baronets who trace their origin to the law, who are very numerous. We quote some few.

"Sir Edmund Bacon, of Redgrove in the county of Suffolk, Baronet, (the first of that dignity within this kingdom,) is descended from Sir Nicholas Bacon, of Gray's Inn, Knight, Attorney of the Court of Wards and Liveries, and Lord Keeper of the Great Seal of England in the reign of Queen Elizabeth; a younger son of which Sir Nicholas, was the no less learned Francis Bacon, of Gray's Inn aforesaid, a person singularly read in the laws, and of incomparable parts, in respect whereof he, was created Baron of Verulam, Viscount St. Albans, and Lord High Chancellor of England, by King James; which great honours and preferments were soon blasted by some great offence he committed during the time he had the custody of the Seal; and so became reduced to lead the remainder of his life in privacy at his chambers in Gray's Inn till his death, leaving no male issue."

"Sir John Shelly, of Michel Grove in the county of Sussex, Baronet, is descended from William Shelly, of the Inner Temple, Serjeant at Law, and one of the Justices of the Common Pleas in the reign of King Henry the Eighth; which William did very considerably augment the estate of his ancestors, who for many ages before had flourished in this country in great splendour."

"Sir Edward Littleton, of Pillaton Hall in the county of Stafford, Baronet, is descended from Richard Littleton, second son of the famous and learned Sir Thomas Littleton, alias Westcote, of Franchly, Knight of the Bath, Serjeant at Law, and one of the Justices of the Common Pleas in the reign of Edward the Fourth."

"Sir Charles Wolseley, of Wolseley in the county of Stafford, Baronet, is descended from Ralph Wolseley, Esq., one of the Barons of the Court of Exchequer in the reign of King Edward the Fourth."

"Sir William Ingilby, of Repley in the county of York, Baronet, is lineally descended from Thomas Ingilby, Esq., one of the Justices of the King's Bench in the reign of King Edward the Third, and one of the Justices of the Common Pleas in the reign of King Edward the Second."

"Sir John Lowther, of Whitehaven in the county of Cumberland, Baronet, a family of great antiquity and honour in those northern parts, is descended by many worthy ancestors of signal renown and quality, from Hugh de Lowther, Attorney General to King Edward the First; and from Thomas de Lowther, one of the Justices of the King's Bench in the reign of King Edward the Third."

"Sir Felix Wilde, of St. Clement Danes in the county of Middlesex, Baronet, is the son and heir of Sir William Wilde, Knight and Baronet, Serjeant at Law, Recorder of the city of London, and lately one of the learned Justices of the Court of King's Bench."

"Sir Edmond Fortescue, of Fallow Pitt in the county of Devon, Baronet, is descended from Lewis Fortescue, one of the Readers of the Middle Temple, as also a Serjeant at Law, and one of the Barons of the Court of Exchequer in the latter end of the reign of King Henry the Eighth; which said Lewis was a younger son of the antient and flourishing family of the Fortescues of the west."

The Knights are of course very numerous; pass we therefore to the Esquires, of whom we have only room for one; but he has been called "the first commoner of England."

"Robert Coke, of Holkham in the county of Norfolk, Esquire, is the eldest branch descended from Sir Edward Coke, of the Inner Temple, Knight, so much celebrated for his profound judgment and experience in the laws of this kingdom, in respect whereof he became the Autumn Reader of the said Society in the 34th year of Queen Elizabeth's reign; soon after which he was constituted Solicitor, and then Attorney General to that Princess, as also Recorder of London; and by King James called to the degree of Serjeant at Law, and advanced to the dignity of Lord Chief Justice of the Common Pleas, whence he was removed to the like honour in the King's Bench, and elected one of his then Majesty's Privy Council."

We now leave this little work, in which is contained much curious information.

## PRACTICE OF RETAINING COUNSEL.

In our 2d volume, p. 262, and the present volume, p. 24, we stated the cases and authorities on the practice of retaining counsel; and in order that our readers may be in possession of the whole matter, we now add Mr. Chitty's statement on the subject, from the 3d volume of his General Practice, p. 132.

"We have in the preceding pages adverted to the expediency and duty of an attorney for a plaintiff, in cases of difficulty or importance, of retaining one or more of the most able counsel before the defendant has the least intimation of the intended proceedings. Although there are very many counsel of great ability, yet there are very few of commanding and supereminent talent as *Nisi Prius* advocates, and hence the result of a cause may frequently depend on securing one of the latter.

"The ordinary retaining fee in a single cause is one guinea. A general retainer, securing the counsel for the client in every case in which he may be a party, either separately or jointly with others, is five guineas. At law a retainer, whether special or general, and either on the part of a plaintiff or a defendant, may be given before any process has issued, and if duly given in the cause continues until its conclusion, and does not always require renewal every year;<sup>a</sup> but care must be observed that the names of the parties be properly stated, or it will not preclude the opponent from afterwards giving a correct retainer. If however a retainer be A. B. and others against C. D. and others, it will secure the counsel whatever persons may be afterwards named in the cause, provided the name of the party particularized be one. In equity it seems that a special or particular retainer is of no efficacy unless given after bill filed, though it is otherwise as to a general retainer.

"With respect to the obligatory effect of a retainer, it seems incumbent on a solicitor to give a *fresh retainer* the instant the former has according to usage become inoperative, for otherwise the opponent may by offering his retainer, or even tendering a brief, obtain the assistance of the same counsel against his former client; and there is no distinction in this respect between cases where such counsel may have become *confidentially acquainted* with secret information which he possibly might afterwards use injuriously against his former client. If it were otherwise, and if, as has been insisted by some, it were incumbent on counsel, before he received a retainer or brief from the opponent, to send to his first client to know whether it was his intention to give a second

retainer, he might appear indecorously to seek employment, and also have to submit to the risk of an answer that his assistance was no longer required, a situation in which no counsel ought to be placed; and if one retainer were to operate perpetually there would never be a second. Moreover, it is not to be believed that any counsel worth retaining will be so dishonourably inclined as to make undue use of any information he may have confidentially obtained. Perhaps, however, the more honourable conduct is to decline holding a brief on either side when any previous confidential communication might be deemed prejudicial to the prior client. If a retainer (then called a *stiffing* retainer) be given and not followed in due time with the delivery of a brief, we have on record a spirited instance in the celebrated Mr. Dunning, of his afterwards taking a brief on the other side."

[We shall be glad to receive any case and opinion on the subject of Retainers, in order that the practice may be better known and settled than it is at present. Ed.]

## NEW BILLS IN PARLIAMENT.

## GOVERNMENT OF PRISONS.

THIS is a Bill "for effecting greater Uniformity in the Government of the several Prisons in England and Wales; and for appointing Inspectors of Prisons in Great Britain."

The preamble recites, that by the laws now in force, rules and regulations made for the government of certain prisons, and for the duties to be performed by the officers of the same, are in London and Middlesex required to be submitted to the two Chief Justices, and elsewhere to certain other Justices for approval, and to be approved of by them before they can be enforced.

The proposed enactments are as follows:

1. Rules for government of prisons, &c. after the passing of this act, to be approved only as therein provided.

2. All rules and regulations which shall be made after the passing of this act by the court of mayor and aldermen of the city of London, justices of the peace or other persons whatsoever, which they are now by law authorized to make for the government of any prisons in England and Wales, or for the duties to be performed by the officers of such prisons, shall be submitted to one of his Majesty's principal secretaries of state, and it shall be lawful for such secretary of state, if he thinks fit, to alter such rules and regulations, or to make additional rules and regulations thereto, and to subscribe a certificate or declaration that such rules and regulations as submitted to him, or altered or added to, are proper to be enforced; and when such secretary of state shall have subscribed such certificate or declaration, such rules and regulations, alterations and ad-

<sup>a</sup> "But a retainer for the *assizes* must be renewed on or before the last day of the term preceding the following assizes."

ditions, shall be binding upon the sheriff and all other persons without any other sanction or approval. Provided that no rule or regulation save as hereinafter is mentioned, which after the passing of this act shall be made for any prison within England and Wales, or for the duties to be performed by the officers of such prison, shall be enforced until a certificate or declaration shall have been duly subscribed by one of his Majesty's principal secretaries of state in manner aforesaid.

3. Justice of peace empowered to commit offenders to any house of correction near the place where the assizes are to be holden at which they are to be tried.

4. Persons convicted of offences for which they are liable to death, transportation, or imprisonment, may be committed to the house of correction, and sentence of death is to be executed by the sheriff.

5. Clerks of peace, &c. to transmit copies of prison rules to secretary of state, who may add to, or alter the same. Clerks of peace, &c. to lay copies of prison rules before the Court of Quarter Sessions.

6. In case clerks of peace, &c. neglect to send such rules, secretary of state to certify rules for government of prison.

7. His Majesty to appoint inspectors of prisons. Inspectors may examine persons on oath.

8. Inspectors to keep minutes of their proceedings, and make an annual report to the secretary of state and to Parliament.

9. Annual returns to the justices to be made up to the 25th September in each year.

10. Secretary of state may authorise any person to visit prisons.

11. His Majesty may order prisoners to be removed from one prison to another.

12. Where term of imprisonment expires on Sunday, prisoner to be discharged on the preceding Saturday.

13. Power given by 4 & 5 W. 4, c. 36, to his Majesty, to direct prisoners sentenced to imprisonment for offences committed beyond limits of that act to be removed to Penitentiary, extended to offences committed within the limits.

14. Eight hundred male convicts may be confined in Penitentiary, instead of six hundred, as limited by 59 G. 3, c. 136.

## THE PROPERTY LAWYER.

No. XLIV.

### OWELTY OF EXCHANGE.

The following point is new :—

The purchaser of lands objected to complete his purchase, on the ground that the trustees of settlement (though they had a power of sale and exchange) had no power to give money for owelty of exchange.

It was argued by Sir *E. Sugden*, for the vendor, that two estates exactly of equal values, can never be met with, and therefore it was incident to the power to receive money for owelty of exchange. By the common law, money must be received for owelty of partition. The trustees who paid the 500*l.* had a power of sale: that sum, therefore, must have arisen from the sale of part of the settled estates. *Doe v. Preston*, 7 B. & Cress. 392.

Mr. *Preston* and Mr. *Lynch*, for the defendant.—This is quite a novel case, both in point of practice and of decision. The transaction was partly a purchase, and partly an exchange. Powers must be strictly pursued; and the parties in whom a power is vested, can do only what the power authorizes. Here the trustees of the settlement were not authorized to pay any money for owelty of exchange. Under an exchange, each party must have a right of re-entry on eviction: but in this case, if eviction takes place, the whole 500*l.* will be lost. *Bartram* died before the transaction was completed; and if an exchange is not perfected in the life-time of both parties, it is void; Co. Lit. 50 b.

The *Vice-Chancellor*.—There is no objection to this transaction in principle. The exchange in this case was not an exchange at common law, nor is it subject to the same rules. The remedies which the parties have in case of eviction, are not the same as the common law gives, but are provided by the covenants in their conveyances. If either of the parties to an exchange at common law, aliens the land taken by him in exchange, his right of re-entry is destroyed. *Bustard's Case*, 4 Co. Rep. 121. No analogy, therefore, exists between a transaction like the present, and an exchange at common law; and the fact that Mr. *Bartram* died before the conveyance to him was executed, does not affect the case. As the 500*l.* has been paid, and the lands have been conveyed to his trustees, I am of opinion that they have a good title, and, consequently, the purchaser is bound to complete his purchase. *Bartram v. Whichcote*, 6 Sim. 86.

## PARTNER'S POWER OF SUING CO-PARTNER.

In a former volume (vol. 9, p. 454) some observations will be found on the power one partner has of binding his co-partner. In connection with this, is the question, Whether one partner can, under any circumstances, sue his co-partner? It is as a general rule true, that one partner cannot sue the other, on the ground that the receipt of one is the receipt of both, and that one partner suing his co-partner would be a person suing for that which, in contemplation of law, is already in his own possession. This, however, would be a source of great evil, if allowed to prevail in all cases:—as, to put an instance, two persons are in partnership; one of them lends a friend 10*l.*, who

afterwards pays it back to the other, who, on being applied to for it, refuses, on the ground that as, on a balance of accounts there may be a surplus in his favour, he is entitled to keep this as a security against this surplus due from his partner, and at the same time that his partner has the power of paying himself out of the joint funds. This general rule is founded in reason, viz. to save circuity of action: a person who has a clear defence in equity, shall be allowed the benefit of such defence, when his equitable right can be clearly defined. Thus, if one partner sues the other, the Courts of Law acknowledge the equitable doctrines of account and contribution between partners; and therefore they say, that if we allowed one partner to recover a sum of money from his co-partner, he would, on its receipt, be obliged to account with his co-partner, which would be creating a circuity of action; and therefore to prevent this, they allow the co-partner the benefit of such equitable right. At the same time that these equitable defences are allowed in Courts of Law, it is with this qualification, that such defence shall be of no avail when raised in opposition to, instead of in furtherance of the object of parties to any particular transaction. In illustration of these positions may be quoted the cases of *Bottomley v. Brooke*, and *Rudge v. Birch*, cited 1 T. R. 621, 2; and *Bedford v. Bruton*, Bing. N. C. 399. In the first of these, an action was brought upon a bond, given to the plaintiff in trust for one E. Chancellor, who, at the time of the action brought, was indebted to the defendant in a greater sum than the amount sued for on the bond. On demurrer to a plea to this effect, by the advice of the Court, the plaintiff withdrew the demurrer; so that the Court did not there look to the person legally entitled, but to her who was beneficially interested in the bond. This authority was recognized in *Rudge v. Birch*, where, to debt on bond, the defendant pleaded that the bond was given to the plaintiff in trust for A., for a debt due from the defendant to A., and that A., at the time of exhibiting the plaintiff's bill, was indebted to the defendant in more monies. The plaintiff demurred, and the Court, on the authority of the case of *Bottomley v. Brooke*, held this to be a good plea. In *Bedford v. Bruton*, one Austin had entered into a covenant with certain persons, described as trustees for a building society, to grant certain leases at particular times, and they covenanted, until they were granted, to pay the rent. By deed of even date, made between the above-named trustees of the one part, and Austin and others, representing the Building Company, of the other part; Austin thereby covenanted, when called upon at any general meeting, to do any act for indemnifying the trustees from all loss. On covenant by Austin, the point raised was, whether or not this was not virtually and substantially an action brought by one partner against his partners, to recover damages against them, to which the plaintiff himself must be contributory, if he succeeds. *Tindal, C. J.*, in giving judgment, says, "The deed upon which the declaration proceeds, con-

tains a covenant under the seal of the three defendants, and one Henry Parry, since deceased, with Austin, before his bankruptcy, that they would pay to Austin the several yearly rents in the indenture mentioned, until he (Austin) should grant the leases which he had covenanted by that deed to grant. Here, then, is an express covenant for payment of a certain sum, under the seal of the defendants; and it is unnecessary to observe that this forms the fit and proper ground of an action of covenant in a Court of Common Law, unless sufficient matter is brought forward in the plea to avoid it. Now, the substance of the first plea is this, that by another deed, of even date with the former, and made between the defendants of the one part, and Austin and the several other persons whose names and seals were thereto subscribed and set, of the other part, and also by certain articles of agreement set out in the plea, and referred to and confirmed by the deed, Austin and the several other persons mentioned in that deed, had formed themselves into a society, called, &c. for the purpose of erecting a number of houses, to be paid for out of a fund to be raised by monthly subscriptions of the members; that Austin had agreed to demise the land on which the houses were to be built, on certain stipulated rents, and that the agreement for the leases should be made to and executed by the trustees of the society, in trust for the benefit of the members thereof, until the completion of the same. The deed set out in the plea then contains a covenant on the part of all the members of the society, that for the better indemnifying the trustees, each of the members would, when called upon at their general meetings, do and perform all such acts as might be necessary for indemnifying the trustees from all loss and damage they might sustain in execution of the trusts. The first observation that arises on this state of the pleadings is, that if we hold the action to be not maintainable, we defeat the very object and intention of the parties. The object was, that Austin, who was an equal contributor to the common fund, by his monthly subscriptions, with the other members, and who, besides that contribution, gave up his land for the general purposes of the society, should receive an annual remuneration for the use of his land in the shape of rent, separate and distinct from his profits as a member of the society: and in order to avoid the difficulty of any direct agreement between himself and each of the other members, he covenanted with the trustees to grant the leases when the houses shall be finished; and they covenant with him, on the other hand, to pay certain annual sums in the mean time. Unless, therefore, some unanswerable objection can be brought forward against the maintenance of this action upon the covenant, the intention of the parties will be best effected by allowing it to be maintained. It is objected that the damages recovered for the breach of covenant will be borne out of the common fund in which Austin is interested. The answer is, that the damages are in the first instance to be borne by the defendants, who are to be indemnified at a

future and uncertain time, in such manner as the members of the society, at a general meeting, shall direct. The rent is reserved at certain stipulated times: the meetings of the society are to be held quarterly. It never was intended that the landlord should wait till the quarterly meeting, when the day of payment occurred before it. It is argued, that to avoid circuity of action, the present action is not maintainable; for if the plaintiffs recover on the covenant made with Austin, the defendants may recover back again from him the damages they have sustained. But this is not so; for each member has covenanted only to do what he shall be called upon to perform at a general meeting, in order to indemnify the trustees. The agreement, therefore, between Austin and the defendants, differs from an agreement between partners, in two important points:—the damages, when recovered by the plaintiff, do not go to any partnership fund, but are his own separate property; and the damages are not to be paid out of any partnership fund, but by the trustees on their personal contract. The cases of *Rudge v. Birch* and *Bottomley v. Brooke*, referred to by the defendant's counsel, go no further than this, that the Courts of Law will so far take notice of the existence of a trust as to let in against the plaintiff, the trustee, that which would be a valid defence against the *cestui que trust*. But those cases have never been extended; and they certainly furnish no authority for considering the *cestui que trusts* the defendants upon the record, where such a proceeding would defeat the whole object of the parties. And the case of *Andrews v. Ellison*, 6 B. Moore, 199, is a strong authority to show that this action is maintainable. There in an action of covenant upon a policy under the seal of the defendants; it appeared upon the record, that the defendants were jointly interested with the plaintiff in the funds which were ultimately to satisfy the plaintiff's loss by fire: and it was held that the defendants were liable, on their express covenant that the plaintiff should be entitled to a remuneration out of the society's funds in case of a loss by fire. Upon the whole, we think the first action maintainable, and give judgment for the plaintiffs.

This case of *Bedford v. Bruton*, although resting upon more special circumstances than will be found in most of the cases, shows that the above general rule is not altogether invariable; and it goes to prove that one partner may enter into such agreements as may create a debt on which he may sue his partner in the same manner as though he was a third party: as suppose two persons under articles, and it be stipulated that a balance shall be struck every year, and when so struck, the person in whose favour the balance shall be, shall be considered as having a debt due from the firm: as regards this debt, he is a third party, nor would the other partner be allowed to say, that because in the following year there may be a balance the opposite way, or immediately that the money is paid, the person receiving it may have to pay some partnership debt, therefore the plea

of partnership should hold good. This would be raising the plea in opposition to, and not in furtherance of the agreement; and it does not follow, because the party receiving may have to pay a debt of the firm the next day, that he is less entitled to this sum because each partner is so bound; and where a debt has been contracted by a firm, the effects of each partner are bound to the full amount, although in account his partner may at the time be indebted to him in a larger amount than the amount paid. Besides, such payment could not remove the funds from the hands of the creditors, as the money is equally within reach, in which ever of the partners' hands it may be: therefore there is nothing in this argument to prevent the suit. And again, the argument that on the following account there might be a balance the contrary way, is, on the very face of it, absurd, as, by this means, one partner might get all the funds into his hands, and offer this excuse on every account struck between them; and so no resort would be left, but for the other party to go into equity: but this is what the partner seeking redress would wish to avoid, as the other partner would thus gain the delay required. If once a balance be struck, there then arises a debt between them, for which they may sue as though they were strangers to one another. This was admitted by Mr. Justice Buller, 2 T. R. 478. "One partner cannot recover a sum of money received by the other, unless, on a balance struck, that sum be found due to him alone." To this authority may of course be added the above ones, of *Andrews v. Ellison*, and *Bedford v. Bruton*. In opposition to these cases, may be mentioned the *dicta* of Lord Eldon and Mr. Justice Lawrence, in the case of *Res v. Whitestable Company*, as it respectively appeared in the Chancery Court and King's Bench, 17 Ves. 326, and 7 East, 353.

Without for a moment, however, doubting the *dicta* of these learned Judges, it is sufficient to say, that the sums in those cases were not sufficiently ascertained to allow of a Court of Law interfering; and the same principle was established in *Chapman v. Koops*, 3 B. & P. 289, on the very same grounds,—that the Court could not see its way through the partnership accounts. None of these Judges, however, said, that if the sum had been clearly defined, still that they could not interfere.

The question discussed is one occurring in a great many shapes: one, for instance may be, where two persons being partners, one owning a house, is naturally very glad to have a partner of his as a tenant; but he would stare a little, if, on suing for his rent, a plea of partnership was put in, or he was told that on a partnership account the balance was against him. This might be the very contrary to what he might have wished, as he might have looked upon this as being a separate property, and not locked up, as the remainder of his property, in the trade. And again, he might not even have the satisfaction of abusing his legal adviser for not telling him the consequence of his entering into an agreement with his partner, as such

legal adviser might not be aware of such tenant being a partner, such partnership being possibly a secret one. Enough, however, I think, has been shewn, to take such dealings between partners out of the general rule, and to relieve legal advisers from asking in every instance whether the proposed tenant is a partner of the lessor's. Enough has also been said, to distinguish other cases than the last, when coming within the general rule and when otherwise.

M.

## PROFESSIONAL GRIEVANCES.

### DELAYS AT THE REGISTRAR'S OFFICE.

*To the Editor of the Legal Observer.*

Sir,

It is seldom that I venture to contribute to your valuable journal: still more seldom is it that my contribution is couched under the form of a complaint; but the unflinching fearlessness with which you oppose every abuse, has tempted me, in this instance, to draw your observation to the errors which, by long sufferance, have crept into the Chancery Registrar's office. I am not one of those who advocate the doctrine of infallibility in public servants; it is sufficient for me that a man does his best, let that best be what it may; but to witness the negligence, the careless indifference, with which the time of the public is treated by some of the gentlemen of this department—to witness this, which I do daily, and remain silent, is beyond my philosophy. A motion is made—say, for paying money into court; the senior counsel's brief is taken to the Registrar's office and the order bespoken; a week elapses before the minutes of that order are given out; two more days pass by before those minutes are settled by the opposing party and returned to the Registrar; then a further delay of ten days before the order is drawn up, and a further delay of two days before the same order is acquiesced in by the opponents, after which it reposes three days on the Registrar's table for his perusal before signature; and to sum up the climax, a still further lapse of three days takes place before the unfortunate order is stamped as having been entered! Thus, Sir, an interval of nearly a month (making no allowance for contingent delays, which, as every one too well knows, are innumerable) must elapse between the order pronounced by the Court, and the order issued by the officer of the Court. It may be asked, how has this month been employed? Has the subject been maturely considered, and such considerations carefully committed to paper? I am afraid that the important omissions, the illegible characters, and the clerical mistakes, will proclaim alike the considering and the transcribing to have been the work of a short half hour. Then, I ask, why is not a remedy found for the evil?

I would suggest, that the office hours of the Registrar's office be from ten to four (the same

as the Six Clerks), until which hour the gentlemen would be *obliged* to be present and work. The present regulation holds out every inducement for the clerk to leave the office for the day at two o'clock in the afternoon; the re-opening in the evening being a mere farce.

SUUM CUIQUE.

[We are persuaded that the grievance here complained of is unknown to the Registrars, at least to any thing like the extent represented; and we doubt not that due inquiry will be made into the subject, and as far as practicable a remedy provided. In the common law courts the rules may generally be obtained in the evening of the day on which they are pronounced, and certainly without any difficulty on the following day. These rules, however, are more concise than Chancery orders, but still the extent of delay in preparing the latter is out of all proportion. The practitioners, and the character of the profession, alike suffer by these unnecessary official delays. En].

## ON THE LOCAL COURTS IN FRANCE.

Sir,

I think the important decision of the Court Royal of Douai, on the appeal from the decision of the Tribunal, in the affair of *Tourasse v. Welleley*, (*ante*, p. 210,) may be referred to, as an argument against the system of Local Courts of provincial administration of justice being established in this country. The advocates of the measure have so often triumphantly referred to France for an illustration of its beneficial effects, that they cannot complain if we also borrow an illustration from "La Grande Nation."

It is not easy, from the report, to shew all the points on which the two courts differed. The proceedings appear to have been somewhat lengthy, and no doubt were very expensive: and where are the parties placed after all this? The Tribunal declares null and void the proceedings against Welleley, as well as the arrest, orders the money deposited to be paid to him, and condemns the plaintiff to pay 1000 francs damages, interest on the money deposited, and costs. The Court Royal at Douai "annuls the judgment appealed against, and doing that which the inferior judges ought to have done, condemns Welleley to imprisonment until he shall have paid the plaintiff 102,430 francs, (allowing proper deductions,) also to the costs of the two proceedings, and to the fine deposited on his appeal; and orders the *restitution of the fine deposited on the present appeal*." What a change for M. Tourasse!

And it has since been determined to take the case before the Court of Cassation at Paris; so that nothing short of Paris will satisfy Mr. Wellesley; and so in all cases of importance would it be here. The parties will not be satisfied with the decision of the provincial judge, nothing but the opinion of the Judges of Westminster will satisfy them.

I will not longer trespass on your columns, but I ask any man, even the warmest advocate for cheap and speedy justice, whether he would wish to witness such proceedings as those of *Tourasse v. Wellesley*, before the two Provincial Tribunals, and then the Court of Cassation. I ask him also whether he (being one of the parties) would risk here the expense of such proceedings: or whether he would willingly see England the theatre of such judicial polity?

J. A.

## DISPUTED DECISIONS.

### ACCOMMODATION BILL.—CONSIDERATION.

THE case of *Lacey v. Forrester*, in your Number for June 27th, calls to memory a *dictum* of Lord Abinger on this subject, delivered in the last term, in the Court of Exchequer, in the case of *Simpson v. Clarke*, being an action by the holder against the acceptor of a bill of exchange, who pleaded that he accepted the bill without consideration, that the drawer endorsed it over without consideration, and the plaintiff gave no consideration for it. To this plea the plaintiff replied that he gave full consideration for it to the last endorsee, whose name was Carter. The cause was tried before Mr. Baron Gurney, at Guildhall, at the Sittings after Hilary term last; when it appeared that the drawer had endorsed the bill to a person named Walker, who endorsed it over to Carter, and that Walker was indebted to the plaintiff in the sum of 56*l.*, and that the plaintiff paid the balance between that sum and the amount of the bill to Carter, which was 20*l.* 18*s.* As this evidence was at variance with the replication, which set forth that the plaintiff had given consideration for the bill to Carter, the learned Judge directed a verdict to be entered for the plaintiff, with liberty to move to enter a nonsuit, or to reduce the damages to 20*l.* 18*s.* A rule to show cause why there should not be a nonsuit, or why the damages should not be reduced accordingly, having been obtained, Sir F. Pollock and Channell shewed cause, contending, that it was not incumbent on the plaintiff to prove that he had paid consideration for the bill, for an endorsement implied consideration; and unless the defendant could show that his acceptance was procured by fraud or imposition, he was liable for the amount of the bill. It was admitted by the plaintiff that the defendant had received no consideration for the bill, or in other words, that it was an accommodation bill; but that was not suf-

ficient to call upon the holder to prove consideration. Mr. *Humfrey* having been heard in support of the rule, Lord Abinger said, "that he was surprised to hear that it was doubted by some of the Judges whether the holder of a bill of exchange was called upon to prove consideration, on its being established that it was an accommodation bill. During his experience at the bar, the practice was, without exception, to call upon the holder to prove consideration, when the acceptor proved that it was an accommodation bill. When the latter fact was proved, it showed that the bill was a nullity as between the drawer and the acceptor. It was therefore incumbent on the holder to set up the bill again by proving consideration. It was admitted that the holder was bound to prove consideration, if the acceptor showed it was obtained from him by fraud; but not so in case of accommodation. But Lord Kenyon and other Judges of that time used to alarm the citizens of London, by declaring against accommodation bills as a fraud, for they purposed to represent value, when it turned out they were a mere nullity, founded on a fictitious transaction; for the effect of proving an accommodation bill was to establish a mere nullity as between the original parties. However, the facts of this case authorized the Court to pronounce an opinion upon it, without deciding the general question. If the learned Judge who tried the cause had called on the defendant to prove that the plaintiff had given no consideration for it, then indeed the question would arise; but as he reserved leave for the defendant to move either for a nonsuit, or for a reduction of the damages, the Court would pronounce in favour of the latter." Mr. Baron Gurney "considered it a point of very great importance to the commercial community, and he hoped that it would be shortly brought before all the Judges, in order that it might be clearly settled." Here, then, is an extra-judicial opinion given by a Judge, in opposition to the expressed opinions of other Judges. It may therefore be as well to inquire who the other Judges are who disagree with his Lordship on this point, and the cases thereon.

In *Basset v. Dodgin*, 10 Bing. 40, where the action was brought by the holder against the indorsee, and on the trial the drawer proved that the bill was accepted by Daniel and indorsed by defendant Dodgin, for his accommodation, and that he applied to a party to discount it, who took usurious interest. This party not being called, nor shewn to be an agent of the plaintiff, *Alderson, J.*, considered the plaintiff not bound to enter into proof of consideration. On motion for new trial, *Tindal, C.J.*, after stating that *prima facie*, the holder is such for valuable consideration, adds, "the question as to what will or will not be sufficient to render it necessary for the plaintiff to prove the consideration given for the bill, was much considered in *Tonson v. Heath*, where three of the Judges held that where a note or acceptance has been given under such circumstances that the original payee cannot recover on it, the indorsee must prove that he became so for valua-

able consideration:—though one of the Judges, Mr. Parke, confines that rule to cases where the note or bill has been obtained by fraud or felony, or duress, which throw suspicion on the holder's title. But none of these circumstances apply to the present case, where there is no suspicion as to the original making of the bill, nor as to the mode in which it is obtained from the original parties:" and Parke, J., adds, "in order to cast it on a plaintiff to show the consideration of a bill, the defendant must show—I will not say, felony or fraud only, but he must cast *such a shade* over the transaction as to make it imperative on the plaintiff to clear it up by further proof." It is not quite clear, from what is above stated, what are the opinions of the two learned Judges, or whether the latter would consider that showing the bill to be an accommodation bill would be casting such a shade as to put the plaintiff to prove his consideration. From a more recent case, however, it would appear that the opinion of the Judges of the Common Pleas was different from Lord Abinger's. In *Low v. Cheffney*, Bing. N. C. 267, to a declaration on a bill for 250*l.*, drawn by Teed on the defendant, and by him accepted, and by Teed indorsed to plaintiff, defendant pleaded that it was accepted without consideration passing from Teed to the defendant. Demurrer and joinder. The Court called on the defendant to support his plea; and in support of which *Heath v. Sansom* was quoted. Tindal, C. J.—"The distinction between *Heath v. Sansom* and the present case is this, that there the question arose at the trial under the general issue, and suspicion was cast upon the plaintiff's claim by his own evidence: here the question arises upon a plea, which professes to be an answer to the action. In *Heath v. Sansom*, it appeared upon the plaintiff's showing, that Sansom, being indebted to a firm in which he was a partner, gave a note in the name of another firm, to which he also belonged, in discharge of his individual debt. The payees indorsed it over, and the indorsee sued Sansom and his partner in the second firm. Suspicion being cast upon the transaction, it was properly held, that that note was made in fraud of Sansom's partner in the second firm, and could not be enforced against him by the payees, and that at least, under those circumstances of suspicion, the indorsee could not recover without proving that he took the note for value, though no notice had been given him to prove the consideration. Here it is only stated that the acceptor of the bill received no consideration from the drawer: consistently with that, the indorsee might be suing on the fairest case: no suspicion is thrown on the transaction, and indorsement *prima facie* imports consideration." Three other Judges (*Gaselee, J., Vaughan, J., and Bosanquet, J.*) gave judgment to the like effect. Here then is a direct decision, and possibly the one alluded to by Lord Abinger. To these opinions may be added that of Mr. Justice Parke, dissenting from the other three Judges, in the case of *Heath v. Sansom*, 2 B. & Ad. 297.—"When the note or acceptance has been obtained by felony, by fraud,

or by duress, it has been usual to require proof of valuable consideration on the part of the indorsee; and I do not dispute the propriety of that usage, as any one of those facts raises some suspicion of the title of the holder; but I am by no means satisfied that the same rule can be applied to *all* cases where an acceptance or note has been given without consideration. I think this is a very important question. It is difficult to reconcile the recent practice—for it is only recent—with principle: for the simple fact of want of consideration between the acceptor and drawer, or maker and payee, affords no inference that the holder received the bill or note *malâ fide*, or without consideration. It besides induces a practice likely to produce great increase of expense, as in every instance a plaintiff who is indorsee can hardly be safe, without being prepared to prove, as to some one at least of the indorsements, that value was given for it; and this inconvenience may outweigh that of casting upon the defendant the burden of making out a case of suspicion against the indorsee, before proof of consideration can be required from him." It also appears to be well settled from the cases of *Fentum v. Pocock*, and *Carstairs v. Rolleston*, 5 Taunt. 192, 551, and *Harrison v. Courtould*, 3 B. & Ad. 36, that if, at the time of receiving the bill, no notice is attained of its being an accommodation bill, no after-attained knowledge will make the bill bad in third parties' hands: and in *Fentum v. Pocock*, *Mansfield, C. J.*, adds, "It appears to me, if the holder had known, in the clearest manner, at the time of taking this bill, that it was merely an accommodation bill, it would make no manner of difference; for he who accepts a bill, whether for value or to serve a friend, makes himself in all events liable as acceptor, and nothing can discharge him but payment or release." In addition to the expense pointed out by Parke, J., who, I would ask, would take a bill, on the risk of its being whispered into his ear at the tenth hour, that it is an accommodation bill, and that to avail himself of it, he must go into proof of his consideration. No honest man objects to show that he has acted honestly in his dealings; but in mercantile transactions the proving a consideration may take more time than the bill is worth:—as supposing, among other causes, two large firms which have dealings with one another in various parts of the world, and bills are from time to time passing between them, as each may have occasion to ask for them from the other. To prove consideration in such a general dealing, a balance of accounts must be struck, and this all because it turns out that one of the bills that has passed between them was in its origin an accommodation bill. Suppose a merchant to receive a bill from a correspondent in the West Indies, drawn and accepted by a party in New York: is the merchant to write to New York, to ascertain if the bill is an accommodation bill or not? or is he at a future time to run the risk of the balance of accounts being in his favour, when on an action brought, he is put to show consideration?



The result of the matter seems to be this: that if Lord *Abinger* be right in his position, bills of exchange will fall into disuse, as in large houses it often takes years to balance accounts, and this must be done in every case where note has not been taken as to what transaction the bill was given in, or in payment of what account. If there was merely a dealing, as a sale of a hundred casks of sugar, payment would here, no doubt, be noticed in the account, as by bill, or so and so; but if a house has dealings with others abroad, as Madeira, an order might be sent to supply so much Madeira to a particular party, and so to different other people; and in return goods might be ordered out to Madeira from time to time, and bills might pass generally between them for mutual accommodation. Here the proof of consideration would rest upon a general balance, without a special appropriation was made as to each particular bill. This in itself is sufficient to show the evil of establishing such a doctrine, although many other instances might be adduced; but I shall now leave this matter in the hands of those who may be willing to support Lord *Abinger's* view of the matter.

M.

## SUGGESTIONS FOR IMPROVING THE LAW.

No. X.

### PRACTICE IN THE EXCHEQUER.—TRIAL.

Sir,

In these reforming days it may not be out of place, through the medium of your useful publication, to call the attention of the parties interested in the matter to a very gross absurdity, in part of the common law practice of the Court of Exchequer. The "commission," which in the case of a trial at the assizes it is necessary to issue, must be tested in term, and (as in a case of my own a day or two since) that may be before the action was commenced, whereas the writ recites *an issue to have been joined* between the parties. Why, when the practice of the Courts was attempted to be equalized, was not this writ abolished, and the *Nisi Prius* Act extended to this Court? or why, when the Uniformity Act was amended, was not this writ included with the jury process, and allowed to be tested *when issued*? It clearly must have been forgotten.

A FRIEND OF UNIFORMITY.

### LAW REFORM.—3 & 4 W. 4, c. 27.

One can hardly expect that the very important acts of parliament, for the furtherance of the object of Law Reform should, on passing, be entirely free from mistake; but when a defect is palpable, one does expect that an early opportunity should be taken of remedying it. In the 23d sec. of the above act, it was at once quite evident to the practical conveyancer, that

the learned framer of the bill had not carried his enactment sufficiently far, to effect the intention expressed in the marginal note, *the quieting the possession in other cases contemplated, after a lapse of 20 years*; two sessions have now nearly passed away, and the defect, although admitted, is allowed to remain; and consequently the act in many cases, where it was intended to apply, is an entire nullity.

## RE-ADMISSION OF ATTORNEY S CEASING TO PRACTISE.

Mr. Editor,

THESE having been several recent special applications to the Courts respecting the re-admission of attorneys who have not taken out their certificates for one whole year, I cannot at a better time than the present, perhaps, make some few remarks upon what appears to me to be a misconception of the act of parliament relating thereto.

If a professional man thinks fit to retire from business, and ceases altogether to practise, but at the expiration of some few years afterwards, from some necessity or other, feels obliged to renew his labors again, it has been for some years past held, that he must be *re-admitted* before he can again take out a certificate; and I believe these decisions have been made under the act of the 37 G. 3; for by the report of the case in the matter of *Ross v. Hodgson* (9th May last), I see one of the learned Judges is said to observe, that "by the 37 G. 3, a person neglecting to take out his certificate in the manner therein directed, is declared to be incapable of practising in any of the Courts therein specified, and that the admission, entry, and enrolment of such person shall be null and void." But I believe the act does not stop short there, and that by reading further on, the latter part of the section, (although the whole of it, certainly, applies to the case of *Ross v. Hodgson*,—for there the attorney had continued to practise without a certificate) will fully bear me out in saying, I do not think that an attorney who has ceased—I can't call it *neglected*—taking out a certificate, and ceased also altogether to practise, is included therein. It runs thus: "Every person who, after the 1st Nov. 1797, shall neglect to obtain his certificate for one whole year, shall be thenceforth incapable of practising by virtue of his admission, and the admission of such person shall be null and void—provided that nothing herein contained shall be construed to prevent any of the said Courts from re-admitting any such person, on payment of the duty accrued since the expiration of the last certificate, and such further sum of money by way of penalty as the said Court shall think fit to direct."

Now it is pretty evident that the above clause alludes only to persons who have been practising without their certificate; for the provision is, that the Courts may re-admit, upon payment

of the duty accrued since the expiration of the last certificate, *and a further sum by way of penalty*. Penalty! for what? why, for having practised without a certificate, and by so doing, making his admission null and void, and thereby incurring a penalty; but this clause can never be considered to apply to a person who ceases altogether to practise.

Again: bear it in remembrance that the words are "neglect to obtain a certificate." Now, a man who leaves off practice purposely, cannot be said to neglect to take out his certificate. I mean therefore to say, that this clause applies only to those I have named as 'practising without their certificate;' and I cannot find any other clause imposing a necessity for re-admission in the other instance.

By the 25 G. 3, certificates were dated the day the attorney applied for them, and expired that day twelvemonths; and I have known many persons cease to practise, and renew their certificates (if occasion required them to enter into business again) years afterwards; and in confirmation thereof, you will find, in Impey's Practice, p. 58 (edit. 1818), this note—in allusion to the arrest of an attorney: "The privilege only continues while he is practising, and while he has the certificate required; therefore ruled that one who had not practised for several years, might be arrested, though, after suing out the writ and before arrest, he recommenced his practice, and took out his certificate."

I had occasion myself, some few years back, to submit a case to counsel, for a country attorney upon this subject, whose opinion was, that as the gentleman had ceased practising since his last certificate, he might renew it without re-admission, which was done accordingly.

I am fearful that I am trespassing too much upon you; but I really think this question one of some importance to the profession; and if things have gone wrong hitherto—which will be the case sometimes—it is time to have them set right; and if you, or some correspondent, will favour me with your or his view of the matter, it will be esteemed a favor by an old subscriber.

C. W. M.

## SUPERIOR COURTS.

### Lords Commissioners' Court.

#### VENDOR AND PURCHASER.—BOND.—LIEN.

*A reversioner in fee conveys her estate to her father, the tenant for life, and accepts a bond for the amount of the price, stating in the deed of conveyance a receipt for the full consideration, and indorsing thereon a receipt of the bond in full "for the consideration within expressed."*

*This bond was not a lien on the estate (see 9 L. O. 268).*

The bill was filed to compel specific performance of a contract, entered into in 1832, for the sale of an estate in Devonshire, free

from incumbrances, for 9,000*l.* to the defendant. He objected to the title, on the ground that Mrs. Orlebar, a married daughter of the plaintiff, had a lien on it to the extent of 3,000*l.*, and that she had not executed any release. Mr. Parrott, the plaintiff, had, under his marriage settlement, executed in 1809, a power of appointment among any of his children, of the reversion in fee of the estate; he having no sons, but several daughters, appointed in favour of his daughter Sophia (Mrs. Orlebar), and being afterwards anxious to sell the property, he entered into a bond to secure 3,000*l.*, the estimated value of her equity of redemption in the estate which was subject to a mortgage of 5,000*l.*, and to the plaintiff's (her father's) life estate. The bond was executed on the marriage of the daughter in 1831, and was in the way of provision for herself, her husband, and the issue of the marriage. On the deed of conveyance from her, a receipt for the bond executed on the same day was endorsed, thus, "received, of the within date, from Joseph Parrott, a bond for the sum of 3,000*l.*, being the full consideration within expressed to be given by him." The question was, whether this bond was a lien on the estate.

The late Master of the Rolls held, that it was not a lien; and this was an appeal from his decision\*. Mr. Preston, Mr. Jacob, and Mr. Bacon, for the respondent, argued, that as the contract between the plaintiff and his daughter was wholly different from the ordinary transactions between vendor and purchaser, and was not for the payment of money by the purchaser, but for a settlement on the daughter's marriage, to be made in a form expressly pointed out, the lien arising by implication on ordinary sales could not exist; that the contract was clear upon the face of the instruments, and that it had been fully complied with. This was a resettlement of the estate, the father giving the daughter that which was more convenient for her. She received that for which she bargained; the bond was a substitution for her former lien. It was clear from her receipt, that she had no idea of a lien, which exists only between vendor and purchaser, or their representatives, but was never extended to third parties. If one buy an estate, and does not pay for it, equity follows the estate in the hands of the purchaser. The daughter's lien here was twice discharged; first, by the bond; and, secondly, by a fine, in which she and her husband joined, to remove the defendant's objection to the title. To shew that this bond was no lien on the estate, they cited (besides other cases) *Clarke v. Boyle*<sup>b</sup>; *Ex parte Parkes*<sup>c</sup>; and *Winter v. Lord Anson*.<sup>d</sup> Although the last case was reversed by Lord Lyndhurst, yet the doctrine laid down by Sir J. Leach as applicable to the point, was

\* See his judgment, 9 L. O. 269.

<sup>b</sup> 3 Sim. 499.

<sup>c</sup> 1 Glyn and Jam. 228.

<sup>d</sup> 1 Sim. & Stu. 439; S. C. reversed, 3 Russ. 488.

not impeached; and indeed Lord Lyndhurst's decision gave much surprise at the time.

Mr. Tinney and Mr. Tyrrell for the defendant, in support of the appeal, insisted, that this was a clear case of lien; that the sum of 3000*l.* was the price for which the daughter of the plaintiff had agreed to part with her estate, and that until that sum was satisfied, she and those claiming under her were entitled to have that sum raised out of the estate; that there was nothing in this case to exempt it from the rules which, on the same head of equity, had been established by a series of cases. They relied particularly on the case of *Mackreth v. Symonds*,<sup>a</sup> in which Lord Eldon examined and confirmed the principles of the former cases. The decision in *Winter v. Lord Anson*,<sup>f</sup> by Lord Lyndhurst, had established, that where a bond was given for the payment of the purchase money, that did not release the lien. The question here was, whether the bond was a security or a satisfaction. The bond was referred to in the indenture of conveyance, and was not there expressed to be in satisfaction of payment. It was clear that the bond was only a collateral security.

Among the other cases cited on either side, were *Tardiff v. Scruggen*; <sup>g</sup> *Elliott v. Edwards*; <sup>h</sup> *Coppin v. Coppin*; <sup>i</sup> *Hamson v. Southcote* <sup>j</sup> and *Fuwell v. Heelis*.<sup>k</sup>

Sir Lancelot Shadwell.—The first question that arose on reading the bond was, whether anything was intended by the parties to it, other than that the father should give such bond. This was not to be regarded as a purchase, but a family arrangement, in a way wholly inconsistent with the payment of purchase money. If it were a purchase, the money would at all events have to be paid; but there are events contemplated in this bond, in which the money might not become payable to the wife or husband, and in which their children might not be entitled. If it appear on the face of the instrument, that the parties were bargaining for security for a future possible payment, and not for money, no lien arises. The principles laid down by Sir John Leach in *Winter v. Lord Anson*, are applicable here. There is no lien.

*Parrott v. Sweetland*, before the Lords Commissioners, Westminster and Lincoln's Inn, June 8th and 29th, 1835.

### Rolls Court.

PRACTICE.—APPEARANCE WITH THE REGISTRAR.

*A defendant on making special application to the master, under General Orders of December 1833, for time to answer, is not bound to enter his appearance with the registrar, though directed to do so if he*

*declines to draw up the order, and plaintiff avails himself of it.*

In this case defendant's time expired on the 15th of May. On the 14th, having made a special application, supported by affidavit, under the 21st Gen. Ord. of 21st December, 1833, for further time to answer amended bill, the master gave a fortnight, but directed an appearance with the registrar, which the defendant did not object to at the time, but subsequently, and before his original time for answering expired, gave notice of his intention not to draw up the order. Plaintiff thereupon drew same up, and gave notice of motion for defendant to enter his appearance with the registrar pursuant thereto. The clerk in court had previously refused to issue attachment pending the order.

In support of the motion it was argued, that the order, being upon notice and on special application, was *instantly* binding on all parties, as contra-distinguished from a third order, to answer an original, or a second order to answer an amended bill,<sup>a</sup> under the old practice, which was obtained *ex parte* without notice, and containing a condition precedent:<sup>b</sup> failing which it took no effect. And that the order in question, as taken in connection with the 21st Gen. Ord. of December, 1833, which makes it compulsory on the master, in the absence of special circumstances, to direct that the defendant *shall* enter his appearance with the registrar, must be deemed peremptory, and not conditional as theretofore. The form of the order, as adopted in the Master's office, specifying no time for entering the appearance, a defendant, as in this case, (unless the Court should interfere) might, by putting in his answer within the extended period, at all times avoid the condition imposed upon him.

Mr. Pemberton and Mr. G. L. Russell, in support.

Mr. Blunt, *contra*.

The Master of the Rolls held, that he could not comply with the motion; the 21st Gen. Ord. of December, 1833, meant to give the master the same jurisdiction which the Court before had, and that the master should have adopted the form of the old orders. It could not be meant that the condition should be imperative, or that the party had no option whether to perform it or not. In this case, the defendant having given notice of his intention not to draw up the order, the plaintiff suffered no mischief, but by his own act of drawing it up.

Motion refused, with costs.—*Judd v. Wartenaby*. Rolls, Westminster, 4th June, 1835.

*Quære*—If defendant, in such a case, should draw up the order and avail himself (as defendant here did) of the time given, would the Court interfere to compel an appearance with the registrar?

<sup>a</sup> L. C. Rosslyn's Order, 23d Jan. 1794.

<sup>b</sup> Viz. "on entering an appearance with the registrar, &c. within four days," the order (notice whereof was to be given) gave the usual time.

<sup>e</sup> 15 Ves. 344.

<sup>f</sup> 3 Russ. 488.

<sup>g</sup> 1 Bro. C. C. 420.

<sup>h</sup> 2 Bos. & Pull. 181.

<sup>i</sup> 2 P. Wms. 290.

<sup>j</sup> 2 Ves. 339.

<sup>k</sup> 1 Bro. C. C. 410.

**Exchequer at Pleas.**

**PLEADING.—BILL OF EXCHANGE.—AWARD AND SATISFACTION.**

*Where to a claim for goods sold and delivered, and on the money counts, the defendant pleads the absolute delivery of a bill of exchange, accepted by him, as to a part of the demand, the plaintiff does not answer the plea by alleging in his replication that the bill remains in his hands un-negotiated.*

This was an action for goods sold and delivered, and on the common money counts. The defendant pleaded—as to the sum of 9*l.* 15*s.* 9*d.* parcel of the said sums in the said declaration mentioned, the defendant says, that after the making the said promise in the said declaration mentioned as to that sum, and before the commencement of this suit, to wit, on the 21st day of October, 1834, the defendant, at the plaintiff's request, made and drew upon a piece of paper having a bill of exchange stamp duty thereon of the sum of 1*s.* 6*d.* a certain instrument purporting to be a bill of exchange, dated the day and year last aforesaid, without a drawer's name thereto, and whereby the defendant was requested to pay to such person, or his order in London, who should place his name thereto as the drawer thereof, 20*l.* two months after the date thereof, as for value received in goods and cash; and the plaintiff then requested the defendant to accept the same towards payment and satisfaction of the said sum of 9*l.* 15*s.* 9*d.*, and for the plaintiff's benefit and accommodation as to the rest of the said sum of 20*l.* to be payable thereby; and the defendant then accordingly accepted the said bill or instrument, and delivered the same to the plaintiff, and thereby became and was liable to pay to the plaintiff or such person who should place his name thereto as the drawer thereof, or his order, the said sum of 20*l.* two months after the date thereof, that is to say, towards payment of the said sum of 9*l.* 15*s.* 9*d.*, and for the plaintiff's benefit and accommodation as to the rest of the said sum of 20*l.*; and the plaintiff then accepted and received the said bill or instrument in and towards payment and satisfaction of the said sum of 9*l.* 15*s.* 9*d.*; and by reason thereof, and according to the law and custom of merchants, he the said defendant then became and was still is liable to pay to such person who has placed or shall place his name to the said instrument or bill of exchange as the drawer thereof, or his order, the said sum of money in the said instrument or bill of exchange specified, according to the tenor and effect thereof, and of his the said defendant's acceptance thereof: And the defendant avers, that the time for the payment of the money in the said bill or instrument specified had not at the time of the commencement of this suit elapsed, nor had the said bill or instrument then become due or payable: And this the defendant is ready to verify, &c.

The plaintiff replied, "that the said instrument in that plea mentioned, from the time of

the delivery thereof to the said plaintiff, as in that plea mentioned, always hath been, and at the commencement of this suit was, and still is, in the possession of the said plaintiff, un-negotiated, without any drawer's name thereto, and unpaid by the said defendant or any other person on his behalf: And this he is ready to verify," &c.

To this replication the defendant demurred, on the ground "that the fact of the bill taken by the plaintiff on account of the debt being un-negotiated and in his possession, is no answer to the defendant's plea."

*R. V. Richards*, in support of the demurrer:—The question is, whether the receipt by the plaintiff of the blank acceptance does not suspend his remedy for the 9*l.* 15*s.* 9*d.* until the bill becomes due? *Keardlake v. Morgan*,<sup>a</sup> is an authority to shew that even if the bill had been given for the exact amount of the debt, the plaintiff's remedy would be suspended.

After hearing arguments—

The Court was of opinion, that the defendant must be taken on this plea to have made an absolute acceptance of the bill to the plaintiff, and therefore the plea is good.

The plaintiff was then allowed to amend.—*Simon v. Lloyd*, T. T. 1835. Excheq.

**DEBT.—COVENANT.—PLEADING.—BREACH.—SPECIAL DEMURRER.—BREACH.—INTEREST.**

*If a plea to a declaration in debt on bond for non-payment of principal, endeavours to put the payment of interest, which is not in dispute, in issue, and concludes to the country, it is bad on special demurrer.*

This was an action of debt on a bond, conditioned for payment of certain principal sums, and the declaration was in these terms:

The defendant heretofore, to wit, on &c., by his certain writing obligatory sealed with his seal, and now shewn to the Barons of his Majesty's Exchequer here, the date whereof is a certain day and year therein named, to wit, the day and year aforesaid, acknowledged himself to be held and firmly bound unto the plaintiffs in the sum of 12,000*l.*, above demanded to be paid to the plaintiffs, or their certain attorney, executors, administrators, or assigns.

That under the said writing obligatory, was written a certain condition, whereby it was recited, that the plaintiffs had on the day and year aforesaid lent and advanced unto the therein above bounden defendant, the sum of 6000*l.*; and by indentures of lease and release, the lease bearing date the day next before the day of the date of the release, and the release bearing or intended to bear even date with the said writing obligatory, and made or expressed to be made between the defendant of the one part and the plaintiffs of the other part: the defendant had appointed, granted, and released, or otherwise assured certain messuages, farms,

lands, tenements, and hereditaments, in the said release particularly described, unto the said plaintiffs, their heirs and assigns for ever, for securing the said sum of 6000*l.* and interest, but subject to a proviso for redemption of the said premises on payment by the defendant, his heirs, executors, administrators, or assigns, unto the plaintiffs, their executors, administrators, or assigns, of the said sum of 6000*l.* and interest, after the rate in the said release mentioned, on the 13th day of November then next ensuing the date thereof. And in which said condition it was further recited, that for the better securing the payment of the same sum and interest unto the plaintiffs, the defendant had agreed to enter into the thereinabove written obligation, with such condition for making void the same as hereinafter was contained; and the condition of the said writing obligatory was declared to be such, that if the therein bounden defendant, his heirs, executors, administrators, or assigns did and should well and truly pay or cause to be paid unto the plaintiffs, their executors, administrators, or assigns, the full and just sum of 6000*l.* of lawful money of Great Britain, with interest thenceforth for the same after the rate of 5*l.* for every 100*l.* by the year, on the 13th day of November next ensuing the date of the said writing obligatory, being the same day and time as were covenanted in or by the said in part recited indenture of release for payment of the same; but subject to such proviso for the abatement of the interest as in such indenture of release contained, and did and should make the said payment without any deduction or abatement for or by reason of any taxes, charges, assessments, impositions, cause, matter, or thing whatsoever, and according to the true intent and meaning of the proviso and covenant in the said in part recited indenture of release contained, then the therein above written obligation should be void, or otherwise should remain in full force and effect, as by the said writing obligatory and the condition thereof will more full and at large appear. That in and by the said proviso and covenant lastly above-mentioned to have been contained in the said indenture, it was provided, that if the defendant, his heirs, executors, and administrators, or assigns, did and should well and truly pay or cause to be paid unto the plaintiffs, or the survivor of them, his executors, administrators, or assigns, the full sum of 6000*l.* of lawful money of Great Britain upon the 13th day of November, 1831, together with lawful interest for the same, after the rate of 5*l.* for every 100*l.*, by the year, without any deduction or abatement whatsoever out of the same principal sum and interest, or any part thereof, for or in respect or upon account of any matter, cause, or thing whatsoever; then and in such case, and upon and at any time after such payment as aforesaid, and on the request and at the costs and charges of the defendant, his heirs, executors, administrators, or assigns, they the plaintiffs, their heirs or assigns, should and would convey and assure the premises therein mentioned unto the de-

fendant, his heirs or assigns, or unto such person or persons as he or they should direct or appoint, free and clear of and from all charges and incumbrances made, done, or committed by the plaintiffs, their heirs, executors, administrators, or assigns. And the defendant did for himself, his heirs, executors, and administrators, covenant, promise, and agree to and with the plaintiffs, their executors, administrators, and assigns, that he the defendant, his heirs, executors, administrators, and assigns, or some or one of them, should and would well and truly pay or cause to be paid unto the said plaintiffs, their executors, administrators, or assigns, the said principal sum of 6000*l.* and interest thereof, at the rate aforesaid, and at the time in the said indenture before appointed for the payment thereof, without any deduction or abatement for or in respect of any present or future taxes, rates, assessments, charges, causes, matters, or things whatsoever, and according to the true intent and meaning of the said indenture. That the said proviso for the abatement of interest mentioned and referred to in the said condition, was and is a certain proviso in the said indenture of release therein also mentioned; by which it was provided, and by which the plaintiffs for themselves, their heirs, executors, and administrators, did covenant, declare, and agree, to and with the defendant, his heirs, executors, administrators, and assigns, that if the said defendant, his heirs, executors, administrators, or assigns, did or should so long as the said principal sum of 6000*l.* or any part thereof should remain upon the then present security, well and truly pay or cause to be paid unto the plaintiffs, their executors, administrators, or assigns, interest for the said sum of 6000*l.*, after the rate of 4*l.* for every 100*l.* by the year, by equal half-yearly payments on the 13th day of May and the 13th day of November in each year, or within two calendar months after each or either of the said days respectively; then and in such case, but not otherwise, they the plaintiffs, their executors, administrators, and assigns, should and would accept and take the same in lieu of and in full satisfaction for interest on the said sum of 6000*l.*, after the rate of 5*l.* per cent. per annum, thereinbefore covenanted to be paid for the same, and shall and will (if required), from time to time, give proper and sufficient discharges for the same interest accordingly, anything in the said indenture before contained to the contrary notwithstanding, as in and by the said indenture, which said indenture, sealed with the seal of the defendant, the date whereof is the day and year hereinbefore in that behalf mentioned, the plaintiffs now bring here into Court, reference being thereunto had, will more fully appear: that the defendant did not well and truly pay or cause to be paid unto the plaintiffs, or either of them, the sum of 6000*l.*, or any part thereof, on the said 13th day of November, 1831, but therein made default, and by reason of the breach of the said condition, the said writing obligatory became forfeited, and thereby an action hath accrued to the plaintiffs to demand

from the defendant the sum of 12,000*l.* above demanded; yet the defendant (although often requested so to do) hath not as yet paid any part of the said last mentioned sum, but the same is still wholly due. To the plaintiffs' damage of 1000*l.*, and therefore, &c.

To this declaration the defendant pleaded, that he the defendant did pay unto the plaintiffs the full and just sum of 6000*l.* of lawful money of Great Britain, with interest for the same from the date of the said writing obligatory, until the day next hereinafter mentioned, after the rate of 5*l.* for every 100*l.* by the year, on the said 13th day of November next ensuing the date of the said writing obligatory, and which was in the year of our Lord 1831; which said sum of 6000*l.* with interest, as in this plea aforesaid, then amounted to a large sum of money, to wit, the sum of 6,300*l.* of like money, and that he the defendant then made the said payment without any deduction or abatement for or by reason of any taxes, charges, assessments, impositions, cause, matter, or thing whatsoever, and according to the true intent and meaning of the proviso and covenant in the said indenture in the said condition in part recited and contained, and according to the form, tenor, and effect, of the said condition under the said writing obligatory, written as in the said declaration is mentioned. And of this the defendant puts himself upon the country, &c.

The plaintiff demurred to this plea, on the ground that it endeavoured to put in issue, and to affirm, a matter not denied by the plaintiffs, namely, the payment of interest; and secondly, that the plea introducing new matter, ought to have concluded with a verification.

The Court was of opinion, that the plea ought only to have traversed the issue tendered on the other side; and as it introduced new matter it ought to have concluded with a verification. There was no denial in the declaration, that the interest had been left unpaid. For the purposes of this action, the plaintiff admits that the principal has been paid. Under these circumstances, the plea must be considered bad on special demurrer.

Judgment for plaintiff.—*Bishton and another v. Evans*, T. T. 1835. *Excheq.*

## NOTES OF THE WEEK.

### Royal Assents.

30th July,

Property in Infants (Ireland).  
Contempts in Equity (Ireland).  
Turnpike Act Amendment.

### HOUSE OF LORDS.

#### Bills for second Reading.

Title of the Bill. Proposer.

Residence of Clergy. Lord Brougham.  
Pluralities Prevention. Lord Brougham.

Ecclesiastical Jurisdic-  
tions.

Lord Brougham.

Illegal Securities.

Capital Punishments.

Education & Charities. Lord Brougham.

Polls at Elections.

Bankruptcy Funds.

Chancery Offices Improvement.

#### In Select Committee.

Highways.

Wills Execution.

Executors.

Prisoners' Counsel.

#### In Committee.

London Small Debts.

Sinecure Church Preferment.

Municipal Corporations.

#### Third Reading.

Certiorari.

#### Passed.

Lunatic Acts Continuance.

### HOUSE OF COMMONS.

#### Bills to be brought in.

Law of Tenure. Attorney General.

Law of Escheat. Attorney General.

Poor Law Amendment. Mr. Trevor.

Registration of Births,  
&c. Mr. Wilks.

#### Second Reading.

Law of Libel. Mr. O'Connell.

Parish Vestries.

Letters Patent. Mr. Tooke.

Turnpike Trusts Consolidation.

Abolishing useless Law  
Offices.

#### In Committee.

Church of Ireland.

Copyholds Enfran-  
chisement.

Attorney General.

Registration of Voters. Lord J. Russell.

County Coroners. Mr. Cripps.

Durham Court of Pleas.

Dissenters' Marriages.

Marriage Act Amendment.

Election Expenses and Qualification of  
Members.

Limitation of Real Actions Amendment.

Landed Securities (Ireland).

Prison Regulations.

#### To be reported.

Imprisonment for Debt.

#### Passed.

Chancery Offices.

Bankruptcy Funds.

Polls at Elections.

#### Postponed.

Ecclesiastical Courts.

## ANSWERS TO QUERIES.

## Common Law.

## FEME COVERT.—TRADER. P. 144.

It is clear, that except by the custom of London, a married woman, living upon a separate maintenance, is neither liable to be sued at law for the debts she may contract; *Marshall v. Rutton*, 8 D. & R. 545; nor subject to the bankrupt laws; Archb. B. L. 40; Lord Henley's Digest, 1. There is no doubt of the creditor's right in equity against the wife's separate estate. They can file a bill against the husband, or the trustees, for the produce of the separate allowance in their hands, and for an injunction to restrain the payment of the future proceeds. See *Lillia v. Airey*, 1 Ves. jun. 278; 2 Roper's Husb. & Wife, 306. The husband is clearly discharged from all personal liability, even for necessities, if the separate maintenance is suitable to his rank in life; *Todd v. Stokes*, 1 Salk. 116; 1 Ld. Raym. 444, S. C.; 2 New Rep. 148; even if the creditors should not be aware of the separation, but it was the general report in the husband's neighbourhood that they were living apart; *per Holt*, C. J. J.

## PARTNERS.—FORMER BANKRUPTCY. P. 144.

Under the 6 G. 4, c. 16, s. 127, and 1 & 2 W. 4, c. 56, the future estate of a person twice bankrupt, who has not paid fifteen shillings in the pound under the second commission, vests in the assignees thereof, from the date of the appointment: consequently, if under the second commission his estate has not made such a dividend, his third certificate would be void, and all his subsequently acquired property, whether in or out of the present partnership, vests in the assignees of those creditors only. *Fowler v. Coster*, 10 B. & C. 427. If he made the required dividend under the second bankruptcy, the rule equally applies to any subsequent bankruptcy in which he has not done so; and such assignees can come upon B. for such part, and such part only, of A.'s share, as will remain after the payment of all the partnership debts by the due contribution of A. and B. Archb. B. L. 341. See *Crawshaw v. Collins*, 1 Jac. & Walk. 267; 15 Ves. 218; *Smith v. Stokes*, 1 East, 263. J.

## RATING OF BUILDINGS. P. 144.

In this question, A. uses the word annual value, by which I suppose he means annual rent. In rating various kinds of property, the rating should be in proportion to the clear annual profit or value of the subject of occupation. Hence houses and buildings should be rated at a less sum in proportion to their annual rent than lands. This is clearly laid down by Bayley, J., in *Rex v. Tomlinson*, 9 B. & C. 63. M. A.

## Law of Property and Conveyancing.

## COVENANT.—UNDERLEASE. P. 143.

1. Underleases are not within the general words of provisoes against assignment. See *Kinnersley v. Orpe*, 1 Doug. 55; *S. P. Church v. Browne*, 15 Ves. jun. 264. M. A.

2. The covenant will not prevent A. from granting an underlease; because underleases are not within the general words of provisoes as to assignments (1 Doug. 55); and because covenants with stronger words have been decided not to extend to underleases. 2 W. Bl. 766. It has been held, where the covenant was not to alien, &c., that possession by a stranger was *prima facie* proof of a breach. 4 Taunt. 766, *sed quære*; and see 1 Stark. C. 87. T. C.

## Law of Attorneys.

## SIGNED BILL. P. 142.

I know of no case as to attorneys; but several cases on the Statute of Frauds have decided, that writing the name in the manner stated is a sufficient signature. Selw. N. P. 865, 859, 860. Note, that the words in the Statute of Frauds are "signed;" but in that as to attorneys, "subscribed." See also 2 Stark. Ev. 351. T. C.

## QUERIES.

## Practice.

## ARREST.—WIFE'S DEBT.

A. was indebted to B. for goods sold to her, but shortly after married C. C. also became indebted (after his marriage with A.) to B. for goods sold; can B. arrest C. for the whole amount? and if so, how should the affidavit of debt be worded? G. D.

## PARTIAL TENDER.—ARREST.

Suppose a defendant tendered a much smaller sum than the debt due, how could a negative to a tender be introduced into an affidavit? yet, I understand, such negative is requisite? G. D.

## THE EDITOR'S LETTER BOX.

"A bill for abolishing Bribery and Corruption" shall be considered. We see no objection, as at present advised, to affording the legislature the benefit of our correspondent's ingenious suggestion.

The Queries and Answers of X. X.; I. C. G.; X. D.; J. P.; C. H. and Z. have been received.

The paper of W. G. C. will be inserted at an early opportunity.

We will endeavour to find room for the inquiry of S. W., in our next.

Will C. W. M. send another copy of his query? His other paper has been printed.

We thank I. N. for his communication on Imprisonment for Debt.

The article on the Six Clerks' Office shall be considered.

The Quarterly Digest of all Reported Cases from the 9th May last, is now published.

# The Legal Observer.

Vol. X. SATURDAY, AUGUST 15, 1835. No. CCLXXXV.

— "Quod magis ad nos  
Pertinet, et nescire malum est, agitamus.

HORAT.

## ON LEGACIES TO EXECUTORS.

A QUESTION very frequently arises in wills, where legacies are left to executors, whether they are entitled to them if they refuse or decline to act: and the rules on it are not very difficult to be collected from the cases.

It is clear, that where a legacy is left to a person as executor, he must in order to entitle himself to the legacy clothe himself with the character of an executor; and this is so whether the legacy be expressed to be for the care and pains of the person or not.<sup>a</sup> And the presumption is, when a legacy is given to an executor, that it is given to him in that character; and it is for him to rebut this, either by the expressions of the will, or the peculiar circumstances of the case.<sup>b</sup> Thus where the testator devised his real and personal estates to the plaintiff and the defendants, *H.* and *M.*, upon various trusts, and appointed them executors, and afterwards made two codicils, by which he gave to these persons legacies not expressly as trustees or executors, but by their names and descriptions, and the legacies by both codicils were classed together and of equal amounts; it was held, that the plaintiff having renounced probate, could not claim the legacy.<sup>c</sup> The circumstances, where more than one person is named executor, of the legacies to each being equal in amount, has always been in favor of their being given in that character. Thus where one person named was entitled to much greater benefits under the will than the other persons named executors, and described by the testator as "his friend and partner," it was

held by Lord *Eldon*, that these benefits were not given him in the character of executor.<sup>d</sup>

Also where the expressions of the will rebut the presumption, the legatee will take; as when a testator gave to *W. K.* and *J. B.*, 50*l.* each, whom he nominated "executors in trust to this my will, the said bequest to be upon condition of their taking upon them the trusts hereinafter mentioned," and afterwards added, "I give unto my cousin *T. K.*, the sum of 50*l.*, whom I appoint as joint executor in trust in this my will." *T. K.* never proved the will, but was held to be entitled to the legacy, on the ground that the gift was rather intended in respect of the legatee's relationship, than of his office.<sup>e</sup> In a recent case,<sup>f</sup> a testatrix gave legacies of 100*l.* each, to *A.*, *B.*, and *C.*, and in a subsequent part of her will she appointed them executors. In the preceding clauses she made devises and bequests to "her executors thereinafter named," and to her executors and trustees. *A.* neither proved the will nor acted, but claimed the legacy; and the present Vice Chancellor declared, that he was not entitled to it. "The rule is," said his Honour, "that when a legacy is given to an executor, *prima facie*, it is given to him for his trouble, and if he refuses the office he is not entitled to it. But if it can be collected from the whole of the will that the legacy was not given to him in respect of the office, then he will be entitled to it. The case of *Cockerell v. Barber*, affords sufficient special circumstances to show, that the general rule did not apply; there I should have thought, from the testator's using the expression "my friend and partner," that it ought to be taken that the legacy was given to him as a friend and partner, and

<sup>a</sup> *Harrison v. Rowley*, 4 Ves. 216; *Abbot v. Massie*, 3 Ves. 148; *Freeman v. Fairlie*, 3 Mer. 31.

<sup>b</sup> *Stackpole v. Howell*, 13 Ves. 421; *Dis v. Reed*, 1 Sim. & Stu. 239.

<sup>c</sup> *Stackpole v. Howell*, 13 Ves. 417.

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<sup>d</sup> *Cockerell v. Barber*, 2 Russ. 586; 1 Sim. 23, S. C.

<sup>e</sup> *Dis v. Reed*, 1 Sim. & Stu. 237; and see *Humberston v. Humberston*, 1 P. Wms. 333.

<sup>f</sup> *Piggott v. Green*, 6 Sim. 72.



there was *no* gift of the same amount to all the executors. The testatrix in this case, frequently calls these legatees "her executors," and "her executors and trustees," and she then classes them together, and gives a legacy of the *same amount* to each of them; and on these grounds, I am of opinion, that the executor who did not act is not entitled to his legacy."

## ABSTRACTS OF RECENT STATUTES.

### 5 W. 4, c. 2.

#### NEWSPAPERS.—ACTIONS FOR PENALTIES.

This is intituled "An Act to amend an Act of the 38 Geo. 3. for preventing the Mischiefs arising from the printing and publishing Newspapers by persons not known," &c.

After reciting that by the 38 G. 3, c. 78. certain affidavits or affirmations, containing such matters and things in the said act specified and set forth, relating to newspapers and other papers in the said act described, are required to be made and signed, and sworn or affirmed, and delivered to the commissioners for managing his Majesty's stamp duties, or to some of their officer or officers as therein mentioned; and that it is enacted, that in some part of every newspaper or other such paper as aforesaid there shall be printed the true and real name and names, addition and additions, and place and places of abode of the printer and printers and publisher and publishers of the same, and also a true description of the place where the same is printed: and that certain penalties are by the said act imposed for any neglect or omission to comply with the aforesaid provisions; and that it is by the said act provided that the said penalties respectively shall be recovered by action of debt, bill, plaint, or information in any of his Majesty's Courts of Record at Westminster, and that the same when recovered shall be, as to one moiety thereof, to and for the use of his Majesty, his heirs and successors, and as to the other moiety thereof, to and for the use of the person who shall inform or sue for the same: and that the printers, publishers, and proprietors of divers newspapers have inadvertently neglected to comply with some of the aforesaid provisions of the said recited act, and many actions, suits, informations, and prosecutions have been brought and commenced against such printers, publishers and proprietors, or some of them, by persons who sue, inform and prosecute, as well on their own behalf as on behalf of his Majesty, to recover various penalties incurred or alleged to have been incurred under or by virtue of the said act by reason of such neglect; and that it is expedient that all further proceedings in such actions, suits, informations, and prosecutions should be prevented, and such other provision made in relation thereto, and otherwise, as is herein-after mentioned; It is enacted, that immediately from and after the passing of this act it shall be lawful for any person or persons against whom any

original writ, suit, action, bill, plaint, or information shall have been sued out, commenced, or prosecuted, on or before the day of the passing of this act, for the recovery of any pecuniary penalty or penalties incurred under the said act, except in the cases herein-after provided, to apply to the Court in which such original writ, suit, action, bill, plaint, or information shall have been sued out, commenced, or prosecuted, if such Court shall be sitting, or, if such Court shall not be sitting, to any Judge of either of the Superior Courts at Westminster, for an order that such writ, suit, action, bill, plaint, or information shall be discontinued, upon payment of the costs thereof out of pocket incurred to the time of such application being made, such costs to be taxed according to the practice of such Court; and every such Court or Judge is hereby authorized and required, upon such application, and proof that sufficient notice has been given to the plaintiff or plaintiffs, or his or their attorney, of the application, to make such order as aforesaid; and upon the making such order, and payment or tender of such costs as aforesaid, such writ, suit, action, bill, plaint, or information shall be forthwith discontinued.

2. Where any action commenced before the 4th March 1835 has been renewed, the Court or Judge may make order for discontinuing it upon payment of costs.

3. Court may make order for discontinuing actions commenced since 4th March without payment of costs.

4. Nothing herein contained shall extend or be construed to extend to any action, bill, plaint, or information in which any judgment or conviction shall have passed on or before the day of the passing of this act, or to any action, bill, plaint, or information which shall have been or shall be commenced, prosecuted, entered, or filed by or in the name of his Majesty's Attorney General or Solicitor General for and on behalf of his said Majesty.

5. From and after the passing of this act all fines, penalties, and forfeitures imposed by or incurred or which may be incurred under the said recited act, shall go and be applied to the use of his Majesty, his heirs and successors, and may be sued or prosecuted for in any of his Majesty's Courts of Record at Westminster, or in his Majesty's Court of Exchequer in Scotland, as the case may arise in England or Scotland respectively, wherein no essoin, privilege, protection, wager of law, or more than one imparlance shall be allowed; any thing in the said recited act or in any other act contained to the contrary thereof notwithstanding.

6. That from and after the passing of this act it shall not be lawful for any person or persons whatsoever to commence, prosecute, enter, or file, or cause or procure to be commenced, prosecuted, entered, or filed, any action, bill, plaint, or information in any of his Majesty's Courts, or before any justice or justices of the peace, against any person or persons for the recovery of any fine, penalty, or forfeiture made or incurred or which may be incurred, by virtue of the said recited act, unless the same be commenced,

prosecuted, entered, or filed in the name of his Majesty's Attorney General or Solicitor General in that part of Great Britain called England, or his Majesty's advocate for Scotland (as the case may be respectively), or in the name of the solicitor of stamps and taxes, or some other officer of his Majesty's stamp duties in England or Scotland respectively; and if any action, bill, plaint, or information shall be commenced, prosecuted, entered, or filed in the name or names of any other person or persons than is or are in that behalf before mentioned, the same and every proceeding thereupon had are hereby declared and the same shall be null and void to all intents and purposes.

7. Act may be repealed or altered this session.

## DISPUTED DECISIONS.

### BATTERY.—COSTS.

*To the Editor of the Legal Observer.*

Sir,

AN action for a battery was lately tried at Westminster, to which, as appears from the newspaper reports of the trial, the defendant's plea was, "that plaintiff came into defendant's house; that defendant requested him to depart, but he refused; on which defendant gently laid his hands upon him. The plaintiff replied, alleging that the defendant had used "more violence than was necessary." From the evidence it appeared the defendant had in fact used more violence than is countenanced by the law in such cases; he having, instead of confining himself to merely pushing the plaintiff out of his house, struck him; and for this blow the jury returned a verdict for the plaintiff, damages one farthing. "There being a plea of justification, which admitted on the record the battery, the plaintiff was entitled to his costs without any certificate from the Judge, under the 22 & 23 Car. 2, c. 9; but the Judge said he had heard that a Judge had lately certified under the 43 Eliz. c. 6, that the damages did not amount to 40s., to deprive the plaintiff of costs; and that he should certify under that act."

Now with every respect for the learned Judge, I cannot help thinking that under the statute of Eliz. he has no power in such a case as the above to certify. This statute enacts, that if on any action personal, not being for any title or interest of lands, nor concerning the freehold or inheritance of any lands, *nor for any battery*, it shall appear and be signified by the Judge before whom the same shall be tried, that the debt or damages to be recovered therein shall not amount to 40s. or above; that then the Judges shall only award the same costs as damages, or less, at their discretion. And the other statute above mentioned, viz. the 22 & 23 Car. 2, c. 9, enacts, that in all actions of trespass, assault, and battery, and other personal actions, wherein the Judge at the trial of the cause shall not find and certify under his hand upon the back

of the record, that an assault and battery was sufficiently proved by the plaintiff against the defendant, or that the freehold or title of the land mentioned in the plaintiff's declaration was chiefly in question, where the plaintiff recovers less damages than 40s., he shall have no more costs than damages.

Under this last mentioned statute (strictly construed) the plaintiff might have doubtless been deprived of his costs, if the Judge had not chosen to certify that a battery had been sufficiently proved; but it having been decided over and over again, that a plea of justification, or of *molliter manus impositus*, does away with the necessity of a Judge's certificate, and is complete evidence of a battery, so as to entitle the plaintiff, in case he recovers damages, to his full costs, the plaintiff would have been entitled to them as a matter of course. But the learned Judge seeing it was a trifling and vexatious action (and one which had it not been for the above mentioned decisions would have come within the statute of Charles), resorts to the 43 Eliz. c. 6, and certifies under that act, although it expressly excepts every action of battery from its operation; and therefore it seems to me takes away from the Judge the power of certifying under it where damages are recovered for a battery. I grant that it appears to be a most trivial case, and therefore perhaps the Judge was acting fairly to deprive the plaintiff of his costs; but that has nothing to do with the present question, which is not whether this particular case merited such a decision, but *whether a Judge has the power in actions of battery to certify under the 43 Eliz. c. 6*. I have not been concerned in the case, nor do I know any of the parties. I have merely taken it up as a debatable point of law, of some importance; and if incorrect in the view I have taken of it, I have no doubt some other more able correspondent will set me right.

LEGALIS.

## NEW BILLS IN PARLIAMENT.

### ABOLITION OF USELESS OFFICES.

This is a bill, "to abolish certain Offices connected with Fines and Recoveries, and the Cursitors in the Court of Chancery, and to make provision for the Abolition of certain Offices in the Superior Courts of Common Law in England."

The preamble recites the 3 & 4 Geo. 4. cap. 74, intituled, "An Act for the Abolition of Fines and Recoveries, and for the Substitution of more simple Modes of Assurance," by which it is enacted, that after the 31st December 1833, no fine shall be levied or common recovery suffered of lands of any tenure, and that every fine or common recovery levied or suffered

contrary to the provision of that act shall be absolutely void, save and except in cases where a writ of dedimus, or other writ in the regular proceedings of such fine or recovery shall have been sued out on or before the said 31st December 1833:

And that by the operation of the said act, the business of certain offices in the Court of Common Pleas, and of the Alienation Office has almost wholly ceased; and it is expedient that the said offices should be abolished, and the few duties remaining to be performed transferred to some other officer;

It is therefore proposed to be enacted,

That after the 31st Dec. 1835, the several offices in his Majesty's Court of Common Pleas hereafter mentioned, namely, of the Chirographer, and the Secondary Register, and clerks of Counties in the office of the Chirographer, of the Clerk of the King's Silver, and of the Clerk of the Return Office, and of the Inrolment of Writs and Fines and Recoveries, and also the several offices in the Alienation Office, consisting of two Commissioners, a Receiver-General, two Entering Clerks, a Master in Chancery appointed for taking affidavits, and an Office Keeper, shall be abolished.

2. That the several records, books and other documents of and concerning the duties and business of the said offices so abolished as aforesaid, shall, on or before the said 31st December, be delivered by the several officers or persons now having custody of the same, into the hands and possession of the officer of the Court of Common Pleas at Westminster, for the time being appointed or to be appointed by the Lord Chief Justice of the Court of Common Pleas for the purpose of examining, filing, and recording all certificates of the taking of acknowledgments by married women of deeds under the provisions of the said in part recited act, to be by him kept and preserved; subject nevertheless to such rules, orders and regulations as the Court of Common Pleas shall or may from time to time make or ordain in respect of the same.

3. Business of abolished offices transferred to the registrar under 3 & 4 Will. 4. c. 74.

4. Searches may be made and copies taken, which shall be as available as heretofore.

5. Fines heretofore paid in the Alienation Office to be paid to registrar under 3 & 4 Will. 4. cap. 74, and accounted for by him.

6. Same fees as heretofore to be received and accounted for, and treasury to fix remuneration of registrar for performing the duties imposed upon him.

7. Compensation to lords of liberties and others for loss of fines.

8. The sum of 2,000*l.* heretofore paid by receiver of alienation fines to the Hanaper to be paid out of the consolidated fund.

9. The bill then recites that by the operation

of 2 W. 4. c. 39, "An Act for Uniformity of Process in Personal Actions in his Majesty's Courts of Law at Westminster;" and 3 & 4 W. 4. c. 74, "An Act for the Abolition of Fines and Recoveries and for the substitution of more simple modes of Assurance;" the business of the cursitors of the High Court of Chancery has been greatly diminished, and it is expedient that their offices should be abolished, and the few remaining duties transferred to some other officer belonging to the said Court; it is therefore proposed to be enacted,

That after the said 31st December, the offices of the cursitors of the said High Court of Chancery shall utterly cease and determine, and all and every the duties of the said cursitors shall be performed by the clerks of the Petty Bag Office in the said Court for the time being, and all the acts to be done by the said clerks of the Petty Bag Office in the performance of the duties of the said cursitors, from and after the said 31st December shall, in all respects, and to all intents and purposes, have the same force and effect as if the same had been done and performed by the said cursitors or by their deputies.

10. Records, &c. of the cursitors transferred to the Clerks of the Petty Bag Office.

11. Clerks of the Petty Bag Office to receive the same fees as the cursitors for all acts done by them.

12. The bill then further recites, that by the amendments and alterations which have of late been made, and may hereafter be made in the process, practice, pleadings and other proceedings of the Superior Courts of Common Law in England, the duties of several of the officers belonging to the said Courts are or may be greatly diminished, or wholly taken away, and it is expedient that offices so circumstanced should be abolished; it is therefore proposed to be enacted,

That after the passing of this act, it shall be lawful for the Lord High Treasurer or Commissioners of his Majesty's Treasury for the time being, or any three or more of them, and the Chief Judge of the Court to which such officer may belong, to abolish by an order under their hands any office in the Superior Courts of Common Law, the duties of which have already been or shall hereafter be wholly taken away, or so much diminished as to render the continuance of such office inexpedient, in consequence of the various alterations and amendments in the process, practice, and proceedings of the said Courts; and in case of the abolition of any such office where the duties shall not be wholly taken away, but only diminished as aforesaid, it shall and may be lawful for the Lord High Treasurer, or the Commissioners of his Majesty's Treasury for the

time being, or any three or more of them, and the Chief Judge of the Court to which such officer may belong, to transfer the duties remaining to be performed to such other existing officer or officers belonging to the said Courts of Common Law as they shall think proper.

13. That the Lord High Treasurer, or the Commissioners of his Majesty's Treasury for the time being, or any three or more of them, and the Chief Judge of the Court to which any such officer may belong, when and as often as it may be deemed expedient to abolish any such office as aforesaid, shall cause their order for such abolition to be promulgated in any manner they may think fit; and shall state in such order when the abolition is to take place, and to what other office or officers the duties, if any, of the office so abolished shall be transferred; and from and after the period fixed by any order to be made as aforesaid, the office mentioned therein shall be deemed to be abolished by lawful authority to all intents and purposes; and the person or persons holding the office or offices to which the remaining duties of the office so abolished are transferred, is and are hereby empowered and required to perform the same subject to all the rules and regulations now in force, or hereafter to be made in respect of the execution of the said duties, and to demand and receive the lawful fees which have heretofore been or may hereafter be received for such services, and to account for the same to the Lord High Treasurer or Commissioners of his Majesty's Treasury for the time being, at such times and in such manner as he or they may direct: and the said Lord High Treasurer, or Commissioners of his Majesty's Treasury, is and are hereby authorized and empowered to allow to such person or persons such remuneration for the performance of the new duties imposed upon them, as he or they shall think reasonable and proper.

## SELECTIONS FROM CORRESPONDENCE.

### No. CVI.

#### MORTGAGE STAMP.

This was a case turning upon the construction of the Stamp Act, 3 G. 4, c. 117, s. 2, as regarded the duty to be placed upon a mortgage, where there was a transfer and an additional sum advanced; and some days since it was contended, that there must first be a 35*s.* stamp for the transfer, and an *ad valorem* duty upon the additional sum advanced; and also that there must be a progressive duty of 25*s.* on the extra skins. The actual stamps used upon the deeds in question, were 4*l.* for the *ad valorem* duty on the additional sum advanced, and a progressive duty of 20*s.* only.

Lord Denman this day, in delivering the judgment of the Court, said the question was, whether the stamps were sufficient; and they thought they were; here there was a further sum advanced, and therefore the transfer stamp was out of the question, and it became a new

mortgage for the additional sum; and that being the case, the progressive duty of 1*l.* was sufficient.

*Doe d. Bartley v. Gray*, K. B. May 10th, 1835.

J. C. G.

#### REMUNERATION TO MEMBERS OF PARLIAMENT.

##### To the Editor of the Legal Observer.

I shall feel much obliged to any of your readers "learned in ancient lore," if they can, through the medium of your valuable miscellany, furnish the public with information upon the mode formerly adopted in issuing out of the Court of Chancery (I presume) the writ of "*De expensis*" which was formerly granted at the termination of each Session of Parliament to enable members to obtain their wages, as well as to give a copy of the writ as a precedent, in the event of its being required in these days of reform and purity; because I think, Sir, you will agree with me, that it is much better the people should pay their representatives, than they should pay themselves out of the public purse.

S. W.

#### PRACTICE OF RETAINERS.

I think Mr. Chitty is incorrect in his statement of the law as to *special common law* retainers to counsel, cited in your Number of 8th August (p. 291). I believe the practice now to be, that neither the plaintiff nor the defendant can properly give a special retainer in a common law cause until a writ has been actually issued.

W. F.

## PRACTICAL POINTS OF GENERAL INTEREST.

### No. LXXXII.

#### LEGAL AND EQUITABLE RIGHTS.

The following case, as to the jurisdiction of the Court of Bankruptcy, is of some importance.

The bankrupt deposited certain policies of insurance with the petitioner, who, instead of having them sold in the usual way, deducted their full value, and proved for the difference. The assignees brought an action at law for the policies. This was a petition to restrain the action.

*Per Curiam.* These policies were a pledge, which the petitioner could not sell without conversion, unless the assignees consented to the sale; the assignees therefore have a legal right to a verdict; but under the circumstances of this case, they must be restrained from proceeding. This injunction, however, does not conclude the question of right, as the assignees may present a petition to the Court if they think fit.

Injunction ordered: costs out of the estate. — *Ex parte Booth, in re Kew*, 2 Mont. & A. 94.

## THE RUSSIAN CODE.

Now that the civil and commercial relations between this country and Russia are continually extending, the laws of that country must be a matter of interest to English lawyers. It is therefore our intention, in the present article, to give a sketch of the origin, progress, and completion of the above important Work. We have abridged and translated it from the account published at St. Petersburg, in the year 1833, and which is generally attributed to M. Speransky, the gentleman principally concerned in the formation of the code. He is a member of the Privy Council, and of the Council of the Empire, President of the legislative commissions for Great Russia, the Baltic provinces, the Polish provinces, and the present kingdom of Poland.

We shall divide the article into three parts.

In the first we shall state the sources whence the materials of the code were obtained; Secondly, the mode in which the code was formed; Thirdly, its contents.

As to the first. The compulsory laws of Russia, that is to say, those which are now in force, in some instances are as old as the code of *Alexis Michailovitch*. The laws anterior to this period have fallen into disuse, and are no longer more than a matter of history. This code, which is only a digest of the laws previously in force, was promulgated in 1649; from that time it has continually increased, though slowly, according to the wants of society. It is to be observed, however, that Russia did not receive the benefit of the Roman laws, of which the nations of the west availed themselves soon after the revival of letters in the twelfth century. The consequence has been, that the legislative edifice has been formed of its own materials, its customs, its traditions, and its experience; its laws, therefore, are quite peculiar. But being thus abandoned to the simple impulse of wants and circumstances, its laws are without plan, connection, or agreement; hence resulted various disadvantages. That principle in other countries which forms the keystone of society, namely, that all persons are supposed to know the law, is nothing more than a fiction; but in Russia it was an absurdity. In other countries the danger of the fiction is diminished by the use of certain forms of promulgation, and by facilitating access to the law itself. In Russia, on the contrary, the promulgation was illusory and vicious.

The authentic collections were so carelessly preserved, that during a period of two centuries after 1649, they embraced only twenty-seven years; even during that period there are various omissions and gaps. The private works intended to supply the absence of an official collection, being undertaken as a speculation, were incorrect and incomplete. If the student should collect, at an expense of more than 200*l.* the various laws in force, he would frequently find the same law repeated twenty times, with the same errors, and would perhaps in vain seek for the one he wanted. To these causes we must attribute the state of abandonment into which the study of the law had fallen. Another consequence was, that it was impossible to compel a Judge to decide according to any particular rule, as there was no obligatory rule established. The constant necessity of having recourse to the legislature, gave rise to other difficulties, namely, that law in general became encumbered, and at the same time formed of scraps; evils which are, perhaps, greater than the absence of all law. Various other inconveniences resulting from such a state of law, might be pointed out; but enough has been remarked, and more may be conceived by the reader, to account for the ardent desire which the Russian monarchs, from Peter the Great downward, have always entertained, to give to the country a clear, regular, and uniform body of laws. This idea was revived every reign, notwithstanding their different qualities and duration. With this object, commissions to the number of ten were created at different and various intervals. The course of their labours may be divided into three periods; collecting, arranging, and perfecting. By commencing with *collecting*, each thought the plan would be easy, from the supposition that it had been traced by preceding labourers; and when experience demonstrated the contrary, instead of fixing and concentrating all its attention on this fundamental object, and conducting it to its conclusion, the commission at once proceeded to "*the arrangement of the existing laws.*" But approaching this work without any clearly conceived system, it was sought to make a collection in which the code of 1649 should form the principal place, and which should be developed by the laws which had since emanated. At another time extracts were made from the cases on any given subject, and arranged without any other order than that of dates; and without any distinction between laws in force and those which had

ceased to be so. This confused compilation, however, never appeared. We shall not enter into a minute description of each of these commissions; but two are worthy of remark. The one appointed by Catharine possesses an air of grandeur, owing to the famous autograph instructions given by the Empress, the number of its members (five hundred and sixty-five, five deputies being convoked from all parts of the empire), and by the solemnizing of its installation. Five months afterwards, however, it was dissolved. It could not be otherwise: a collection so long and so minute, requires patience, connection, and uniformity, and can only be formed by a very limited number of persons.

The second commission was that of Alexander. At the head of this was a lawyer both learned and accustomed to business; but having no fixed principle on which to form his code, and fluctuating between the different methods of codifying, the commission embraced every plan, projected much, and did nothing.

All these legislative labours, pursued without interruption during a period of one hundred and twenty-six years, absorbed ten millions of francs of expenditure, and produced nothing complete, not even a simple chronological collection; not even the first elements of such a collection.

At length the present Emperor succeeded to the throne. On his accession, he immediately took under his direction the works relating to codification. It was necessary, first of all, to define their nature: two plans were taken into consideration; the first was, to form a *code of concordance*, that is to say, to make a collection of the existing laws according to their order of subject, without any change in their provisions; the second was, to form a *new code*, that is to say, a uniform system of laws, modified, completed, and perfected. The former of these two plans was adopted.

This principle having been established, the consequences of it were to be followed out. We have already observed, that every thing remained to be done, and the commission did every thing. It collected the materials, compared, purified, verified, and classed them: it extracted the laws in force, reduced them into form, and distributed them into systematic divisions. Thus in conjunction with the competent authorities, it renewed, amended, and completed them. It formed chronological and alphabetical tables, an index of subjects and words, partial summaries, and a general one; and this

series of labours, solving the problem which rendered useless the efforts of an age and ten legislative associations, was accomplished in the period of seven years.

In the progress of the work, one part of the commission performed the labour of collecting the laws, the other of methodically arranging them.

Easy and simple as this first part may appear, it was nevertheless surrounded with great difficulties. That will easily be conceived, when it is considered, that to this present day France does not possess a good chronological collection. We may, therefore, imagine what must have been the obstacles which such a collection was calculated to meet in Russia. The *ukases*, or laws, are of two descriptions, those which the sovereign addresses to the senate to be registered and proclaimed (an institution perfectly analogous to that of registering the royal edicts by the ancient parliaments of France), and those which he decrees, *proprio motu*. The former were not, as we have seen, brought together in the authentic collections: the others, addressed to those who were the immediate objects of them, principally in manuscript, formed a secret legislation, although it governed all the inhabitants of the country. It was, therefore, necessary to search the civil, military, judicial, and synodal archives, the imperial cabinet, the chapter of orders, and the different central authorities; every place was laid under contribution; everywhere acts buried in oblivion were discovered. It then became necessary to proceed to the examination of these incoherent materials; to compare them, to remove duplicates, and to verify texts.

The collection commences with the code of 1649, and ends with 1831, inclusive. It comprehends all the acts emanating from the legislative power, in chronological order, making no difference between obligatory and abrogated laws. The whole number of these acts amount to 35,993; out of these rather more than 5000 belong to the present reign. The collection consists of 56 thick volumes quarto, printed in two columns. A supplement, containing the laws passed during each year, will be annually continued. Those for 1832, and 1833, have appeared.

[To be continued.]

## LIABILITY OF ATTORNEYS FOR CONCEALING INCUMBRANCES.

How far an attorney is liable to a purchaser, in case he conceals the knowledge he has of an incumbrance on the vendor's estate, is a question worthy of some notice. The rule as to a vendor being liable, if he conceal an incumbrance from a purchaser, seems clear enough: and Lord *Hardwicke*, in 1 Ves. 96, lays it down, "that even if an attorney of a vendor of an estate, knowing of incumbrances thereon, treat for his client in the sale thereof, without describing them to the purchaser or contractor, knowing him a stranger thereto, but *represents it so as to induce* a buyer to trust his money upon it, a remedy lies against him in equity;—to which principle it is necessary for the Court to adhere, to preserve integrity and fair dealing between man and man: most transactions being by the intervention of an attorney or solicitor."

Here Lord *Hardwicke* qualifies this liability, by stating that it would arise on the representation of the party leading a purchaser into error; but he does not mean to say, that if a solicitor had merely a knowledge of such incumbrance, and nothing was said about it, that he would thereby be liable;—for although this is a concealment which an honest man would not make, still we shall find that there are some rules of equity, which would absolve the solicitor from liability.

The doctrine laid down by Lord *Hardwicke* would equally affect any other party than a solicitor, who by his representations enabled a vendor to commit a fraud. In *Evan v. Bicknell*, 6 Ves. 174, where the tenant for life under a settlement, having an absolute title, independent of the settlement, induced the trustee to give up the deeds, which were handed to a mortgagee, who, on discovering the settlement, brought his bill against the trustee for recompense, Lord *Eldon*, in giving judgment, made the following remarks: "If there is no express declaration or concealment by the trustee, it results to this: whether, under all the circumstances, and the answer and evidence together, the mere parting with the deeds for the purpose stated, and on condition to return them in a few hours to a man having the settlement in his possession, is a circumstance of such gross negligence, and because it may possibly lead to mischief, that it is conclusive evidence of fraud." "The issue ought to be upon this question—Whether the deeds were fraudulently delivered to enable Stansell (the tenant for life) to obtain money of other persons; but unless I am satisfied by a jury that there was such fraudulent intent, I shall dismiss the bill, without costs." "The case of *Arnot v. Biscoe*, which was relied upon, is very distinguishable. The defendant declared the title to be in every respect good—a fact very materially discriminating that case from this; for Lord *Hardwicke* very properly puts the attorney in the situation of the vendor himself; and then the plaintiff's money was advanced

on the express declaration of that attorney, that the title was clear. Lord *Hardwicke* lays down the principle of equity, that, whenever the buyer is drawn in by misrepresentation or concealment of a material fact or circumstance, so as to be injured thereby, and that done with intention and fraud, he is entitled to satisfaction here. In that passage and others, Lord *Hardwicke* lays so much stress upon the title to relief here, that I think it very questionable whether he foresaw the relief that has been given upon the principle these cases furnish so liberally at law; and there seems something like a declaration by him, that if a first mortgagee does not take the title deeds, he shall be postponed. That appears to have been the old notion of the Court.\* In *Burrows v. Locke*, 10 Ves. 470, a trustee of a fund was held liable, for having by misrepresentation induced a purchaser to advance money.<sup>a</sup> The result of these cases is, that, as a general rule, a person by misrepresentation inducing another to advance his money, thereby makes himself liable to the extent of the damage consequent thereon.

The doctrine of notice, when we come to examine it, makes a great deal of difference, as regards solicitors and other parties; but this advantage is one rather claimed on behalf of the public than as an individual benefit: and therefore it cannot be said that any particular set of individuals have more favour shewn them than others. As regards ordinary persons, the notice received by them of any incumbrance, remains with them; and if at any future time they be employed as agent to a third party, such notice, previously received, will be binding on the party employing such agent. The above noticed case of *Burrows v. Locke* will support this position. There a trustee of a fund, who had received notice of an incumbrance on the fund, at a future time, on being asked if any incumbrance existed, stated that no incumbrance did exist: forgetfulness was held to be no excuse. As regards a solicitor, the matter is very different, as will appear from the following cases. In *Warwick v. Warwick*, 3 Atk. 291, the case was, that a solicitor, who was employed to prepare a mortgage, had, in the course of looking into the title, seen certain marriage articles, binding the mortgagor. The mortgage, however, was completed, and at a later period the same solicitor was employed to prepare an assignment of this mortgage; and the question was, whether the assignee had constructive notice of the articles. Lord *Hardwicke*.—"But consider what kind of notice the assignee had. The solicitor had not notice at the time of the assignment, nor relative to this business; but before, even before the original mortgage. In the case of

\* In *Adamson v. Ewit*, 2 Russ. & M. 66, the same doctrine was admitted; but in addition it was decided that the vendor and his agent in such transactions—(this was the sale of an annuity)—are not bound to disclose all the circumstances of the grantor's situation, but they are bound to give honest answers to questions put to them.

*Fitzgerald v. Falconbridge*, it was held, the notice should be in the same transaction. This rule ought to be adhered to, otherwise it would make purchasers and mortgagees' titles depend altogether on the memory of their counsellors and agents, and oblige them to employ persons of less eminence as counsel, as not being so likely to have notice of former transactions." In *Mountford v. Scott*, 3 Madd. 34, the case was: A solicitor, who knew that the original lease was deposited as a security with a third party, advised the lessee to grant an underlease; and the solicitor accordingly prepared such underlease, a sum being paid down. Subsequently, the underlessee assigned, and the same solicitor prepared such assignment; and the question was, whether the assignee was bound by the notice to the solicitor. Sir Thomas Plumer.—"But then it is said, Gyles's (solicitor) prepared the underlease to Blake (underlessee), and that he was employed to prepare the assignment from Blake to Warner, and that when he so prepared such assignment, he knew of the deposit with the plaintiff, and it was his duty to communicate his knowledge to Warner. No authority is produced to that extent. The agent stands in the place of the principal; and notice therefore to the agent is notice to the principal; but he cannot stand in the place of the principal until the relation of principal and agent is constituted; and as to all the information he has previously acquired, the principal is a mere stranger."

From the above cases it may, I think, be inferred, that as the knowledge of an incumbrance, acquired in a previous transaction, would not be binding on any one employing such solicitor; therefore in the absence of any direct question on the subject, which must naturally lead the solicitor to the inquiry whether such incumbrance is still in existence, the solicitor could not be held liable for such concealment. The case of *Toulmin v. Steere*, 3 Mer. 210, explains this rule to be one only claimable in the case of the notice being in a previous transaction, and nothing happening to keep the notice alive in the solicitor's memory. There a solicitor was employed to negotiate and prepare a security for an annuity to be a charge upon the estate of the grantor, on which there then existed a mortgage of 5000*l.* The grantor subsequently mortgaged for 3000*l.*, and the second mortgage bought in the first mortgage. The annuity was paid through the hands of the solicitor up to the time of a sale of the property by the direction of the Court of Chancery to trustees under a will, of whom the solicitor was one; and the question was, whether the solicitor and his co-trustees were bound by the notice the solicitor had of such annuity; and the Court held that the payment of the annuity through the hands of the solicitor amounted to a continuing notice, and therefore bound the trustees.

The reason of the rule seems to be, therefore, as stated by Lord Hardwicke, viz. to relieve the client from the hazard of all the notices

which a man in full business must have received of various incumbrances; besides it does not follow that because a solicitor has been employed to prepare an incumbrance, such incumbrance must necessarily be in existence at a future time, when he is again employed in the same property. *Toulmin v. Steere* shows the distinction. How far, then, would a solicitor, in a case like this, be liable to a purchaser? *A.*, having mortgaged his estate for 5000*l.*, sells it to *B.* for 6000*l.*, employing the same solicitor. *A.*'s solicitor, having such notice of the mortgage, delivers *B.* an abstract, upon which the mortgage does not appear, and *A.* appears absolute owner in fee. *B.* on an appointed day, compares the abstract with the title-deeds at the solicitor's office, who has procured them, except the mortgage, from the mortgagee, for the purpose. *B.* advances *A.* 3000*l.*, part of the purchase money, without the solicitor's knowledge. *A.* becomes insolvent before the purchase is completed, or the mortgage discovered. The whole of this question rests upon this one point—Was the solicitor bound to communicate his knowledge acquired in the previous transaction? If a Court of Equity makes a rule that previous knowledge is no knowledge at a future time, it certainly cannot be alleged as a fraud on the part of a solicitor withholding that which he was not bound to remember. In such case it would, I conceive, become the duty of the purchaser to ask such question as would lead to the inquiry of whether there was any incumbrance existing; and then the solicitor would be bound to give a fair answer to such inquiries, according to the above case of *Adamson and Evitt*; but in the absence of any misstatement there does not appear to be any ground for attacking the solicitor on the ground of fraud; in being merely silent on his previously attained notice. It may, however, be as well to consider whether the above stated case comes within that of *Toulmin v. Steere*. Here the solicitor is represented as going to the mortgagee for the deeds. Now it must entirely depend upon what passed between the solicitor and the mortgagee as to whether the solicitor then received fresh notice that the mortgage was still in existence. If so, it was then equally a fraud on his part, the concealing the incumbrance from the purchaser, as it would have been on the part of the vendor. It does not, however, exactly follow, that because the deeds happen to be in the mortgagee's hands that the mortgage is still unpaid; although, generally speaking, a man would take his deeds away on payment of the money, it sometimes happens that they are left till wanted, even after payment. If, again, a mortgagee, from the confidence he has in the mortgagor, should, on a message from him, deliver the deeds up, without mentioning that his mortgage was still unpaid, it would be too much to say, that on the mere suspicion of fraud a solicitor should be liable. His liability in all such cases must always depend upon this—whether fresh notice can be attached upon him: if so, then he is liable. If all his knowledge is previously acquired, I do not see how



he can be made liable. From what fell from Lord Eldon, as above noticed, in *Evans v. Bicknell*, as regarding whether it was a fraud on the part of the trustee allowing the deeds to the tenant for life, it might be open to contend, in the present instance, that the fraud lay on the mortgagee parting with the deeds. Such fraud might exist without the solicitor being cognizant of it: and as long as it is open to mere suspicion, the solicitor could not I conceive, be made liable.

Where fraud does exist, the remedy seems, from the above noticed opinions of Lord Hardwicke and Lord Eldon, to exist both at law and in equity; and in 2 Russ. & Myl. 73, Sir John Leach thus expresses himself: "If by the misrepresentation, on the part of the defendants, of facts relating to the circumstances of the grantor or his sureties, or by the concealment, on the part of the defendants, of facts relating to those circumstances which the defendants were bound to disclose, the plaintiff was induced to become the purchaser of this annuity, and has in consequence suffered a loss, there can, I think, be no doubt, that the plaintiff could sustain an action at law for damages against the defendants in the nature of a writ of deceit. But this Court, nevertheless, with respect to the fraud, would have a concurrent jurisdiction with a Court of Law."

M.

## SUPERIOR COURTS.

### Vice Chancellor's Court.

#### PRACTICE. — PLEADING. — INSOLVENT DEBTORS' ACTS.

*Held, that the assignees of an insolvent debtor may institute a suit without the consent of the major part in value of the creditors or approbation of the Court for Relief of Insolvent Debtors, notwithstanding the requisition of the act 7 G. 4, c. 57, s. 24, continued by 1 W. 4, c. 38.*

To a bill filed by the assignees of an insolvent, praying that a certain deed therein described be given up to be cancelled, the defendant pleaded that the suit was instituted without the consent in writing of the major part in value of the creditors at a meeting convened for that purpose, as required by the Acts for the Relief of Insolvent Debtors, and also without the approbation of the Insolvent Debtors' Court.

Mr. Ellerton, in support of the plea.—The Insolvent Debtors' Acts empowered the assignees of an insolvent to sue and do other acts in their own name, provided that no suit should be commenced, &c. without the consent in writing of the creditors, or the approbation of the Insolvent Debtors' Court. This bill alleged that such consent and approbation had been previously obtained. That the plea

denied; and the question was, whether the proviso in the act 7 G. 4, c. 57, s. 24, was prohibitory. In *Ockleston v. Benson*,<sup>a</sup> Sir John Leach, Vice Chancellor, held that consent was an indispensable preliminary. The same construction was adopted upon that authority in subsequent cases, as *Boxon v. Williams*,<sup>b</sup> and *King v. Tullock*.<sup>c</sup> But in *Piercy v. Roberts*<sup>d</sup> the same learned Judge took a contrary view, and considered that this provision was made for the benefit of creditors alone, and that it was not competent for a defendant to urge the present objection. The learned counsel, after arguing the point at some length, submitted, that according to the true construction of the statute consent was necessary.

Mr. Richards, for the assignees.—The first decision of Sir John Leach had been reluctantly followed, and was at last overruled by the decision of that learned Judge himself. In *Piercy v. Roberts*, and in *Jones v. Yates*,<sup>e</sup> Sir William Alexander, after consulting with the Vice Chancellor, decided against this objection, so that the point might now be considered as settled. And without imputing more foresight to the Legislature than was necessary, it could never have been intended that assignees should be precluded altogether from commencing a suit without this previous process, inasmuch as a suit might be necessary to restrain waste, or to obtain a writ of *ne exeat regno*, before a meeting of the creditors could be possibly convened.

His Honor the Vice Chancellor observed, that the case had been very ably argued, and he was glad it had so occurred, as, notwithstanding the conflict of authorities, he was enabled to decide it upon his view of the proper construction to be put upon the statute. He did not like to overrule an express decision of his predecessor. He knew it was a rule with Lord Eldon, that even a single decision unappealed from acquired a degree of favor, and was not lightly to be disturbed. Even Sir William Alexander's first decision was in conformity with that of Sir John Leach. However, under the circumstances of this case, and looking at the later decisions of these learned Judges, he did not consider the want of consent was an absolute bar to the suit, and more particularly for the reason given by Mr. Richards—that the not filing a bill without such consent might sometimes lead to the total destruction of the subject of the suit. The best course would be to overrule the plea, but, on account of the conflict of the cases, without costs.

*Cusborne v. Barsham*, Sittings at Lincoln's Inn, June 25th and July 2d, 1835.

<sup>a</sup> 2 Sim. & Stu. 265.

<sup>b</sup> 2 You. & Jerv. 265, 475.

<sup>c</sup> 2 Sim. 469.

<sup>d</sup> 1 Myl. & K. 4; S. C. 5 Leg. Obs. 224.

<sup>e</sup> 3 You. & Jerv. 373.

## Exchequer of Pleas.

PLEADING.—PLEA OF PAYMENT.—DEMURRER  
—STATEMENT OF CAUSE OF DEMURRER.

*Where a defendant pleads payment of money into Court, he must pursue the form given by the new rules, and it should be pleaded after all other pleas which the defendant may think proper to put on the record.*

*What is a sufficient statement in a demurrer to a plea of payment, on the ground of defect in form.*

This was an action for money had and received, and the declaration also contained a count on account stated. The defendant's plea was in this form:—"As to the sum of 25*l.*, parcel of the monies in the said declaration mentioned, that the plaintiff ought not further to maintain his action, because the defendant now brings into Court here the said sum of 25*l.* ready to be paid to the plaintiff: and the defendant further saith, that the plaintiff has not sustained damage to a greater amount than 25*l.*, in respect of the causes of action in the said declaration mentioned as to the sum of 25*l.*, and this the defendant is ready to verify; and as to the residue of the said monies in the said declaration mentioned, the said defendant saith, that he did not promise in manner and form as the plaintiff hath above alleged; and this he prays may be inquired of by the country," &c.

To this plea the plaintiff demurred; and the special cause assigned was, that "the plea was not in the form given by the late rule of Court."

In support of the demurrer, it was contended, that the plea should have concluded with a prayer of judgment, in accordance with the rule.

On the other hand, it was submitted, that, according to the mode in which the ground of the demurrer had been stated, this objection was not open to be taken.

The Court was of opinion, that the objection was open, and that the form of the plea given by the rule ought to be strictly pursued. Where there were several different answers to be given to different parts of the demand, they should be exhausted first, and the plea of payment introduced last.

Time to amend was then given, on payment of costs.—*Sharman v. Stevenson*, E. T. 1835. Excheq.

*same amount, paid on a previous occasion, was produced by the defendants. The jury then gave a verdict for 21*l.* only, having also made other minor deductions. As it was not denied by the defendants that the sum alluded to was due, on an application made by them for their costs, it was held, that they could not be allowed.*

This was a rule obtained by the defendants, calling upon the plaintiff to shew cause why they should not be entitled to their costs under 43 G. 3, c. 46, under the following circumstances:—The defendants, it appeared, had been arrested by the plaintiff for a sum of 45*l.* alleged to be due for a tavern bill. The defendants had lived at the house of the plaintiff, and had then incurred a debt to the above amount, which included a sum of 19*l.* 10*s.* paid for their use. On the trial a question arose as to whether the sum of 19*l.* 10*s.* had been paid or not, and it was sworn by a witness for the plaintiff that the money was paid on a certain day, while, on the other hand, a receipt was put in shewing that it was paid on a previous day. The jury, upon this, returned a verdict for the plaintiff, but gave damages only to the amount of 21*l.*, having also made other minor deductions.

It was now contended on behalf of the plaintiff, that there was no denial on the part of the defendants that the whole amount was due. Besides, there was the positive affidavit of the plaintiff shewing that the whole sum was properly claimed, although the jury had only returned a verdict for a smaller sum. They might have done so, being of opinion that the evidence was not sufficient to prove the whole debt. The bill for 45*l.* had been delivered to the defendants, who had left the tavern for the alleged purpose of obtaining money to pay the demand. They however never returned, and the plaintiff was subsequently compelled to employ stratagem to arrest them. Reasonable cause therefore existed for arresting the defendants.

In support of the rule it was submitted, that the verdict of the jury was the only proper criterion to judge by, and if there could exist any doubt that must remove it. The witness, who swore to the payment of the sum of 19*l.* 10*s.*, must have been guilty of wilful perjury, and the plaintiff could not but be aware of the nature of the evidence he was going to give.

The Court was of opinion, that there existed reasonable grounds for the arrest of the defendants, who, it was proved, had since admitted the justice of the demand of the whole sum. Had it been shewn, that the witness alluded to had committed wilful perjury, and that the plaintiff was aware of his intention so to do, the verdict of the jury might have been taken as conclusive, and the defendants would have been entitled to their costs; otherwise, however, the plaintiff could not be called upon to pay those costs.

Rule discharged.—*Smith v. Smith and another*, T. T. 1835. Excheq.

ARREST WITHOUT PROBABLE CAUSE.—COSTS.  
—VERDICT OF JURY.

*The defendants having been arrested for a sum of 45*l.* the justice of the demand was disputed, and the cause was tried. A witness then swore that a sum of 19*l.* 10*s.*, which composed a part of the debt, was paid to the defendants' use on a certain day, while, in contradiction, a receipt for the*

**PROMISSORY NOTE.—PLEA.—NO CONSIDERATION.—DEMURRER.**

*In an action upon a promissory note, the plea that there was no consideration given, was held to be bad upon special demurrer.*

This was an action brought on a promissory note. The plea set forth that the note had been made without any valuable consideration, and concluded with a verification. In the demurrer, it was contended that it was not shewn how there was no consideration given. The plea, besides, should have terminated with the appeal to the country, and not a verification.

In support of the latter it was now submitted, that although there was no consideration at the time the note was drawn, yet it was perfectly consistent with the plea, that something might subsequently have been given.

On the other hand it was contended, that the defence set up in the plea was a perfectly good one, and no inconvenience could arise to the plaintiff, whose putting in a general replication would be quite sufficient, as it would be for the defendant to shew that no consideration was given for the note.

The Court considered the plea should have set forth how there was no consideration, and gave judgment for the plaintiff.

On application, the Court refused to allow an amendment unless upon a special affidavit of merits.

Judgment for the plaintiff.—*Houghton, exco. v. Earl of Kilmorey*, T. T. 1835. Excheq.

**EJECTMENT.—POSSESSION WITHOUT THE KNOWLEDGE OF DEFENDANT.—RULE FOR JUDGMENT.**

*In an action of ejectment, it was held that the plaintiff having obtained possession from the tenants without the knowledge of the defendant, was no answer to a rule for judgment as in case of a nonsuit.*

Cause was now shewn by the plaintiff, against a rule as for judgment as in a case of nonsuit, on an affidavit which set forth, that before the rule was obtained, possession had been given by the tenants to the lessor of the plaintiff, who had had possession ever since.

For the defendant, it was contended that the tenants had no right to give possession. The defendant was the landlord.

The Court thought that it should appear that the possession was given by consent of the landlord, who might have been ignorant of the compromise. A peremptory undertaking ought to be given.

Rule dismissed on a peremptory undertaking.—*Doe d. Draper v. Dyer*, T. T. 1835. Excheq.

**BAIL.—AFFIDAVIT OF JUSTIFICATION.**

*An affidavit to justify bail ought clearly to shew where the property of the person offering himself was situated.*

This was an application to put in bail. The affidavit of justification set forth, that the bail possessed property to the required amount, and that it consisted of household furniture and effects, and good book debts, and that he had resided in his present place of abode for a very considerable period.

It was now contended, in opposition to the bail, that it was not sufficiently clearly shewn where the property was deposited.

On the other hand, however, it was urged, that as the property consisted of household goods, it might be considered to be in the house occupied by the bail.

The Court was of a contrary opinion. It should have been clearly shewn where the property was.

Bail rejected.—*Cooper's Bail*, T. T. 1835. Excheq.

**DEMURRER.—ARGUMENT.—PAPER-BOOKS.**

*At the suggestion of the Court, it was directed, that for the future two lists of cases of demurrer should be made out, one shewing those cases where argument would be offered, the other where no observations would be made.*

This was a demurrer to a replication; but as no one appeared in support of the plea, application for judgment was made. It was understood that no argument was intended to be offered.

The Court refused to give judgment, in consequence of the paper-books not having been delivered, and ordered that the case should stand over until the next paper day. It was at the same time suggested, that in future, where no argument was intended to be offered on a case, that fact should be mentioned to the officer of the Court. He should then make out two lists, as was the practice in the other Courts, the one of cases to be argued, the other where no argument would be offered. With regard to the latter, however, the rule respecting the delivery of paper-books should have no reference.

Application refused.—*Harvey v. King*, T. T. 1835. Excheq.

**EJECTMENT.—MOTION TO GIVE SECURITY.—EXECUTION OF LEASE.**

*In ejectment it is sufficient that a motion under 1 G. 4, c. 87, for a defendant to enter into recognizances, be made by one of three tenants in common, and if the execution of the lease is proved by other evidence, the attesting witness need not be called upon to depose to that fact.*

A rule nisi had been obtained in an action of ejectment, calling upon the defendant to shew cause why he should not enter into recog-

nizances to pay costs and the amount of damages sought to be recovered, agreeably to the terms of the act 1 G. 4, c. 87.

It was contended, that the affidavit which proved the execution of the agreement under which the defendant held possession, was not proved by the best evidence. It should have been sworn by the attesting witness, instead of which, other persons were called upon to give testimony to the fact. Besides, as the defendant held possession under three landlords, the notice to quit given by one only was insufficient. He could only be entitled to an undivided third part. The act, it was submitted, applied to those cases alone where the landlord was entitled to possession of the whole.

The Court, however, expressed a different opinion on these points, and made the rule absolute.

Rule absolute.—*Doe dem. Morgan v. Rotherham*, T. T. 1835. Excheq.

MISNOMER.—CAPIAS.—ARREST.—PLEADING.  
—MANSLAUGHTER.

*Where a defendant, named "Cocken," is sued by the name of "Cocker," and arrested on a writ in that name, and gives a bail-bond in his right name, and that bail-bond is afterwards assigned, the declaration on it is not good unless it is averred that the defendant is known by one name as well as the other.*

This was an action by the assignee of a bail-bond. The declaration stated that the plaintiff, on the 21st of November, 1834, sued out of the Court of Exchequer a certain writ of our Lord the King, called a writ of *capias*, against one *W. Cocken*, by the name of *W. Cocker*, directed to the sheriff of the county of Middlesex, by which writ the king commanded the sheriff to take *W. Cocken*, by the name of *W. Cocker*, if he should be found in his bailiwick, and him safely keep until he should have given bail or made deposit with him, &c. or until the said *W. Cocken* by the said name of *W. Cocker*, should by other lawful means be discharged; and further commanding him that, on the execution thereof, he should deliver a copy thereof to the said *W. Cocken*, by the said name of *W. Cocker*, and thereby required the said *W. Cocken*, by the said name of *W. Cocker*, to take notice that within eight days after execution thereof he should cause special bail to be put in for him to the said action, &c.; that the writ was indorsed for bail for 100*l.*, and was delivered to the sheriff, who, within four calendar months, executed it by arresting the defendant, and that the sheriff took bail for the said *W. Cocken's* causing special bail to be put in for him to the said action, and that the defendant gave a bail-bond with a certain condition thereto, whereby after reciting that the said *W. Cocken*, sued as *W. Cocker*, was on the 10th day of December then instant taken by the said sheriff in the bailiwick of the said sheriff, by virtue of the King's writ of *capias*, issued out of his Majesty's Court of Exchequer, bearing date at Westminster, the 21st day of

November then last, to the said sheriffs directed and delivered, against the said *W. Cocken*, arrested by the name of *W. Cocker*, in an action on promises, at the suit of the said *C. Finch*, and that a copy of the said writ, together with every memorandum or notice subscribed thereto, and all indorsements thereon, was on execution thereof duly delivered to the said *W. Cocken*, sued as aforesaid; and that he was by the said writ required to cause special bail to be put in for him in the said Court to the said action, within eight days after execution on him, inclusive of the day of such execution. The condition of the said obligation was declared to be such, that if the said *W. Cocken*, sued as aforesaid, did cause special bail to be put in for him to the said action in his Majesty's said Court, as required by the said writ, then the said obligation was to be void. The declaration then averred that the said *W. Cocken* did not cause special bail to be put in as required by the writ, whereby the bond became forfeited, and that the sheriff thereupon assigned the bond to the plaintiff, and that the defendant had not paid the amount of the bond.

Pleas.—First, *non est factum*, and that no such writ of *capias* as is in the said declaration mentioned ever issued out of his said Majesty's Court of Exchequer of Pleas at Westminster, against the said *W. Cocken* in manner and form as the plaintiff alleged in his declaration. The plaintiffs joined issue on these pleas.

When the cause came on for trial the plaintiff produced the writ. It was directed against *William Cocker*. Other evidence was then given, which clearly satisfied the jury, and they accordingly found specially that the defendant Cocken was the person meant in the writ. It was then objected, that the production of a writ against "Cocker" could not support an averment of a writ against "Cocken." The learned Judge accordingly nonsuited the plaintiff, with leave to him to move to set aside the nonsuit.

On shewing cause against this rule,

The Court was of opinion that the rule must be made absolute, the Jury having found that the defendant was the person intended by the writ. They however intimated an opinion that the declaration would be bad in arrest of judgment, as it alleged that a writ had been issued against "Cocken," by the name of "Cocker," which was impossible.

A rule *nisi* was accordingly granted for arresting judgment.

Cause was afterwards shewn against this rule. It was contended, that the defendant was too late to take the objection as to the misnomer. The only mode in which advantage could be taken on the ground of misnomer, was either by plea in abatement, or that which the Courts in their equitable jurisdiction had made equivalent to it, namely, relief on summary application. But the 3 and 4 W. 4, c. 42, s. 11, had abolished pleas in abatement, and provided "that in all cases in which a misnomer would but for that act have been by law pleadable in abatement, in such

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On application, the Court refused to allow an amendment unless upon a special affidavit of merits.

Judgment for the plaintiff.—*Houghton, excc. v. Earl of Kilmorey*, T. T. 1835. Excheq.

**EJECTMENT.—POSSESSION WITHOUT THE KNOWLEDGE OF DEFENDANT.—RULE FOR JUDGMENT.**

*In an action of ejectment, it was held that the plaintiff having obtained possession from the tenants without the knowledge of the defendant, was no answer to a rule for judgment as in case of a nonsuit.*

Cause was now shewn by the plaintiff, against a rule as for judgment as in a case of nonsuit, on an affidavit which set forth, that before the rule was obtained, possession had been given by the tenants to the lessor of the plaintiff, who had had possession ever since.

For the defendant, it was contended that the tenants had no right to give possession. The defendant was the landlord.

The Court thought that it should appear that the possession was given by consent of the landlord, who might have been ignorant of the compromise. A peremptory undertaking ought to be given.

Rule dismissed on a peremptory undertaking.—*Doe d. Draper v. Dyer*, T. T. 1835. Excheq.

**BAIL.—AFFIDAVIT OF JUSTIFICATION.**

*An affidavit to justify bail ought clearly to shew where the property of the person offering himself was situated.*

This was an application to put in bail. The affidavit of justification set forth, that the bail possessed property to the required amount, and that it consisted of household furniture and effects, and good book debts, and that he had resided in his present place of abode for a very considerable period.

It was now contended, in opposition to the bail, that it was not sufficiently clearly shewn where the property was deposited.

On the other hand, however, it was urged, that as the property consisted of household goods, it might be considered to be in the house occupied by the bail.

The Court was of a contrary opinion. It should have been clearly shewn where the property was.

Bail rejected.—*Cooper's Bail*, T. T. 1835. Excheq.

**DEMURRER.—ARGUMENT.—PAPER-BOOKS.**

*At the suggestion of the Court, it was directed, that for the future two lists of cases of demurrer should be made out, one shewing those cases where argument would be offered, the other where no observations would be made.*

This was a demurrer to a replication; but as no one appeared in support of the plea, application for judgment was made. It was understood that no argument was intended to be offered.

The Court refused to give judgment, in consequence of the paper-books not having been delivered, and ordered that the case should stand over until the next paper day. It was at the same time suggested, that in future, where no argument was intended to be offered on a case, that fact should be mentioned to the officer of the Court. He should then make out two lists, as was the practice in the other Courts, the one of cases to be argued, the other where no argument would be offered. With regard to the latter, however, the rule respecting the delivery of paper-books should have no reference.

Application refused.—*Harvey v. King*, T. T. 1835. Excheq.

**EJECTMENT.—MOTION TO GIVE SECURITY.—EXECUTION OF LEASE.**

*In ejectment it is sufficient that a motion under 1 G. 4, c. 87, for a defendant to enter into recognizances, be made by one of three tenants in common, and if the execution of the lease is proved by other evidence, the attesting witness need not be called upon to depose to that fact.*

A rule nisi had been obtained in an action of ejectment, calling upon the defendant to shew cause why he should not enter into recog-

nizances to pay costs and the amount of damages sought to be recovered, agreeably to the terms of the act 1 G. 4, c. 87.

It was contended, that the affidavit which proved the execution of the agreement under which the defendant held possession, was not proved by the best evidence. It should have been sworn by the attesting witness, instead of which, other persons were called upon to give testimony to the fact. Besides, as the defendant held possession under three landlords, the notice to quit given by one only was insufficient. He could only be entitled to an undivided third part. The act, it was submitted, applied to those cases alone where the landlord was entitled to possession of the whole.

The Court, however, expressed a different opinion on these points, and made the rule absolute.

Rule absolute.—*Doe dem. Morgan v. Rotherham*, T. T. 1835. Excheq.

MISNOMER.—CAPIAS.—ARREST.—PLEADING.  
—MANSLAUGHTER.

*Where a defendant, named "Cocken," is sued by the name of "Cocker," and arrested on a writ in that name, and gives a bail-bond in his right name, and that bail-bond is afterwards assigned, the declaration on it is not good unless it is averred that the defendant is known by one name as well as the other.*

This was an action by the assignee of a bail-bond. The declaration stated that the plaintiff, on the 21st of November, 1834, sued out of the Court of Exchequer a certain writ of our Lord the King, called a writ of *capias*, against one *W. Cocken*, by the name of *W. Cocker*, directed to the sheriff of the county of Middlesex, by which writ the king commanded the sheriff to take *W. Cocken*, by the name of *W. Cocker*, if he should be found in his bailiwick, and him safely keep until he should have given bail or made deposit with him, &c. or until the said *W. Cocken* by the said name of *W. Cocker*, should by other lawful means be discharged; and further commanding him that, on the execution thereof, he should deliver a copy thereof to the said *W. Cocken*, by the said name of *W. Cocker*, and thereby required the said *W. Cocken*, by the said name of *W. Cocker*, to take notice that within eight days after execution thereof he should cause special bail to be put in for him to the said action, &c.; that the writ was indorsed for bail for 100*l.*, and was delivered to the sheriff, who, within four calendar months, executed it by arresting the defendant, and that the sheriff took bail for the said *W. Cocken*'s causing special bail to be put in for him to the said action, and that the defendant gave a bail-bond with a certain condition thereto, whereby after reciting that the said *W. Cocken*, sued as *W. Cocker*, was on the 10th day of December then instant taken by the said sheriff in the bailiwick of the said sheriff, by virtue of the King's writ of *capias*, issued out of his Majesty's Court of Exchequer, bearing date at Westminster, the 21st day of

November then last, to the said sheriff's directed and delivered, against the said *W. Cocken*, arrested by the name of *W. Cocker*, in an action on promises, at the suit of the said *C. Finch*, and that a copy of the said writ, together with every memorandum or notice subscribed thereto, and all indorsements thereon, was on execution thereof duly delivered to the said *W. Cocken*, sued as aforesaid; and that he was by the said writ required to cause special bail to be put in for him in the said Court to the said action, within eight days after execution on him, inclusive of the day of such execution. The condition of the said obligation was declared to be such, that if the said *W. Cocken*, sued as aforesaid, did cause special bail to be put in for him to the said action in his Majesty's said Court, as required by the said writ, then the said obligation was to be void. The declaration then averred that the said *W. Cocken* did not cause special bail to be put in as required by the writ, whereby the bond became forfeited, and that the sheriff thereupon assigned the bond to the plaintiff, and that the defendant had not paid the amount of the bond.

Pleas.—First, *non est factum*, and that no such writ of *capias* as is in the said declaration mentioned ever issued out of his said Majesty's Court of Exchequer of Pleas at Westminster, against the said *W. Cocken* in manner and form as the plaintiff alleged in his declaration. The plaintiffs joined issue on these pleas.

When the cause came on for trial the plaintiff produced the writ. It was directed against *William Cocker*. Other evidence was then given, which clearly satisfied the jury, and they accordingly found specially that the defendant Cocken was the person meant in the writ. It was then objected, that the production of a writ against "Cocker" could not support an averment of a writ against "Cocken." The learned Judge accordingly nonsuited the plaintiff, with leave to him to move to set aside the nonsuit.

On shewing cause against this rule,

The Court was of opinion that the rule must be made absolute, the Jury having found that the defendant was the person intended by the writ. They however intimated an opinion that the declaration would be bad in arrest of judgment, as it alleged that a writ had been issued against "Cocken," by the name of "Cocker," which was impossible.

A rule *nisi* was accordingly granted for arresting judgment.

Cause was afterwards shewn against this rule. It was contended, that the defendant was too late to take the objection as to the misnomer. The only mode in which advantage could be taken on the ground of misnomer, was either by plea in abatement, or that which the Courts in their equitable jurisdiction had made equivalent to it, namely, relief on summary application. But the 3 and 4 W. 4, c. 42, s. 11, had abolished pleas in abatement, and provided "that in all cases in which a misnomer would but for that act have been by law pleadable in abatement, in such

actions the defendant shall be at liberty to have the declaration amended at the cost of the plaintiff, by inserting the right name." The method of taking advantage of misnomer pointed out by this act, not having been used by the defendant, he must be taken to have waived it. The present rule, therefore, for arresting the judgment, must be discharged.

In support of the rule, it was submitted, that the defendant could not have waived the objection, which was apparent on the face of the record. The act of parliament referred to, did not apply to cases like the present. It referred to instances where a declaration had been filed or delivered, and where for the purpose of facilitating the proceedings of the plaintiff, the plea of misnomer was abolished. The object of it was only to facilitate the remedy of plaintiffs in particular actions, and not to alter the law in general. The proposition on the other side, however, went to the extent of arguing, that the law in general was altered. That act could never have been intended to have the effect, nor had it, of authorizing the arrest of a defendant on a writ against him by a different name from his own. If it could, then a writ without a name would authorize an arrest; but general warrants had been declared illegal. The present declaration, however, alleged, that a writ had been sued out against him (*Cocken*) by the name of "*Cocker*," which could not in point of law be done. The judgment, therefore, must be arrested. The plaintiff might, perhaps, suggest, that a difficulty would arise as to how the declaration could be framed under the existing circumstances of the case; such a difficulty would immediately be removed by alleging in the declaration, that the defendant was known as well by one name as the other.

Lord Abinger, C. B., said, the present case involved a question of very great importance, which might, perhaps, on some future occasion, come to be settled on an indictment for murder. It was therefore most important that it should be determined at once. There was no doubt, that before the late act, if a writ were issued against *A. B.* by the name of *C. D.*, the officer to whom the process was directed, had no right to arrest *A. B.* upon it; if he did, and the death of the officer was the consequence of resistance by the defendant, it would only amount to manslaughter. The question throughout was, whether any alteration was intended to be made in the law by that act, so as to entitle a sheriff to arrest a defendant by any name which might be introduced into the writ. It did not appear to have been the intention of the legislature so to do; and therefore, the present rule for arresting the judgment must be absolute.

*Parke*, B., was of the same opinion. The legislature never could have intended to effect so great a change in the law, as to enable sheriffs to arrest by any name stated in the writ, and to compel defendants to submit to such an arrest. The sole object of the act was to prevent defendants from availing themselves of such an objection, by plea in abatement,

and by no means to alter the law to the extent contended for. Were it not for this act, the suit could not proceed, if plea in abatement were pleaded; but now this inconvenience is removed. The plaintiff had no occasion to have declared in the way he has, since all difficulties would have been removed by alleging, that the defendant was as well known by one name as the other. The judgment must, therefore, be arrested.

*Bolland*, B., concurred.

*Alderson*, B., was of the same opinion.

Rule absolute for arresting the judgment.—

*Finch v. Cocken and others*, T. T. 1835. Excheq.

#### BILL OF COSTS.—TAXATION.—DISALLOWANCE OF COSTS.—COSTS OF TAXATION.—ATTORNEY AND CLIENT.

*Where, on taxation, more than one-sixth of a bill of costs shall be disallowed in consequence of one item for commencing an action in a wrong form, which was obliged to be discontinued, being struck off, the Court will allow the client the costs of taxation.*

This was a motion that the costs of taxing a bill of costs might be taxed to the plaintiff, on the ground that more than one-sixth had been taken off by the Master. A summons had been taken out for the purpose at a Judge's chambers, and at that time a case was cited as an authority to shew that the attorney was not liable to pay the costs of taxation. It was then alleged that the bill had not been taxed upon a general taxation, but that a particular branch had been entirely struck out. There were three bills, one only of which had been reduced a sixth. It was now contended, that so long as the *allocatur* remained unaltered the rule must apply; and that as more than a sixth had been taken off, the attorney must pay the costs of taxation. The attorney should have applied to have the taxation reviewed.

On shewing cause, it was stated, that from the affidavits put in, the account taxed off on the whole three bills exceeded one-sixth only by a very trifling amount. There would have been no excess whatever but for a whole item having been struck out for commencing an action out of form, which was afterwards discontinued, and proceedings, in consequence, taken *de novo*. Under these circumstances, it was contended, that the case already cited was exactly in point. It was there held, that where the deduction exceeded one-sixth only in consequence of a whole branch of the bill being taken off, the attorney was not liable to the costs of taxation; and the Court said, that the statute only applied where exorbitant charges were made on the particular items of the bill. Another case was also now alluded to, where the attorney was not called upon to pay costs of taxation, in a case where one of the bills delivered was disallowed, on the ground of the non-liability of the parties.

In reply to these observations, a third case was cited where, under similar circumstances,

a motion was made to review the Master's taxation, and affidavits were put in shewing that the charges were not exorbitant. The Court, however, refused to interfere, and held that one-sixth having been taken off the bill by the Master, no departure could be allowed from the precise words of the act. So in other cases, where the bill was not reduced fully a sixth, yet the Court acted upon the discretionary power given to them, and ordered the attorney to pay the costs of taxation.

The Court thought that this case came precisely within the meaning of the statute. The attorney had made charges which were improper, and which had been taxed off in the proper manner. According to the statement of the Master, all three bills were treated as one, and therefore one-sixth of the gross amount of the whole being taxed off one bill, it must apply to the total amount. There had been a case where a sum of money was paid to an attorney by his client to satisfy counsel, which was considered to be, properly speaking, a part of his bill. In a later case, however, where an attorney had received a certain sum to pay a debt and costs in an action, which he made a part of his bill, the Court refused to allow him the costs of taxation.

Rule absolute, with costs.—*Morris and another v. Parkinson*, T. T. 1835. Excheq.

## NOTES OF THE WEEK.

### HOUSE OF LORDS.

#### *Bills for second Reading.*

<i>Title of the Bill.</i>	<i>Proposer.</i>
Residence of Clergy.	Lord Brougham.
Pluralities Prevention.	Lord Brougham.
Ecclesiastical Jurisdiction.	Lord Brougham.
Illegal Securities.	
Capital Punishments.	
Education & Charities.	Lord Brougham.
Publication of Lectures.	

#### *In Select Committee.*

Wills Execution.  
Executors.  
Prisoners' Counsel.

#### *In Committee.*

Highways.  
Sinecure Church Preferment.  
Municipal Corporations.  
Polls at Elections.

#### *Third Reading.*

Bankruptcy Funds.  
London Small Debts.

### *Passed.*

Chancery Offices Improvement.  
Certiorari.

### HOUSE OF COMMONS.

#### *Bills to be brought in.*

Law of Tenure.	Attorney General.
Law of Escheat.	Attorney General.
Poor Law Amendment.	Mr. Trevor.
Registration of Births, &c.	Mr. Wilks.

#### *Second Reading.*

Law of Libel.	Mr. O'Connell.
Parish Vestries.	
Letters Patent.	Mr. Tooke.
Certiorari.	
Tithes' Recovery.	

#### *In Committee.*

Copyholds Enfranchisement. Attorney General.  
Registration of Voters. Lord J. Russell.  
County Coroners. Mr. Cripps.  
Durham Court of Pleas.  
Dissenters' Marriages.  
Marriage Act Amendment.  
Election Expenses and Qualification of Members.  
Limitation of Real Actions Amendment.  
Landed Securities (Ireland).  
Abolishing Offices.

#### *Third Reading.*

Imprisonment for Debt.  
Ecclesiastical Revenues.

#### *Consideration of Report.*

Prisons Regulations.

### *Passed.*

Church of Ireland.  
Turnpike Trusts.

## ANSWERS TO QUERIES.

### *Common Law.*

#### LIABILITY OF INDORSER. P. 160.

1. Discharging or giving time to any of the parties, is a discharge of every other party, who, upon paying the bill or note, would be entitled to sue the person to whom such discharge or time has been given; see *English v. Darley*, 2 Bos. & Pull. 61, where the holder



of a bill sued the indorser and acceptor, and took execution against the acceptor, but received 100l. from him on account, and afterwards took a warrant of attorney and bond for the remainder, payable by instalments, he then proceeded to trial in his action against the indorser, when Lord Eldon thought the giving indulgence to the acceptor was a bar, and nonsuited the plaintiff. R. B.

2. Mr. Justice Bayley, in his Treatise on Bills, under the head of Indulgence, lays down the general rule as follows:—"Discharging, or giving time to any of the parties, is a discharge of every other party, who, upon paying the bill or note, would be entitled to sue the party to whom such discharge or time has been given," and refers to *ex parte Smith*, 3 Bro. C. C. 1; *English v. Darley*, 2 Bos. & Pul. 61; *Gould v. Robson*, 8 East, 576.

#### GRADUS.

#### Eato of Property and Conbpaning.

LEGATEE'S AGE.—BAPTISM.—INTEREST. P. 143.

A register of baptism is no proof of either the time or place of a child's birth; but as hearsay evidence is admitted in questions of this nature, and the declarations of a parent are good evidence to prove the time of the birth (see *Herbert v. Tuckall*, 7 East, 290), there can be no doubt but that the executor in this case would be justified in paying the legacy, on having the entry of B.'s birth in the family bible by the parent properly authenticated. Where there is no time fixed for payment of a legacy, the legatee, if an infant, is entitled to interest from the expiration of one year from the testator's death; and if of full age, from the time of the demand of the legacy after one year from the testator's death. See the general rule laid down by Lord Redesdale, in *Pearson v. Pearson*, 1 Scho. & Lef. 10. M. A.

WILL.—WITNESS.—TRUSTEE. P. 144.

This will I should consider sufficiently attested; the words of the statute (25 G. 2, c. 6,) being "to whom any *beneficial* devise," &c. Now a trustee cannot come within this clause, and cannot therefore be deemed an incompetent witness. See *Phipps v. Pilcher*, 1 Madd. 144, where the executors were directed to sell, and the will was attested by three witnesses, one of whom was also one of the executors, to whom the power was given; and the Court decided that the will was properly attested. M. A.

EXPENSES OF SALE.—STATUTE OF FRAUDS. P. 143.

As an auctioneer is agent for both parties, and his authority is the buyer's bidding aloud (4 Taunt. 38), and the bidding was not retracted before the hammer fell (3 T. R. 148), I think if the auctioneer had signed on the first sale, a specific performance might have

been enforced (3 Ves. & B. 57), and the Statute of Frauds would have been satisfied (4 Taunt. 209). *Semble*, as the bidding could not be retracted, a signature by the auctioneer would have done at any time before the second sale, but not after. See a case as to goods, 4 Moo. & Scott, 217. I think there has been no legal contract, and that it is too late to make one; if so, no action *ex contractu* can be maintained, and the remedy, if any, will be an action on the case, laying the difference and expenses as special damage. Possibly the vendor may have case against the auctioneer for negligence in not signing contract, and thereby depriving him of his right of action against the purchaser. T. C.

#### QUERIES.

##### Practice.

WARRANT OF ATTORNEY.—NEW RULES.

By the rules of Hilary Term, 1834, it is directed, that all judgments shall be entered of record of the day of the month and year when signed, and shall not have relation to any other day. In signing judgments on warrants of attorney, the old practice was, in the entry of the memorandum on the roll, to state that a bill was filed of a certain day in a certain term; (if judgment signed in vacation, usually the last day of the preceding term). What day is the declaration now to be stated as filed on? Perhaps some of your readers may state their practice, if they can give no greater authority.

It has also occurred, that the usual words in warrants of attorney to enter up judgment as of the last, present, or subsequent term, should be altered.

##### INVESTIGATOR.

DISTRAINING CATTLE.—BANKRUPTCY.

A sent cattle to B. to agist on B.'s land, paying so much per head per week. During the time the cattle were at B.'s, B. committed an act of bankruptcy, which was followed by a fiat. Can the landlord of B. distrain them for arrears of rent, or do they pass to B.'s assignees as goods and chattels in B.'s possession, order, or disposition? A.

#### THE EDITOR'S LETTER BOX.

We doubt the utility of giving such a copious General Index to our past Volumes, as would enable an inquirer to find every piece of passing intelligence or casual observation; but we think that a *General Table of Contents*, referring to all the important articles, may be useful, and we shall endeavour to comprise it in one of the Supplements (without any additional expense), after the conclusion of the present volume.

The Queries and Answers of A. G.; R. B. W.; Inquirer; H. M. R.; Advena; and J., have been received.

The Communications of J.; C.; and J. C., will be inserted at an early opportunity.

# The Legal Observer.

Vol. X. SATURDAY, AUGUST 22, 1835. No. CCLXXXVI.

— "Quod magis ad nos  
Pertinet, et nescire malum est, agitamus.

HORAT.

## PHILLIPS'S DIRECTIONS TO STUDENTS.

IN pursuance of our intention lately expressed, to bring under our readers' notice, some of the oldest legal writers, we shall now direct the attention to one of the earliest works, written for the benefit of the law student; it is called, "*Studii Legalis Ratio*, or Directions for the Study of the Law, under these heads: the qualifications for nature, means, method, time, and place of the study. By W. P. [Wm. Phillips] London, 1662." It contains many directions which will prove of great benefit to the student, and we shall extract such passages as appear to us most interesting.

The author first enumerates the qualifications necessary to the student, and warns him to examine himself well before he enters upon the study, lest peradventure he may have mistaken his bent. We shall pass over the necessary qualifications dwelt on, as well by other and later authors on the same subject, and select some hints on matters not so generally alluded to, but not the less useful on that account. Speaking of the student, he says:

"His habit likewise ought to be decent and neat, not gay or apish, nor may he spend any part of that time allotted for study, in a curious and antic dress which after all the pains bestowed, doth not become a man. *Non est ornamentum virile*, saith Seneca; but this ought to be left to those weaker vessels, women, to dwell and be wholly intent upon the outside; in which respect Plato, I believe, thanked God he was not made a woman. *Morbundiu Plato nature gratias egit quod mas fuit non femina*. Neither is it only an effeminate part, but it is likewise a sure signe that they are frothy and empty, and accordingly resolved to put a good face upon the matter, and peacock-like, to place their worth and excellency in

their outside. And as on the one side this is to be avoided, for we have a Philosopher's warrant, *Licet sapere sint pompa*; so on the other side, decency and neatness is not to be neglected, being that pre-eminence which nature hath bestowed on us. To conclude, behaviour is, as it were, the guardian of the mind, and it ought to have the condition of a garment; for it ought to be made in fashion, it ought not to be too curious, it ought to be shaped so as to set forth any good making of the mind, and hide any deformity; and above all, it ought not to be too straight or restrained for exercise or motion."

After dwelling on the merits of temperance, "The next," he says, "is modesty, that he be not over confident and peremptory in his words or assertions, nor given to much boldness and obstinacy in his determination. Yet on the other side, too much bashfulness is not commendable in any, unless a young man, as Seneca saith, for then it is *signum virtutis*. Yet are many of such a soft and facile constitution, that the least contradiction of their discourse, though in a known truth, presently riseth the blood in their face. *Durat ad huc perversa recti verecundia*, as the same Seneca saith; and he, mauer his stoick apathie, was forced to say, *inivitus eburesco*."

The second chapter is devoted to the Nature of the Study; chapter 3, to the Means of the Study; but of course, the list of books to be read, and other matters mentioned in them, cannot be of much interest or use to the student of the present day. In the fourth chapter, relating to the Method of Study, many useful hints are to be found, and among others the following may be attended to with advantage.

"In reading, our student must not give himself over to such books as are besides his study, much less that conduce nothing to it. He must not be at one book to-day and another to-morrow, wandering like a sickly

stomach, that hath an appetite to all things, but can digest none."

But the most amusing chapter is the last, on the Time and Place for Study; and from this we shall extract more largely. Phillips thus begins it:

"There is a time for every thing (saith the wise man), and if so, there is a time for study too. Indeed every time is a time for study. *Tempus quidem nullum est par an idoneum studio salutari.* Yet some time is fitter than another, witness the old saying, *aurora musis amica.* For the spirits of our bodies following the disposition of the air, which in the morning at sun-rising is subtil and thin, pure and free from all groes vapours, and our minds being of the same condition, are quick and nimble; the humours and spirits enlarged, which make us more apt for study. And being after rest, the spirits are stronger to encounter with difficulty and weighty matters; and after sleep the memory is moistened with the vapours arising out of the stomach, and so made fitter and better disposed to receive the figures of the matter conceived and apprehended. Therefore, our student must make use of the best part of the day, the morning, called by the physicians, *the Golden Hours.*"

We fully concur in this encomium on study in the earlier part of the day. We will venture to assure the student, that two hours steady reading before breakfast, we would say from six until eight, or from seven to nine, will do more for him than he can suppose, if he have not tried it; after that he will go to breakfast with a good appetite, and be quite ready, after a short walk, for pursuing his studies. To continue:

"He must not study presently after meat, *non est*, saith Seneca, *quod post cibum studeas*, being very hurtful and destructive to the body. For, saith Lessius, the exercises and employments of the mind, do very much hinder and disturb the concoction [or digestion as we now say]; and that either because in calling up the whole force of the soul, they do as it were abate and suspend the power and actions of the inferior faculties, as experience sheweth; for when we are very intent on study, we neither hear the clock, nor take notice of anything that comes before our eyes and other senses, or else because they do withdraw not only the animal, but the vital and natural spirits themselves from their proper services."

But it must not be supposed that our author is against proper relaxation. "Live-

ly wits," he says pleasantly, "must have their retreat or intermission of exercise, as rams (engines of war in the ancient times) recoiled back to return with greater force. He must sometimes loosen his minde, and with some delightes or other refresh it. He must not be still poring on books, for that makes him dull and blunts the edge of his understanding."

And then comes the question of what are the proper recreations or "delights." They must not be too violent or laborious. "Such recreations as require much labour, as wrestling and the like, do not become *hominem literatum*, a learned man." And he supports his opinion, both by his favourite Seneca, and also by Lord Bacon, the latter of whom says, "that such exercises are hurtful to the body when strength is extended and strained to the uttermost, as dancing, wrestling, and such like; for it is certain, that the spirits being driven into straights, either by the swiftness of the motion, or by the straining of the forces, do afterwards become more eager and predatory. Nor do I, (he continues) speak against a moderate stirring of the body. And the same Lord Bacon saith, that exercises which stir up a good motion, but not over swift, or to our utmost strength, as shooting, leaping, riding, bowling, and the like, do not hurt, but rather benefit."

We may here remark, that the dancing of these degenerate days, is hardly so fatiguing as leaping or bowling; but it is certainly, with its usual accompaniments, more likely to divert the mind of the student, who in our humble opinion should go to as few evening parties as possible, where his mind is more likely to be distracted than any where else. Late hours, unwholesome food, and unprofitable discourse, will here combine to weaken and divert his better reason. While a student, we banish him from all such assemblies; when he has become a lawyer, let him attend as many as he will. We shall shortly return once again to our author.

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## THE PROPERTY LAWYER.

No. XLVII.

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### EQUITABLE MORTGAGE.

The point decided by the following case should be generally known to our readers.

The plaintiff filed his bill for the purpose of giving effect to an equitable security made by the deposit of deeds; and the bill prayed a

sale of the estate, the title deeds of which had been deposited. Mr. *Bickersteth*, at the hearing, resisted, on the part of the defendant, the sale of the property prayed by the plaintiff, and argued, that all the plaintiff could claim was a legal mortgage. If, where deeds were deposited, and the equitable mortgagee brought his bill to obtain the benefit of his security, the Court could decree an immediate sale, an equitable mortgagee would be in a better situation than a legal mortgagee. Mr. *Pemberton*, for the plaintiff, contended, that from the earliest period at which equitable mortgages were recognized, the course of the Court had been to decree a sale. In *Russell v. Russell*, 1 Bro. C. C. 269, which established the doctrine of equitable mortgages, Lord *Thurlow* decreed that the deposited lease should be sold, and the plaintiff paid his money. Where there was no agreement for a legal mortgage, and the only evidence of contract between the parties was the deposit of deeds in the hands of the lender of the money, the obvious inference was, that the deposit was made, not as a pledge for a formal security, but as a pledge for the payment of money.

*The Master of the Rolls*.—If the contract between the plaintiff and defendant had been that the deeds should be deposited as a security until a legal mortgage could be prepared, there would be ground for the argument of the defendant; but there being here a general equitable charge upon the property, the plaintiff is entitled to a sale for satisfaction of that charge; and such has been the constant course of the Court, and the decree must be accordingly. *Pain v. Smith*, 2 M. & K. 417.

## ABSTRACTS OF RECENT STATUTES.

### EXEMPTION FROM TOLLS.

5 & 6 W. 4. c. 18.

This is intituled, "An Act to exempt Carriages carrying Manure from Toll." [30th July, 1835.]

Reciting, that disputes have arisen as to the exemption from toll for horses and carriages when employed in carrying or conveying manure for improving lands: It is enacted, that from and after the 1st January 1836, no toll shall be demanded or taken on any turnpike road for or in respect of any horse, beast, cattle, or carriage, when employed in carrying or conveying only dung, soil, compost, or manure for land, (save and except lime,) and the necessary implements used for filling the manure, and the cloth that may have been used in covering any hay, clover or straw which may have been conveyed.

2. That nothing herein contained shall extend or be construed to extend so as to exempt any waggon, cart, or other carriage laden with dung or manure for manuring land, or any horse or other beast drawing the same, from any toll imposed in respect thereof by

virtue of any Local Act or Acts now passed whereby such toll has been imposed for the maintenance of the roads therein respectively mentioned.

3. And recites, that there are many persons who are now contractors for turnpike tolls, and whose leases or contracts will not expire until after the said 1st day of January 1836, but who, by reason of this Act, may be desirous of terminating their said leases or contracts; be it therefore enacted, that it may be lawful for any lessee or contractor for tolls whose lease or contract shall not expire until after the said 1st day of January 1836, at any time within twenty-one days after the passing of this Act, to give notice to the clerk or treasurer of such turnpike road of his or her intention to vacate such lease or contract on the said 1st day of January 1836, upon which day such lease or contract shall expire accordingly.

4. Act not to extend to Scotland or Ireland.

## THE RUSSIAN CODE.

### NO. II.

In our last article we concluded by stating the number of laws contained in the new Russian Code, and that a Supplement will annually appear.

We shall now proceed to consider the principles on which it was formed, and its contents.

The principles adopted by the commission were—first, to exclude all laws which were directly or indirectly repealed; secondly, to avoid repetitions; thirdly, to preserve the original text, although conciseness might in some degree be sacrificed; fourthly, to strike out the narrations and considerations, which serve as a sort of preambles to the ukases; fifthly, to collect in one body of laws those which govern the whole extent of the empire; and to arrange in a separate collection the local laws preserved in certain provinces; lastly, to submit each part of the work to the competent authorities.

Having adopted these principles and fixed them firmly as the basis of the code, the work advanced rapidly.

The first thing necessary was the selection of the materials; and for this purpose historical expositions of the principal branches of the law were made. These were in fact so many treatises elucidating the different transformations which each of them has undergone. Their collection formed as it were an internal history of the Russian law.

To this work succeeded the formation of texts. The laws now collected and freed

from all foreign admixture, were arranged in rational order, were formed into articles, and divided into separate codes. This period of the work, properly speaking, constitutes the Digest.

At the bottom of each article were pointed out the sources whence it was taken. Some of them were also accompanied with annotations, which serve sometimes to maintain the unity of the plan, by means of references to the articles connected with it; and sometimes they give in a few words the history of the law, when it is necessary to determine the meaning of it. Here the legislator becomes, in some degree, the professor.

The forms necessary for practice, and of all civil proceeding, the tables and rates, and the regulations of detail, have been introduced in appendices attached to the body of the work.

Having completed the work so far, the various codes were compared together by the commission, for the purpose of verification. By these means all repetitions and inconsistencies were removed, and a connection between the detached parts, in accordance with the general plan, was introduced.

The work was then revised. Committees were appointed in each department for this purpose, with directions to inquire "whether all the laws in force have been presented in their true meaning." It appeared from their report that on different points new regulations had been made, by which the ancient ones had been restored or perfected. It became necessary therefore to retrace their steps, and not only to change several *articles* in the codes already formed and examined, but often whole *chapters* and *titles* of them.

In order to obviate the disarrangement which every incident of this nature caused in the work, it was resolved to stop at one date throughout the work, and which was determined to be the end of the year 1831. Nevertheless exceptions were made to that rule, with respect to certain important laws passed in the course of 1832. The summary limits these exceptions to the regulations as to bills of exchange, failures, and insolvencies, the organization of the Tribunal of Commerce, civil executions, and *cordon-sanitaire*. But that is an error in the summary, because the laws taken from among those of 1832 are much more numerous, and embrace almost all the legislative provisions of that year, down to the month of November: part has been introduced into the text, and part into the

*addenda*, according to the state of the printing.

The revision which began in April 1828, and was continued as the codes proceeded, was entirely ended in 1832. The work was then rendered public, but not yet obligatory: two whole years between its publication and its coming into force were allowed, in order to enable the country to form an opinion on it. This was a sort of appeal to the judgment of the country, for the manifestation of its opinion,—a manifestation, however, rather difficult, when the press is neither authorized by the law, nor required by the habits of the people. So far, however, as we may conjecture from what has transpired in public, we should be led to conclude that the country had pronounced itself *in favour* of the code, but the class of functionaries *against* it. The official criticism to which it was subjected was, we must confess, more malevolent than impartial. The concurrence of the functionaries in the revision was never very sincere: it tended rather to fetter the work than to second its progress. We believe that without difficulty. The state of confusion into which the legislation was plunged, had concentrated the monopoly of its formation in the hands of certain adepts. The propagation of the knowledge of the laws by means of a clear and methodical arrangement, became as formidable to them as the divulging of the solemn judicial forms was to the Patricians of Rome.\* We may also conceive the instinctive repugnance of functionaries, gently vegetating in official routine, towards every thing which is reform, amelioration, or advancement. These petty interests, fortified by petty rivalry, and petty rancour, formed a league both noisy and numerous. Every means was set at work to bring the Digest into discredit:

\* By Cneius Flavius, the Scribe of Appius Claudius, in the year of the City 449. "Civile jus repositum in penetralibus Pontificum evulgavit, Fastosque circa forum in Albe proposuit, ut, quomodo lege agi posset, sciretur." (*Liv. lib. 9, c. 46.*)

"Inventus est scriba quidam, Cn. Flavius, qui cornicum oculos confixerit, et singulis diebus ediscendos Fastos populo proposuerit, et ab ipsis cautis Jurisconsultis eorum sapientium compilarit." (*Cic. pro Murena, s. 11.*)

"Quid ergo profecit (Flavius) quod protulit Fastos? Occultatam putant quodam tempore istam tabulam, ut Dies agendi peterentur a paucis. Nec vero pauci sunt auctores, Cn. Flavius, Scribam, Fastos protulisse, actionesque composuisse." (*Cic. ad Atticum, 6.*)—*Translator.*

whole volumes were written to point out its errors. Attempts were also made to shew that its authors had exceeded their powers, and invaded the province of the legislator, by substituting their will for that of the law.

The attacks, however, gave way before the immovable will of the Emperor, and the Digest in its original state is henceforth in full force. In fact, to what could the censure apply? Was it either omissions or innovations? We think that the authors of the Digest will have the candour to allow that some provisions may have escaped them, and some others under their hands may have assumed a new aspect. But admitting these inaccuracies to exist, can they counter-balance the immense advantages of a regular legislation? Must we reject the ancient order of things, and return to that chaos in which but lately memory and reason alike were lost! The opponents of the Digest do not dare openly to express such a wish, and they can propose nothing else in its place; and those are undoubtedly the grave considerations which have insured to the Digest so splendid a triumph. It is much better that something useful should have been omitted, if at that price we have been freed from a heap of useless laws.<sup>b</sup>

We now come to state the contents of the Digest.

The title of it is, "The Digest<sup>c</sup> of the Russian Empire, compiled by order of the Emperor *Pavlovitch*." It is divided into Books, those books into Parts, and those parts into Regulations, or rather particular Codes, according to the different matters of legislation, whether civil or administrative. There are thirty-five of these Codes. The inferior divisions are titles, chapters, sections, and several subdivisions. Eight of them have appeared, containing the following heads:

First, Organic Statutes, forming three volumes.

Secondly, provisions as to *Prestations*, in one volume.

Thirdly, regulations as to Finance, in four volumes.

<sup>b</sup> This appears to have been the opinion of Justinian; for in the preface to the Pandects (l. s. 17) he says, "Multo sane melius paucis quibusdam idoneis privari, quam multis inutilibus prægravari." *Translator*.

<sup>c</sup> I have translated the word *Sood* as "Digest," that being the word which will by itself best express its meaning. The word means "a collection of co-ordinate and obligatory laws." *Translator*.

Fourthly, as to the state of Persons, in one volume.

Fifthly, Civil Laws, in one volume.

Sixthly, regulations as to Public Economy, in two volumes.

Seventhly, regulations as to Interior Police, in two volumes.

Eighthly, Penal Laws, in one volume.

The whole together form fifteen volumes.

At the commencement of the first book are the fundamental laws of the Empire. They concern the prerogative of the supreme autocratic authority, the order of succession, the regency, the accession to the throne, the oath of allegiance, the coronation, the established religion. These laws also regulate the exercise of the legislative power, the formation, promulgation, and interpretation of the laws, their effect and repeal. This species of *charter*, to which are attached the laws regulating the imperial family, distinguished by a different paging and type, is not introduced into the body of the Digest.

The first book is divided into three parts: the first sets forth the organic laws of the state; the second contains the constitutional laws of the governments; the third treats of agents and persons employed in the administration.

This division may be very applicable to Russia; but in order to render it intelligible to our readers, we shall explain more particularly the administration and judicial machinery of Russia. The formation of it is somewhat similar to that of France. In Russia, as in France, there are superior authorities, central authorities, departmental authorities, and local authorities.

The superior authorities are—

First, the Council of the Empire.

Secondly, the Committee of Ministers.

Thirdly, the Senate, which is at the same time a judicial authority, with its dependencies, the Chamber of Nobles, and the Depository of the Charters of the State.

Fourthly, the Sacred Synod.

The central administration is performed by the Ministers. If we understand by the word "Ministry," authorities the scope of whose power extend throughout the state, parallel to each other, and deriving their power from the supreme power, there are twelve ministers in Russia. They are the Ministers of Finance, Interior, Public Instruction, Central Administration of Public Works, Central Administration of the Ports, Control of the State, Justice, Chapter of the Imperial and Royal Orders, the Imperial House, Foreign Affairs, War, Marine.

Provisions on the four last ministries have not been introduced into the Code.

The administration of the provincial government is vested in a regency, for matters purely administrative, and of police; and in a Chamber of Finance. Justice is administered by Courts of Conscience, a species of Court of Reconciliation,<sup>d</sup> the civil and criminal tribunals. In an inferior degree, the same mode is adopted in the districts of each government. There is also an institution similar to the Prussian Pupillary College, entitled "The Tutelage of the Nobility."

The local authorities are of two sorts; *Municipal*, which are subdivided into Administrative, exercised by the Mayor; and Judicial, exercised by three species of functionaries: and *Commercial*. These latter, to whom recourse must be had by tenantry of the state domains, that is to say, of one quarter of the territory, have been spontaneously introduced by several proprietors on their vast domains.

The complaints most generally made against the administration of the law in Russia, are directed against the instability of their decrees. There is in fact in Russia no Court of last resort. In the ordinary way, the last appeal is to the Senate, deciding in the section having the care of the appeals; and it is only in certain excepted cases that the affair is taken before the general assembly with the sections united. The principle, that all justice emanates from the Sovereign, finds a rigorous application in Russia. The prince is there literally the supreme dispenser of justice. The decree of the General Assembly even may be called in question by a petition to the Throne. It is then examined in the Senate, with another selection of its members, or in the Council of the Empire, and then the judgment is quashed, all the proceedings are annulled, and a replender awarded. At other times (for there can be no invariable principle in the exercise of such a preroga-

<sup>d</sup> Correctly speaking, the principle is not recognized in Russia, that every proceeding introductive of legal steps ought to be preceded by an attempt at reconciliation. The Court of Conscience only interferes by consent of both parties. If it succeeds in reconciling them, the proceeding has the effect of a judicial decision; if not, the judicial discussion takes place. The obligatory attempt at reconciliation takes place among the miners, the government serfs, and the civil list, the inhabitants of the Cossack countries, Caucasus, and Georgia.

tive) the Sovereign is considered as pronouncing the decree. This decree is also capable of being retracted. There are even cases in which during a litigation two or three ukases may be pronounced. These cases are no doubt rare. But it is sufficient that there may be such things, in order to throw confusion into numerous affairs, and to render an irrevocable sentence illusory.

The second book treats of *prestations*. They are divided into *personal* and *real*. To the first belong the recruiting the army; to the latter, statute labour and rural servitude, keeping up the ports, repairing the roads, the cantonment, conveyance, and supply of the troops.

[To be continued].

## NEW BILLS IN PARLIAMENT.

### LITERARY PUBLICATIONS.

This is a bill intituled, "An Act for preventing the Publication of Lectures without consent."

The preamble recites, (in the same terms as the previous Copyright Acts) that "Printers, Publishers, and other persons have frequently taken the liberty of printing and publishing Lectures delivered upon divers subjects without the consent of the Authors of such Lectures, or the persons delivering the same in public, to the great detriment of such Authors and Lecturers."

The proposed enactments are as follow:

1. That from and after the 1st day of September 1835, the author of any lecture or lectures, or the person to whom he hath sold or otherwise conveyed the copy thereof, in order to deliver the same in any college, school, seminary, institution, or other place, or for any other purpose, shall have the sole right and liberty of printing and publishing such lecture or lectures; and that if any person shall, by taking down the same in short hand or otherwise in writing, or in any other way, obtain or make a copy of such lecture or lectures, or any part thereof, and shall print or lithograph, or otherwise copy or publish the same, or cause the same to be printed, lithographed, or otherwise copied or published without leave of the author thereof, or the person to whom the author thereof hath sold or otherwise conveyed the same, and every person who, *knowing the same to have been printed and published without such consent* shall sell, publish or expose to sale, or cause to be sold,

published or exposed to sale, any such lecture or lectures, or any parts thereof, shall forfeit such printed or otherwise copied lecture or lectures, or parts thereof, together with one penny for every sheet thereof which shall be found in his custody, either printed, lithographed, or copied, or printing, lithographing, or copying, published or exposed to sale, contrary to the true intent and meaning of this act, the one moiety to his Majesty, his heirs or successors, and the other moiety thereof to any person who shall sue for the same, to be recovered in any of his Majesty's Courts of Record in Westminster, by action of debt, bill, plaint, or information, in which no wager of law, essoin, privilege, or protection, or more than one imparlance, shall be allowed.

2. That any printer or publisher of any newspaper who shall, without such leave as aforesaid, print or publish in such newspaper any lecture or lectures, or any part thereof, shall be deemed or taken to be a person printing and publishing without leave, within the provisions of this act, and liable to the aforesaid forfeitures and penalties in respect of such printing and publishing.

3. That no person allowed for certain fee and reward, or otherwise, to attend and be present at any lecture delivered in any place, shall be deemed and taken to be licensed or to have leave to print, copy, or publish such lectures or any part thereof, only because of having leave to attend such lecture or lectures.

4. That nothing in this act shall extend to prohibit any person from printing, copying, and publishing, any lecture or lectures, which have, or shall have been printed and published with leave of the authors thereof, or their assignees, and whereof the time hath or shall have expired with the sole right to print and publish the same given by an act passed in the 8th year of the reign of Queen Anne, intituled "An Act for the Encouragement of Learning, by vesting the Copies of Printed Books in the Authors or Purchasers of such Copies during the time therein mentioned;" and by another act passed in the 44th year of the reign of King George the 3d, intituled, "An Act to amend the several Acts for the Encouragement of Learning, by securing the Copies and Copyright of Printed Books to the Authors of such Books or their Assignees."

5. That nothing in this act shall extend to any lecture or lectures, in the printing, copying, or publishing any lecture or lectures, or any parts thereof, which shall be delivered in any place not licensed by law for such purpose, and of the delivery of which, notice in writing shall not have been given to two justices living within five miles from the place where such lecture or lectures shall be delivered, two days at the least before delivering the same.\*

\* This appears to be a very singular provision,—coming from a Patron of Literature and Liberality!—Ed.

## LIEN ON PROPERTY CONVEYED FOR AN ANNUITY.

SIR Edward Sugden, in his *Treatise on Vendors and Purchasers*, 2 vol. p. 65, 9 edit., after noticing the various cases relating to lien in respect of unpaid purchase money, observes, "Upon the whole, therefore, it seems quite clear, that taking a covenant bond or note for the purchase money, or any part of it, will not discharge the vendor's equitable lien on the estate; and it seems, that the same rule must prevail although the estate is sold for an annuity, and a covenant bond or note is taken for securing the payment of it." In support of the latter part of his proposition, the learned Author refers to the case of *Tardiffe v. Scrughan*, 1 Bro. Ca. Ch. 423; which appears to be a clear authority in favor of it. The case of *Mackreth v. Symmons*, 15 Ves. 329, is, however, referred to, as being a contrary decision; but on close investigation of that case, it will be found, that Lord Eldon admitted the rule established by the case of *Tardiffe v. Scrughan*, but considered that under the particular circumstances, the vendor had waived his lien. In p. 341, Lord Eldon states the principle to be, "that the lien exists, unless an intention, and a manifest intention, that it shall not exist appears;" and he then observes, with reference to the case under consideration, that "the questions are first, supposing the lien would have existed, as to the gross sum, the debt due to Manners, and the annuities, or their value; whether the circumstances of silence as to the debt and the indemnity taken against the annuities, which is very important, amount in equity to evidence of a manifest intention to abandon the lien." After noticing several circumstances in the transaction (p. 351-2), evincing an intention that there should not be a lien in respect of the annuities: he further observes, that "Lord Camden's opinion (in *Tardiffe v. Scrughan*), seems to have been, that the mere circumstance of an estate given in consideration of an annuity, with a bond, would not prevent the lien; and so understanding it, I cannot bring my mind to the conclusion, that it is an authority which ought to lead me to determine, that with reference to these annuities, there is a lien either for the original value or the further payments, which may or may not become due."

It is manifest, that Lord Eldon did not intend to impeach Lord Camden's decision, for in addition to the expressions above quoted, in adverting to another point in the case, he (Lord Eldon) states the ground of his conclusion to have been, that "the party did not mean to have a lien with regard to the annuities;" or in other words, that a manifest intention appeared, that there should be no lien.

The case of *Winter v. Lord Anson*, 1 Sim. & Stu. 434, arose upon an agreement, providing for the payment of the purchase money at the purchaser's death, with interest in the mean time; and it was held, that no lien existed; but this decision was afterwards reversed



by Lord *Lyndhurst*, 3 Russ. 492. In giving judgment, Lord *Lyndhurst* referred to the general principle laid down by Lord *Eldon*, in *Markreth v. Symmons*, and decreed that the lien did exist, from the circumstances that there was no agreement for the extinguishment of the lien, and that there was nothing in the transaction leading to a clear and manifest intention that such was the intention of the parties.

In the case of *Clarke v. Royle*, 3 Sim. 499, the seller conveyed an estate in consideration of the covenants of the purchaser to pay an annuity during the seller's life, and a gross sum in case of his marriage; and the Vice-Chancellor (Sir *Lancelot Shadwell*) decided, that no lien existed in respect of the annuity or the gross sum. He is reported to have stated that Lord *Eldon*, in *Mackreth v. Symmons*, expressly overruled the decision in *Turdiff v. Scrughan*; and that the case in question was decided by the authority of *Winter v. Lord Anson*, in which case the decision of the Master of the Rolls had not then been reversed. The report of this case is very imperfect.

The case of *Parrott v. Sweetland*, which was heard at the Rolls in July 1834, arose upon a conveyance made in consideration of 3000*l.* "advanced or secured or agreed to be advanced or secured," and a receipt was indorsed on the conveyance for a bond for 3000*l.* as the consideration. By the bond, the purchaser secured the payment of an annuity to the vendor and her intended husband during their lives, and a gross sum in certain events. The Master of the Rolls (Sir *John Leach*) decided that the estate was exonerated from all lien in respect of the monies secured by the bond; and on appeal, this decision was affirmed by the Lords Commissioners, Sir *L. Shadwell* and Mr. Justice *Bosanquet*. In giving judgment, Sir *L. Shadwell* declared that the report of the case of *Clarke v. Royle* was incorrect; that he decided that case without any reference to the case of *Winter v. Lord Anson*; and that the sole ground of his decision was, that the conveyance was made in consideration of the covenants: and in affirming the decision of the Master of the Rolls in *Parrott v. Sweetland*, he stated that it appeared to him that the conveyance was made in consideration of the bond; that the parties did not contemplate any further security, and, therefore, that the lien did not exist.

It should be observed, that neither of the decisions of Sir *L. Shadwell* infringes the general rule before stated; and although it may be doubted whether the particular circumstances in the cases of *Clarke v. Royle* and *Parrott v. Sweetland*, justified the making them exceptions to the rule, especially after the numerous decisions, that the taking a bond, covenant, or note, does not affect a vendor's lien in respect of unpaid purchase money, yet it seems quite clear that the principle remains unaltered. These observations cannot therefore be better concluded than with the emphatic expression of Lord *Eldon*, "that

the lien exists, unless an intention, and a manifest intention, that it shall not exist, appears."

W. G. C.

## NEW PROPOSAL FOR ABOLISHING BRIBERY AND CORRUPTION.

Sir,

Not having sufficient confidence in any Bill which has yet been brought into parliament, for doing away with bribery and corruption, I now forward you the draft of such a bill as will *no doubt* abolish that crime, and at the same time make every member who will after its passing have a seat in that house, feel himself a truly patriotic person, as he can only be there according to his powers of washing away more of the national debt than his less fortunate competitor. Copies of the Bill, through your Work, will no doubt speedily find their way to the Treasury, and save further trouble on this head.

W. G.

### BILL FOR THE ABOLITION OF BRIBERY AND CORRUPTION.

[The words in *Italic* are proposed to be inserted in Committee.]

Whereas it is expedient to take effectual measures for correcting divers abuses that have long prevailed in the choice of members to serve in the Commons House of Parliament, be it therefore enacted by the King's most excellent Majesty, by and with the consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, that from and after the 1st day of January, 1836, all exclusive right or privilege enjoyed by any person or persons whatsoever to vote in the election of a member or members to serve in any future Parliament, shall absolutely cease and determine.

2. And be it enacted, that at all future elections for the choice of any member or members to serve in any future Parliament, the mode of election pursued shall be as follows:—each candidate who shall have been proposed and seconded, and who shall have demanded a poll, shall upon the day proposed for such poll, before the hour of ten o'clock in the morning, deliver unto the returning officer one or more boxes or chests with the name of such candidate painted thereon in legible letters, and that in the lid or other part of such box or chest, there shall be cut a hole sufficiently large to admit of the dropping therein of all kinds of the current coins of the realm, and that at the same time such box or chest shall be provided with such an apparatus, that the returning officer may be enabled to attach his own particular lock thereto.

3. And be it enacted, that the returning officer shall upon the receipt of all such boxes or chests as may be so tendered as aforesaid, and after fixing his lock thereto, place the same in some conspicuous and accessible portion of

portions of the hustings, or allow the same to be carried round by a deputation to be appointed for that purpose.

4. And be it enacted, that the mode of voting shall be by putting money into the box or chest of such candidate, *as any person (man, woman, or child,)* shall wish to be chosen as member or members.

5. And be it enacted, that after such boxes or chests shall have so remained open to voters for the space of twelve hours, the same shall, in the presence of all the candidates, or persons appointed on their behalf, be opened by the returning officer, who on the following day shall publicly declare in whose box or chest the largest sum of money has been found, and such person shall thereupon be declared to be duly elected.

6. And be it enacted, that immediately such declaration shall be made, the returning officer shall thereupon cause all the boxes or chests which have been so sent unto him for the purposes aforesaid, to be sealed up, and directed with the contents thereof to his Majesty's Chancellor of the Exchequer.

7. And be it enacted, that upon receipt of the contents of such boxes or chests, the Chancellor of the Exchequer shall place the same to the credit of the *Sinking Fund*.

8. And be it enacted, that this act may be altered or amended during the present session.

## SELECTIONS FROM CORRESPONDENCE.

### No. CVII.

#### SEIZING A CORPSE FOR DEBT.

Sir,

Having lately been engaged in a case where a corpse was attempted to be detained on a writ of *capias*, in order to compel the friends to pay the debt, I have availed myself of the opportunity to state the law on that subject, which is forcibly laid down by Lord Ellenborough, in *Jones v. Ashburton*, 4 East, 460 and 465, where he states, "To seize a dead body upon any such pretence would be *contra bonos mores*, and an extortion on the relatives. It is contrary to every principle of law and moral feeling; such an act is revolting to humanity, and illegal, and therefore any promise extorted by the fear of it, could never be valid in law. It might as well be said that a promise in consideration that one would withdraw a pistol from another's breast, could be enforced against the party acting under such unlawful terror."

J.

#### ATTORNEYS' STAMP DUTIES AND FEES OF ADMISSION.

Sir,

I consider the following may serve as an additional clause to the petition inserted (*ante*,

p. 248), being a copy of fees paid by every solicitor on his admission.

J.

Taking affidavit of execution of articles from clerk's office -	£	s.	d.	
Three affidavits—of service, payment of stamp duty, and service of notices -	0	5	0	
Swearing same before Judge's clerk	0	7	6	
Order for admission in King's Bench	1	1	0	
Admission fee paid in Court	0	10	6	
Admission being detained, paid Judge's clerk for taking same from his office -	1	0	0	
Affidavit of payment of stamp duty prior to admission in Common Pleas -	0	2	6	
Swearing same -	0	2	0	
Order for admission -	0	10	6	
Admission fee -	1	0	0	
Paid on taking same from clerk's office -	1	0	0	
Affidavit of payment of stamp duty prior to admission in Exchequer	0	2	6	
Swearing same -	0	3	0	
Order for admission -	0	10	6	
Admission fee paid in Court	1	3	6	
Paid on taking same from clerk's office -	1	0	0	
Affidavit to obtain commission for swearing affidavits -	0	2	6	
Swearing same -	0	2	0	
Recommendation to obtain commission in King's Bench -	0	2	6	
Commission -	1	12	6	
Recommendation in Common Pleas	0	2	6	
Commission -	1	11	6	
Recommendation in Exchequer	0	2	6	
Commission -	1	12	6	
Commission in the Court of Chancery -	1	18	6	
Commission as Master Extra	9	9	0	
Admission in the Court of Bankruptcy -	0	6	0	
	£26	8	6	
Admission as Notary	-	30	0	0
	£56	8	6	

#### ORDER OF ADMINISTRATION TO NEXT OF KIN.

Next of kin who are entitled to administration in their regular order:—

1. The children, and on failure of them,
2. The father of deceased, or if dead,
3. The mother.

The parents are of the first degree, but the children are allowed the preference; 2 Blk. Com. 504.

4. Brothers; 11 Vin. Abr. 93.

But primogeniture gives no right to preference; *Warwick v. Greville*, 1 Phill. Rep. 123.

5. Grandfathers; 11 Vin. Abr. 93.

Although they are both of the second degree, yet the brothers shall be preferred.

## 6. Uncles or nephews; 2 Blk. Com. 505.

This appears (the grandfathers being preferred to nephews) still further confirmatory of the doctrine laid down by me; 9 L. O. 411; and also explained in my answer to G. G.'s letter; *ante*, p. 56.

## 7. Cousins, &amp;c. the females of each class respectively; 2 Blk. Com. 505.

1. Half blood is admitted to the administration as well as the whole; 11 Vin. Abr. 91. A brother of the half blood excludes uncle of the whole blood; *ibid.* 85.

If administration is granted to two, and one of them dies, the administration survives. J.

## LEGAL ANECDOTES, &amp;c.

We extract the following from the notes to the last part of Mr. Chitty's General Practice.

*Successful Pertinacity of a Junior.*—A leading counsel gave up a point; but the junior so pressed the argument that he almost incurred the displeasure of the then Lord Chief Justice *Ellenborough*, for jejune and injudicious pertinacity; but at length Mr. Justice *Bayley* induced the Chief Justice to pause and hear the argument; after which the distinguished Chief, with that candour which influences a great mind, and is indispensable in the due administration of justice, publicly avowed that he had changed his opinion, and with the other Judges decided in favor of the defendant; upon which the bar, with a warmth and sincerity negating all supposition of unworthy jealousy, congratulated the junior; and he has attributed much of his subsequent success in his profession to the result of that particular discharge of his duty. 3 Chitty's Gen. Prac. 7.

*Justifying Bail.*—Before the 11 G. 4, and 1 W. 4, c. 70, it frequently bordered on the ridiculous, to witness two, if not four learned serjeants supporting or opposing bail, and the four Judges almost vying with each other in acuteness and skill in endeavouring to elicit truth from such bail with respect to their property or other matter, and when it frequently occurred that in such Court the cunning of the bail succeeded against all the learning and experience of the Judges and Serjeants, and the bail then justified; but perhaps within a quarter of an hour afterwards, the same bail were rejected, either by a different course of proceeding in the King's Bench, or the more active inquiries of the plaintiff's attorney and his better affidavits.—p. 12.

*Letter before Action.*—An action on an attorney's bill was tried before the then Chief Justice of the Common Pleas, Sir *James Mansfield*, and on a reference of several bills of costs being pressed, the plaintiff, an attorney, refused to refer, unless his charge of 3s. 6d. for a letter was previously agreed to be allowed, but which the defendant pertinaciously refused; upon which the Chief Justice facetiously declared, that rather than the cause should not be

referred, he would himself pay the 3s. 6d., and which he instantly did, whereupon the parties, ashamed of their ill-judged pertinacity, immediately referred the cause generally.—p. 137.

*The wrong Leg.*—In a late case of an action by a surgeon for his professional charges in setting a leg, it singularly happened that the real party's brother had his leg broken about the same time, and was attended by another surgeon, who had been paid; and by mistake the latter brother was served with the process: and had it not been for the proof that the *real* party had in writing instructed his attorney to appear, and that his left leg had been broken, and that the plaintiff set a left leg, whereas the other brother's *right* leg was set, the plaintiff would have been nonsuited.—p. 168.

*Resemblance of an Action to a Tree.*—An eminent special pleader, partial to fanciful illustrations, has resembled an action and the proceedings therein, to a tree:—considering the writ or process as the *root*; the declaration as the *stem* or body; the pleas as the main *branches*; the replications and subsequent pleadings, issues, verdict, and judgment, as the *twigs* or ramifications; and the execution for debt, damages, and costs, as the *fruit*.—p. 253.

## SUPERIOR COURTS.

## Lords Commissioners' Court.

## PRACTICE.—DISCOVERY.—PARTIES.

*A party obtaining leave from the Court of Chancery to bring an action at law, is not entitled to file a bill of discovery in aid of the action, the order of Court containing no directions in that respect.*

*A person interested in the original suit, and directed to defend the action directed to be brought at law, has a right to interfere to stop the bill of discovery, although not a party to it.*

In a suit instituted by the sister of the testator, John Alexander Nisbett, (who died a few days after attaining his age of twenty-one,) against his executors, for the administration of his assets, the usual decree was made; and during the prosecution of that decree in the Master's Office the testator's widow, having attained her age of twenty-one, filed her bill for the same purpose. Both suits having the same object were consolidated and prosecuted under the same decree, and Mrs. Nisbett, the widow, obtained an order giving her the conduct of the proceedings before the Master. Mr. Buckhardt, a tailor, brought in a statement of a claim as a creditor, for dresses supplied to the testator while he was a minor, but, for reasons not necessary now to mention, the claim was disallowed by the Master. Buckhardt omitted to take objections to the Master's report while in minutes, but after the report was made, and before it was confirmed, he applied to the Court for leave then to take exceptions, which application was refused. He subsequently obtained an order of Court for

leave to bring an action at law against the executors to establish his claim, and by the same order Mrs. Nisbett was to be at liberty to defend that action. Buckhardt having declared against the executors in the action at law, filed a bill of discovery against them in Chancery in aid of his action.

Mr. Wakefield, Mr. Wigram, and Mr. G. Richards, moved that the bill of discovery be taken off the file, as being irregular, and contrary to the practice and the principles of this Court. It was a great indulgence to the plaintiff to be allowed, after failing to establish his claim under the decree of this Court, to bring an action at law for the purpose. He had liberty to prove his claim at law as he might, but he had no title to the further aid of this Court to compel the production of evidence to support his action. The only foundation for the order giving him leave to bring the action was, that he had a legal demand, supported by legal evidence, but was barred by the rules of this Court, in not taking his exceptions to the report in due time and form. The present motion was made on behalf of Mrs. Nisbett, who, not being a defendant named in Buckhardt's bill, could not meet it by demurrer, but she had a right to meet it by this motion, as she was the person chiefly interested in the suit, and was directed by the Court to defend the plaintiff's action. This Court never permitted a bill of discovery in aid of an action brought at law under its own order. *Cooke v. Marsh*; <sup>a</sup> *Ex parte Coles*, in *re Coles*.<sup>b</sup>

Mr. Jacob and Mr. Stuart, *contra*.—The cases cited did not apply to this case. In *Cooke v. Marsh* an order was made, on a petition in bankruptcy, for liberty to bring an action at law, and special directions were given for the production of papers, and not to set up the bankruptcy. A bill of discovery there filed in aid of the defence, prayed for an injunction until discovery made; but Lord Eldon said, that was contravening his own order, and therefore he allowed a demurrer to that bill. That was no authority for taking this bill off the file, on the motion of a person who was no party to the record. There was no precedent for such an application. If there was any objection to this suit it ought to be taken by the defendants, who might demur, if they had grounds of demurrer. But the defendants on the record made no objection to the discovery. The ground of the motion is, that the bill of discovery is in contravention of the order of the Court giving the plaintiff leave of action, but not to file a bill of discovery. But the plaintiff had an original right of action at law, antecedent to any proceedings in this Court, which was not the case in *Cooke v. Marsh*, where the action was the creation of the order of Court. Where the plaintiff has a right of action he has a right to a discovery of evidence in support of it, and that right is not in this case fettered by any directions of this Court. A stranger to this suit, at all events,

has no right to be heard on such an application as this.

Sir C. C. Pepys, without calling on the counsel in support of the motion to reply, said, he did not entertain any doubt of the propriety of the application. The order giving leave to bring the action was made in the consolidated suits, and it was made in favor of a creditor who had no right without that order to proceed at law, after coming in under the decree. By the same order giving him leave of action, Mrs. Nisbett, who had already obtained the conduct of the proceedings before the Master, was also directed to defend that action with the executors. Mr. Buckhardt deriving his right of action from the authority of this Court, had no right to prosecute his claim beyond the indulgence given him by the Court. The main objection to the motion is, that Mrs. Nisbett is not a party to the record—to the bill which she applies to be taken off the file. It is true, she is not a party named on that record, but she is a party to the previous proceedings in this Court, and by the Court's special directions she is to defend the action at law; she, therefore, has a right to interfere here in respect of a proceeding which is to be imported into the conduct of the action below, in support of it. The case of *Cooke v. Marsh* would be more applicable if the defendants to the action had filed a bill to stay it, for that would be opposing the order of the Court giving leave to bring the action. But the question is, whether the party who had leave of the Court to bring an action—which he could not bring without that leave—had a right to file a bill of discovery in aid of it; and whether Mrs. Nisbett, who had the conduct of the proceedings here and below, was the proper person to make this motion. He had no right to file this bill, and she was the proper person to interfere, as any admissions by the executors might prejudice the defence and her interests.

Sir J. B. Bosanquet concurring in this view of the case, the bill was ordered to be taken off the file, and the costs of the application to be paid to Mrs. Nisbett, and also to the defendants, the executors, who had to take an office copy of the bill and to appear by counsel on the motion.

*Montara v. Hall and others, and Buckhardt v. Ford and others.* Before the Lords Commissioners, at Westminster, June 13th, and Lincoln's Inn, July 4th, 1835.

### Eschequer of Pleas.

LONDON COURT OF REQUESTS ACT.—COSTS.—  
RESIDENCE.—WRIT OF TRIAL.

*The fact of a cause being tried before the sheriff on a writ of trial, does not interfere with the defendant's right to deprive the plaintiff of his costs under the London Court of Requests Act.*

In this case a rule *nisi* had been obtained on behalf of the defendant, to enter a suggestion under the London Court of Requests Act, (39 & 40 G. 3, c. 104,) to deprive the plaintiff of his costs. The case had been tried before the sheriff.

<sup>a</sup> 18 Ves. 209.

<sup>b</sup> Buck's Cases in Bankruptcy, 293.

On shewing cause against this rule, it was submitted that the defendant's affidavit, on which he had obtained his rule, was not sufficiently positive. It did not, in conformity with the act, shew him to be resident in *London*, but merely stated that he had a warehouse and counting-house in *New Broad Street*. It then went on to state, that from the time the cause of action accrued, until the commencement of the suit, the defendant lived and resided there, and that the defendant's partner and clerk constantly resided there. From this it was contended, it must be inferred, that the defendant's counting-house was used merely for the purpose of receiving orders, and that the defendant himself was resident out of *London*. The trial of the cause had taken place before the sheriff with the defendant's consent. The present application is too late. Under all the circumstances, therefore, this rule must be discharged.

*Per Curiam.*—We think the affidavit sufficiently shews that the defendant seeks his livelihood in *London*, and that it is quite immaterial whether the cause was tried before the sheriff, or a judge. As to the other objection, there is nothing in it. The present rule must therefore be made absolute.

Rule absolute.—*Bond v. Bailey*, H. T. 1835. Excheq.

**TROVER.—NON-DELIVERY OF GOODS.—DAMAGES SUSTAINED.—PAYMENT INTO COURT.**

*In an action of trover arising from the non-delivery of goods at a specified time, the defendant paid a sum of money into Court, while the plaintiff declared he had sustained greater damage. The amount paid in was the cost price of the goods, and it had been taken out by the plaintiff; but evidence was also adduced to shew that greater damage had been sustained. The jury, however, found for the defendant; and on an application to set aside the verdict, on the ground that the plaintiff was entitled to nominal damages at least, the Court refused to interfere.*

This was a motion for a rule to set aside the verdict in an action of trover. The count was in the usual form for taking and converting the goods. The defendant, who was a carrier, had paid money into Court, which it was contended was sufficient to cover all loss or damage sustained, and which the plaintiff had taken out of Court. It appeared on the trial that the simple facts of the case were, that the goods ordered had not been tendered until two days after the period specified in the agreement, when they were sent. In consequence of this delay the plaintiff sustained considerable damage. It was then contended, that the plaintiff was at least entitled to some damages beyond the price of the goods, for the loss sustained by him; but the jury found a verdict for the defendant. The point was now again urged, when it was submitted, that although no real recompense was allowed, the plaintiff was yet entitled to some nominal damages.

The Court, however, thought there was no ground for the present application. The goods had been tendered within two days after the time agreed upon, and the jury thought the plaintiff was wrong in not accepting them. The costs ought therefore to fall upon him.

Rule refused.—*Evans v. Lewis*, B. T. 1835. Excheq.

**TRESPASS.—VERDICT AGAINST ONE OF SEVERAL DEFENDANTS.—LEAVE TO ENTER VERDICT.**

*In trespass, when a verdict was given against one only of several defendants, although the evidence applied to all alike, it was held, that no verdict could be entered against the other defendants, unless leave to that effect had been reserved.*

In an action of trespass against four defendants, it was laid in two counts that they had been guilty of assault and battery, and also of breaking a fishing net belonging to the plaintiff. A verdict was found for the plaintiff on one count only, and against only one defendant, although it was contended that the same evidence applied to all alike.

A motion was now made to enter a verdict against the three latter defendants, on that ground, but—

The Court refused to entertain the application, as no permission was reserved to that effect.

Rule refused.—*Starling v. Cosens*, T. T. 1835. Excheq.

**ACTION AGAINST ADMINISTRATOR.—FORMER JUDGMENT.—PLEA BAD, WITHOUT AVERMENT OF NO ASSETS.**

*An action was brought against an administrator, who obtained time to plead; he then pleaded a judgment which had been obtained since the delivery of the declaration, but the plea did not set forth that there were no assets ultra the judgment. The defendant having admitted the possession of assets since the commencement of the action, it was held, that the plea was bad; and the Court permitted the plaintiff to enter up judgment.*

A rule had been obtained to shew cause why the plaintiff should not be allowed to sign judgment as for want of a plea, on the ground that no averment was made by the defendant of there being no assets ultra a judgment before obtained, and that the plea did not conclude with a verification. A further ground was, that the defendant had admitted the possession of sufficient assets to satisfy the plaintiff's demand after the delivery of the declaration. Subsequently to this, however, he had obtained time to plead, and pleaded the plea above mentioned. Some days after judgment had been obtained, which was subsequent to the commencement of the action.

Cause was now shewn, when it was contended, that although the plea was bad in

form, yet there was no reason for suffering the plaintiff to sign judgment, especially as there did not appear to have been any fraud attempted. Permission to amend the plea was applied for.

It was contended, *contra*, that no favour or indulgence should be shewn to the defendant. The plea was evidently bad, from the omission of the averment that there were no assets *ultra* the judgment.

The Court thought the plea was bad, and made the rule absolute.

Rule absolute.—*Roberts v. Wood*. T. T. 1835. Excheq.

**COSTS OF ISSUES FOR DEFENDANT.—DEDUCTION FROM PLAINTIFF'S COSTS.—LIEN OF PLAINTIFF'S ATTORNEY.—EXAMINATION OF DEFENDANT'S WITNESS.—COSTS.**

*In a case where there were several counts in the declaration, of which some were found for the plaintiff and some for the defendant, it was held, that the costs of the issues on which the defendants was successful should be deducted from the plaintiff's costs, and that the plaintiff's attorney should have a lien only upon the balance of costs coming to plaintiff.*

*The expenses of a witness called for the purpose of being examined only on those issues where the defendant was successful, although questioned on some other points, should also be taxed to the defendant.*

A rule had been obtained, calling upon the defendants to shew cause why they should not pay to the attorney of the plaintiff a certain sum of money which the master had allowed to be set off on the taxation of the defendant's attorney's costs, without prejudice to the plaintiff's attorney's lien; and why the master should not review his taxation of the defendant's costs. It appeared that two actions, the one on the case, and the other for trespass, had been brought, both of which had been referred to arbitration. The former action arose out of certain irregularities alleged to have been committed in the course of several distresses for rent. The arbitrator found for the plaintiff, with 100*l.* damages, upon eleven counts in the declaration; but upon twelve other counts, he found for the defendants. On taxation, the master taxed the costs of the defendants upon the issues found for them, at the sum now sought to be obtained, and that was deducted by him from the costs taxed to the plaintiff. The result of the motion would depend upon the construction given to two rules of court, one of which directed that the plaintiff should recover no costs upon issues where he had not succeeded, and that all costs upon issues found for the defendant should be deducted from the plaintiff's costs. The second rule declared that no set-off of damages or costs between parties should be allowed, to the prejudice of the attorney's lien for the costs; but it also provided that interlocutory costs awarded to the opposite party

might be deducted. Another objection taken was, that the master had allowed a sum of money as expenses for a witness called by the defendants, who, although called to speak only to particular counts, where the defendants had succeeded, was also examined on other points respecting the other counts, on which a verdict had been given for the plaintiff.

It was now contended, in opposition to the rule which had been obtained, that the master had pursued a course which was strictly correct. He had set off the costs without regard to the attorney's lien, so that judgment might be entered for the balance. He was also justified in allowing costs for the witness, who although examined on some other minor points, was nevertheless called to speak to particular facts in support of the issues found for the defendants.

In support of the rule it was submitted, that the costs were not interlocutory, and that the set-off should not have been permitted. With regard to the witness called, his costs should not have been allowed, as his examination was not confined to the issues upon which the defendants were successful. A case was cited where, under similar circumstances, the costs of a witness were refused.

The Court thought that, looking fairly at the case, the costs of the witness were rightly allowed, as but for the introduction of the counts on which the defendants succeeded, he would not have been called. Merely asking a few questions on other points, was hardly enough to warrant his being looked upon as a witness upon other counts. As regarded the first objection, the real question was, whether the attorney had a lien upon any thing but the balance. Some issues being found for the plaintiff and some for the defendants, the former could not claim more than the balance. The attorney, therefore, had a lien only on that balance.

Another objection was now urged, that the master had made a greater allowance for counsel's fees to the defendants than was fit; and although more than one-half the items were struck out of their costs, a charge was made upon the plaintiff for taxation.

The Court said, that with regard to the briefs a very clear case must be made out before they could interfere. The question was, to what issues the greater portion of fees were applied.

Rule discharged.—*Eades v. Everatt and another*, T. T. 1836. Excheq.

**NONSUIT.—NEGLIGENCE OF PLAINTIFF.—DEFENDANT'S COSTS.**

*The Court will not set aside a nonsuit obtained through the negligence of the plaintiff's attorney, unless the plaintiff shall consent to pay the expenses of the attendance of the defendant's witnesses to try.*

Cause was shown against a rule which had been obtained for setting aside a nonsuit, on payment of the costs of the day. It appeared,

that the action was brought upon an indemnity bond, to which the general issue had been pleaded. The cause stood eight on the list, and the plaintiff's clerk left the Court for a few minutes, but on his return found that his cause, with others, had been called on, and a nonsuit had been obtained against the plaintiff. Affidavits were put in upon the merits of the case, and it was alleged by the defendant, that the plaintiff had issued another writ, and had threatened another action upon the same bond. The defendant had been in attendance at the Court for several days with his witnesses, and the proceedings of the plaintiff were evidently vexatious.

The Court said, that the rule could only be granted upon the agreement of the plaintiff to pay the costs of the defendant's witnesses attending to try. He must, besides, undertake that the second action should not be proceeded with until the Court should make a further order.

Rule absolute.—*White v. Sandell*, T. T. 1835. Excheq.

**SLANDER.—VERDICT FOR PLAINTIFF.—ADDING PLEA.**

*A verdict with 100l. damages, had been given against the defendant in an action for slander, the general issue only having been pleaded. An application was now made by the defendant for a new trial, on the ground that he had sufficient evidence to justify, the general issue only having been pleaded by mistake of the pleader. The mistake had not been discovered until a day before the trial, when an application to amend the plea was made at Nisi Prius, but refused. It was held, that the application could not be granted, as the defendant did not swear that he never used the words; the application besides came too late, as it had been pointed out some months before the trial, that a special plea was necessary.*

In an action for slander, a verdict of 100l. had been given against the defendant, who had only pleaded the general issue. An application was now made for a new trial, on the ground that it was by a mistake of the special pleader, that the general issue only was pleaded, as the defendant was prepared to justify. The pleader had supposed that one plea only could be pleaded. The mistake was not discovered until one day before that on which the cause was fixed to be tried, when an application was made at *Nisi Prius* to amend the plea, but refused on the ground that it came too late. A case was now cited, where an amendment was permitted to be made in the declaration, by stating that the defendant had guaranteed the payment for certain goods, instead of an allegation before inserted, that he had promised to pay for them himself. In support of the present case, it was now sworn, that there existed quite sufficient evidence to justify.

The Court said, that the application to amend should have been made before. If an

affidavit had been sworn that the defendant never used the words imputed to him, he might have been suffered to plead specially upon certain terms; but that not being done, his application could not be entertained. It had been mentioned by one of the witnesses some months before the trial, that the defendant could not justify, because he had pleaded that the words were true; but notwithstanding this, no application was made. In the case cited, the amendment was merely formal, and did not affect any point in the case. Such an amendment as the one now proposed, was without precedent.

Rule refused.—*Kirby v. Simpson*, T. T. 1835. Excheq.

**WRIT.—AGREEMENT WITH PLAINTIFF.—NOTICE.—SECOND WRIT.—DISCONTINUANCE OF FIRST ACTION.**

*A writ had been issued against the defendant upon an affidavit of debt, for the amount of several bills of exchange. On his attorney giving an undertaking, however, he was not arrested; and an agreement was then entered into by the plaintiff, that proceedings should be stopped, and nothing further done without his authority. He also promised to give three months notice before he commenced any other suit. After a lapse of twelve months, notice was served by the plaintiff's attorney, and a second writ was issued, upon which defendant was arrested. It was now held, upon a motion to discharge the defendant out of custody and to stay proceedings, that the second writ was legally put in force, notwithstanding the first action was not discontinued. The defendant, however, was ordered to be discharged, upon the ground of the notice not having been given by the plaintiff, but by his attorney.*

A rule had been obtained to shew cause why the defendant should not be discharged out of custody, and why proceedings should not be stayed in this action, on the ground that a former action had been brought upon the same transactions as the present, which was still pending, as well as that notice of proceedings had not been given to the defendant according to the terms of an agreement duly entered into with the plaintiff. The agreement stated, that all transactions between the parties respecting the bills should remain as they were, the plaintiff having the power still to proceed if he thought fit. It also prohibited any person to proceed to arrest or molest the defendant in the plaintiff's name, without his further authority; and he promised, before taking any further proceedings, to give three months notice. The agreement also set aside any writs that were in force against him on that account.

Cause was now shewn, when it was contended that the agreement, being without consideration, was null. It appeared, that notice had been served by the plaintiff's attorney upon the defendant, that further proceedings would be taken, and that after this, some time elapsed

before the present action was commenced. Besides, though a bailable writ was issued in the first action, no arrest had been made, as the defendant's attorney gave an undertaking. The writ was issued sixteen months since.

In support of the rule it was submitted, that it was irregular to commence one action before the other was discontinued. Besides, by the terms of the agreement, three months notice of this action was promised to be given by the plaintiff, which had not been done.

The Court thought, that the first writ having been issued so long ago, and not having been executed, might be considered as having lost its force. The terms of the agreement not having been complied with, however, in the particular of three months notice being given by the plaintiff personally, the defendant must be discharged from custody on that point.

Rule absolute.—*Ryves v. Bunning*, T. T. 1835. Excheq.

## NOTES OF THE WEEK.

### HOUSE OF LORDS.

#### *Bills for second Reading.*

<i>Title of the Bill.</i>	<i>Proposer.</i>
Residence of Clergy.	Lord Brougham.
Pluralities Prevention.	Lord Brougham.
Ecclesiastical Jurisdiction.	Lord Brougham.
Illegal Securities.	
Capital Punishments.	
Church of Ireland.	
Turnpike Trusts.	
Imprisonment for Debt.	

#### *In Select Committee.*

Wills Execution.  
Executors.  
Prisoners' Counsel.

#### *In Committee.*

Sinecure Church Preferment.  
Municipal Corporations.  
Education & Charities.

#### *Third Reading.*

Polls at Elections.  
Highways.  
Oaths Abolition Amendment.

#### *Passed.*

Bankruptcy Funds.  
London Small Debts.  
Publication of Lectures.

### HOUSE OF COMMONS.

#### *Bills to be brought in.*

Law of Tenure.	Attorney General.
Law of Escheat.	Attorney General.
Poor Law Amendment.	Mr. Trevor.
Registration of Births, &c.	Mr. Wilks.

#### *Second Reading.*

Law of Libel.	Mr. O'Connell.
Parish Vestries.	

#### *In Committee.*

Copyholds Enfranchisement.	Attorney General.
Registration of Voters.	Lord J. Russell.
County Coroners.	Mr. Cripps.
Durham Court of Pleas.	
Dissenters' Marriages.	
Marriage Act Amendment.	
Abolishing Offices.	

#### *Third Reading.*

Certiorari.

#### *Consideration of Report.*

Letters Patent.

#### *Postponed.*

Election Expenses and Qualification of Members.  
Limitation of Real Actions Amendment.  
Landed Securities (Ireland).

#### *Passed.*

Ecclesiastical Revenues.  
Prisons Regulations.  
Imprisonment for Debt.  
Tithes' Recovery.

### IMPRISONMENT FOR DEBT BILL.

It is understood that this bill, which is now in the House of Lords, will be referred to a Select Committee, where we rely it will be rendered less objectionable than it is in its present shape. There is much evidence yet to be taken, and several official returns to be made, which will throw light on the subject. We repeat, that the profession can have no pecuniary interest in opposing the bill, but rather the contrary. For the sake of their clients, however, it is their duty to warn the Legislature against the consequences of the measure, and we would urge them to continue to do so, notwithstanding the supposed unpopularity of the opposition.

### CHANCERY REFORM.

It appears that the present Ministers intend in the next session to revive the plan of a Chief Judge in Equity, and the separation of the judicial from the political functions of the Lord Chancellor. The Great Seal, it seems, will for the present remain in the hands of the Lords Commissioners.



## ANSWERS TO QUERIES.

## Law of Landlord and Tenant.

HUSBAND AND WIFE.—DISTRESS. P. 144.

1. It is, I believe, laid down in all modern works, and sanctioned by a variety of cases, that not only when the reversion is a chattel interest, but even when it has been of an estate of freehold and inheritance in the wife, that the husband may not only distrain, but even *avow* for the rent alone. See *North v. Wyard*, 2 Balst. 233; *Bowles v. Pore*, Cro. Jac. 282; *Wise v. Bellett*, *idem*, 442; *Osborne v. Wellesden*, 1 Mod. 273; *Pullen v. Palmer*, 3 Salk.

M. A.

2. In an action for the rent, husband and wife may join, or the husband may sue alone; 1 Chit. Pl. 32, n. f.; and since the same doctrine is laid down as to an *avowry* for rent in *arrears jure uxoris*, no doubt they may join in a *distrain*, or not. Cro. Jac. 442. 1 Mod. 273. I think the husband's signature would be sufficient to the warrant of distress; but as the wife has a clear interest, it might be better to join her in all the proceedings. T. C.

## Law of Property and Conveyancing.

VESTING OF LEGACY. P. 143.

1st. The words "*now living*," are held as referring to the period of making the will; precluding therefore those nephews and nieces born in the interval between that period and the death of the testator. *Crosley v. Clare*, 3 Swanst. 320 n.; *Abney v. Miller*, 2 Atk. 539; *Blundell v. Dunn*, cit. 1 Madd. 433.

2dly. Where a class is defined at some period during the testator's lifetime (as it is in this case), the subsequent decease of any of its members in the interval between the making of the will, and the testator's death, would occasion a lapse of their shares precisely in the same manner as if the gift had been to them *nominatim*. *Allen v. Callow*, 3 Ves. 289. Though the point did not arise in this case, Lord Alvanley expressed a very decided opinion upon it. The next of kin of the testator would therefore be entitled to the two lapsed shares, as the bequest was of the residuary estate. See *Skrymsh v. Northcote*, 1 Swanst. 570; *Bagwell v. Dry*, 1 P. W. 700; *Page v. Page*, 2 P. W. 489; *Owen v. Owen*, 1 Atk. 495; *Peat v. Chapman*, 1 Ves. sen. 542; *Cheslyn v. Crewwell*, 2 Ed. 123; S. C. in Dom. Proc. 3 B. P. C. Tom. ed. 246.

J. B.

## QUERIES.

## Practitioner.

## ORDER FOR TIME.

Defendant served a summons for time to plead; plaintiff gave a consent for "a week, upon the usual terms." Defendant neglected

to get an order upon that consent. Can the plaintiff, under those circumstances, sign judgment in the mean time, the defendant not having complied with "the usual terms?"

SIO.

## Law of Property and Conveyancing.

LEGACY.—PERPETUITY.

A., the testator, by his will, directs his executors to lay out and invest such a sufficient sum of money in the funds as will realize the annual sum of 500*l.*, and to stand possessed thereof upon the following trusts:—To permit and suffer his wife B. to receive the same during her life, and immediately after her decease, to pay certain legacies, and subject thereto for C. D. for life, and immediately after her decease, to his issue absolutely, upon his or their attaining the age of twenty-four years; but in default of such issue, or if such issue die under the said age of twenty-four years, then to his daughter E. F., upon the like trusts. At the testator's death, the wife B. and the son (C. D.) were living, the latter of whom was and is an infant, and unmarried. Is or is not the above bequest void, as being contrary to the law against perpetuities? V.

## THE EDITOR'S LETTER BOX.

A correspondent, who remarks on the length of the Lancaster Court Report, should recollect that it concerns intimately many hundred members of the profession resident in Lancashire, and their agents; and that Lord Abinger's opinion on Local Courts must be important to the whole profession.

We are obliged by several cases and opinions on retaining Counsel, and shall prepare a short collection of these points as soon as we have sufficient materials.

The communication of M. shall be attended to.

The letter on Attorneys' Re-admissions shall be published.

The historical contribution of G. B. is acceptable.

The letter of Patronus Justitiæ shall be inserted.

The Queries and Answers of J. H.; and A., have been received.

Some copies of the Municipal Corporation Report remain, of the limited number printed for the use of our Subscribers.

# The Legal Observer.

Vol. X. SATURDAY, AUGUST 29, 1835. No. CCLXXXVII.

— "Quod magis ad nos  
Pertinet, et nescire malum est, agitamus.

HORAT.

## RECREATIONS FOR THE LAW STUDENT.

WE now return to Phillips' little volume, to which we lately adverted; and we are glad to lay before our readers the remaining extract we had marked for insertion, at the present time, when, perhaps, some students may be more disposed for play than work. If so, we can now tell them how they may gratify their fancy in the most approved manner.

"Recreations the most innocent, are ever the most commendable; and, if so, certainly shooting, bowling and angling, are most worthy his exercise. The first is useful both in peace and war; an honest pastime for the mind, and a wholesome exercise for the body. It provides meat for the stomach and stomach for meat. It is the ancientest of any, as ancient as Cain, whom some say Lamech killed with a shaft, anciently practised by kings and emperors. Witness Zenophon, who saith that Cyaxares, king of the Medes; Astyages, his son Cyrus, and Darius, were skilled in this art; nay, the latter was so taken with it, that he caused to be engraved on his monument that he was exquisite in shooting. Domitian, the emperor, was so cunning therein that he would shoot betwixt a man's fingers standing at a distance. It is a quiet and harmless exercise, yet doth it well deserve the name of exercise: for it both increases strength and most preserveth health, being not violent, but moderate; not overlaying any one with weariness, but equally exercising every part of the body. Shooting, saith Lord Bacon, is good for the lungs and breast. In a word, it is the only recreation allowable in our law, and being a lawful recreation, is the most worthy of a lawyer's practice."

This was, however, written before the day of certificates and licenses. To those,

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therefore, who cannot or will not shoot, we can mention other resources.

"Bowling (saith the same Lord Bacon) is good for the stone and veins; and those that lead sedentary lives, as students do, are most subject to these diseases, therefore doth in a manner injoin our students exercise thereof, *periculo incumbente*. It is an instructor of the mathematics, an innocent recreation, doth moderately refresh the body and very much quicken and sharpen the understanding."

And, lastly, if our friends care neither for shooting nor bowling, they may take to an amusement, we should say, peculiarly proper for the lawyer.

"Angling, the last, but not the worst of the three, is a recreation though tedious to some, yet full of pleasure and delight to others; and this is of ancient standing too. Of its innocence there is no question, our Saviour himself being often present when the apostles used the same; and, if you believe Plutarch, Mark Anthony, amidst his wonderful glory, used angling as a principal recreation; so harmless a recreation that it is allowed to clergymen, being a recreation that invites to contemplation and quietness, and used by them accordingly; witness Dr. Whittaker, Mr. Noell, and Mr. Perkins. Sir Henry Wotton saith, that after tedious study, it was a rest to his mind, a clearer of his spirits, a diversion of sadness, a calmer of unquiet thoughts, a moderator of passions, a procurer of contentedness, and it begets habits of peace and patience in those that practise it. It is a recreation that doth not at all take up the mind, but gives it liberty for any contemplation, therefore most befitting a student; witness that angler that said,

"My hand alone my work can do,  
So I can fish and study too."

If this at all tempts our readers, we can, from experience, recommend Wales, both South and North, for the sport. For fear,

however, that the student should get too much weaned from the law by his "delights," the author closes with the following admonition:—

"But let not recreation get so much ground upon him as to make him forget it is but a recreation; let him not spend too much time therein, but after some short while return to his study again, following Seneca's advice, *Quicquid facies cito redi a corpore ad animum, illum diebus ac noctibus exerce labore modico aliter ille.*"

Herewith we take leave of our author.

## THE PROPERTY LAWYER. No. XLVIII.

### EFFECT OF A FEOFFMENT ON A TENANCY AT WILL.

In Comyn's Digest, Estate (H. 6), it is laid down, that if a lessor comes upon the land, he may determine a tenancy at will in the absence of the lessee; and under the head Feoffment (B. 7), it is stated, that the livery will be good if the tenant be only lessee at will, though he dissent, for the livery shall be a determination of the will; and see Co. Litt. 55, b. and Dy. 186. These authorities were acted on in the following case:—

**Trespass.**—The first count of the declaration was for breaking and entering the plaintiff's close, situate at Whitfield, in the county of Gloucester, and ejecting the plaintiff therefrom, &c. The second count was for an assault and battery. Pleas, not guilty, and a justification to both counts; upon which, however, no question arose. (The pleadings were before the new rules as to pleadings came into operation.) At the trial before *Alderson, B.*, at the last summer assizes for the county of Gloucester, the only question was, whether the plaintiff was lawfully in possession of a close of land, inclosed from the waste by one Richard Withers, the father of the defendant, Thomas Withers. The inclosure from the waste had taken place about thirty years ago; since which time Richard Withers had continued in quiet possession of the land until about six or seven years ago, when he agreed to sell the land to his son for the sum of 5*l.*; and the son was, in pursuance of that agreement, put into possession; but only a small part of the purchase money was paid. Thomas Withers, the son, continued in quiet possession down to the year 1831, when Richard Withers, the father, not having been able to obtain the remainder of the purchase money, at the plaintiff's request, agreed to sell him the land for *£*—; and the plaintiff having paid the money, a feoffment was accordingly prepared by one

Baxter, an attorney, and duly executed by Withers, the father, and the plaintiff, with livery of seisin, indorsed. After the feoffment was executed, the attorney of the feoffor proceeded to the land, in order to make livery of seisin, for the purpose of delivering possession to the plaintiff; and possession was accordingly delivered to him. It appeared that shortly before the parties went on the land, they saw Withers, the son, upon the land, but there was no person upon the land when they got there. The possession of the land was disputed by Thomas Withers, the son, down to the commencement of the action. The jury found that Thomas Withers did not go off the land for the purpose of giving up possession. The learned Judge directed the jury to find a verdict for the defendants; but gave the plaintiff liberty to move to enter a verdict for him, if the Court should be of opinion that the livery of seisin was sufficient in point of law to confer a valid title on the plaintiff. *Ludlow, Serjeant*, having in Michaelmas term last obtained a rule accordingly:—

*Lord Abinger, C. B.*, said, a tenant at will has a mere scintilla of interest, which the landlord may determine by making a feoffment with livery upon the land, or by a demand of possession. There is no doubt here that the father had contracted to sell the land in question to his son, and that the son had been put into possession under that contract; but the son had only a mere equitable interest, of which a court of law cannot take notice; at law, he had no other title than that of a tenancy at will. Any mode by which the will was determined would entitle the father to maintain an ejectment. If the lessor makes feoffment with livery of seisin on the land, it is a solemn act done by him which would have that effect. The general rule of law, that any act done upon the land by the lessor in assertion of his title to the possession determines the will, is a sufficient ground for us to say that this feoffment and livery of seisin did determine it. I therefore think, that the title of the plaintiff was a good and valid title.

*Parke, B.*—I am entirely of opinion, that Withers, the son, was nothing more than a mere tenant at will. He had nothing more than a lawful possession; and must be considered as having that kind of legal title to the possession, which in law is recognized as a tenancy at will. Then the father executes a feoffment to the plaintiff, and livery of seisin is given. I am clearly of opinion that the entry on the land to make livery of seisin determined the will. Any act of that kind determines the will, whether the tenant knows it or not. It consequently follows, that, by the feoffment and livery, the plaintiff acquired a good title, and that the defendant, who entered afterwards, was a trespasser.

*Bolland, B.*—I am clearly of opinion that the defendant Withers had no title to this land, and the authorities clearly shew that the plaintiff's title was a good title.

*Alderson, B.*—I am of the same opinion.  
*Ball v. Cullimore*, 2 C. M. & R. 120.

# THE COMMISSIONERS' REPORT ON THE CONSOLIDATION OF THE COMMON LAW OFFICES.

It appears by the Report of the Commissioners under 1 W. 4, c. 58, that there are five principal officers of the Exchequer of Pleas, whose salaries amount to 5600l.;<sup>a</sup> in the Common Pleas there are twenty-one officers, whose salaries amount to 10,836l. 19s.; and in the King's Bench nineteen officers, whose salaries amount to 31,416l. 13s. 9d.

The Report states the particulars of these sums, and then proceeds as follows:—

Upon the statement made to us, we came to the conclusion that no good reason could be adduced for continuing this wide difference in the number and establishment of officers in the different Courts, and that it would be highly advantageous to the suitors and the public, if the establishment in each of the Superior Courts could be rendered uniform, and were regulated upon one common and fixed principle, and until this should have been done, it appears to us that no tables of fees could be satisfactorily prepared or brought into practice, so as to effect the main objects contemplated by your Lordships' minute, namely, *pecuniary relief to the suitors*, and fixing with certainty and uniformity the fees proper to be demanded in all the Courts for services actually performed.

The Plea or Common Law Side of the Court of Exchequer having been recently remodelled by 2 & 3 W. 4, c. 110, we proceeded, in the first instance, to examine whether its establishment could be appropriately taken as the basis of a new arrangement in the other two Courts.

We enquired into the amount of business at present transacted in each Court, and ascertained the following to be the comparative statement of actions commenced and disposed of in the three Courts in the past year; namely,

Writs issued in the Exchequer	-	39,637
- - - - King's Bench	-	32,400
- - - - Common Pleas	-	11,750
Causes tried	-	
- - - - Exchequer	-	564
- - - - King's Bench	-	637
- - - - Common Pleas	-	491
Final judgments entered	-	
- - - - Exchequer	-	6264
- - - - King's Bench	-	7483
- - - - Common Pleas	-	3384

The quantity of business in the Exchequer, (now the most frequented Court) being found to be thus considerable, we were solicitous to learn whether the five principal officers and their clerks, who constitute the official establishment of this Court, were fully adequate to the performance of the duties with satisfaction to

the Court, and facility and accommodation to the suitors. We accordingly examined several extensive practitioners in the Courts of Common Law; and the result of these examinations has convinced us, that the establishment of the Exchequer of Pleas, as proved by the experience of three years, is more than sufficient to carry on the business to the entire satisfaction of its Judges and suitors; and moreover, that great convenience results in that court from the business being concentrated and conducted in one office, or, in other words having *all the officers and clerks under one roof*. We were further of opinion, that the same facilities being afforded in the other two Courts, *four* principal officers, assisted by efficient clerks would be an ample establishment for each of those Courts respectively.

Being thus satisfied of the expediency and practicability of rendering uniform, and thereby more effective, the official establishments of the Courts of Common Law, our attention was next directed to the mode of accomplishing that object, and discontinuing the present multiplicity of offices (many of them nearly sinecures or executed by deputy) in the Courts of Kings Bench and Common Pleas.

This object, we are of opinion, may be effected easily, and without injustice to the present officers.

The 16th section of 1 W. 4, c. 58, provides, "that if any of these offices shall be abolished by lawful authority, the holder shall receive such annual sum as three of the Commissioners of his Majesty's Treasury, and the Lord Chief Justice or Lord Chief Baron, shall appoint, not being less than three fourth parts of the value certified by us under the provisions of the same act." It is clear that this statute contemplated the event which has so frequently within our experience occurred, namely, that the duties and fees of certain compensated officers might become so diminished as to render their abolition highly expedient; and the act provides that an officer, when so abolished and thereby released from further duties, attendance and responsibility, may be called upon to surrender one-fourth part of the certified value of his office; a provision which appears to us liberal as respects the individual, and just to the public.

It seems preposterous to attribute to the legislature an intention that when the duties of an office have dwindled to nothing, and its fees fall short even of paying the expenses of the office, and the officer yet continues to receive from the public a large annual compensation, such unprofitable office should be nominally kept up, at an increased charge, merely to constitute a dead weight upon the public and the suitors, for the benefit of the officer. This evil is still more serious if the fixture of a useless officer is to have the effect, (as it would do) of obstructing all improvement in transacting the business of the Court.

The unreasonableness of such a course cannot be better illustrated than by the case of the Filacer of the Court of King's Bench, who receives from the government the large annual

<sup>a</sup> This appears to be exclusive of clerks and expenses, the amount of which is afterwards estimated at 4000l. annually.—Ed.

compensation of 5,496*l.* whilst the fees and duties of his office have so diminished that its receipts do not pay its expenses, and the public were last year called upon to pay to that officer a further sum of 19*l.* (in addition to his compensation) as for an excess of expenditure over receipts.

It appears to us, therefore, that the abolition of the present useless offices would not be unjust to the holders, whilst it can be made apparent that it would highly benefit the public, both as respects pecuniary results and the more effective administration of justice in the Courts.

By the arrangement proposed it is at present estimated that nineteen officers might be abolished in the Courts of King's Bench, and twenty-five in the Court of Common Pleas. The present annual amount of compensation of the several officers alluded to, is 34,622*l.* 4*s.* and a reduction of one-fourth under the act of the 1 W. 4, c. 58, sec. 16. would effect a saving to the consolidated fund of 8,555*l.* 11*s.* per annum.

Supposing the official establishment of the several Courts to be fixed (as we think it might safely be) at four principal officers, with the necessary assistants, it is proposed that in the

#### KING'S BENCH

There should be on the plea side four Masters and Prothonotaries, with equal powers in the taxation of bills of costs, in whatever Court originating, and in the general superintendence of the office: the charge of this establishment to be as follows: viz.—

Four masters and prothonotaries, at 1200 <i>l.</i> per annum each (a sum proposed by us in deference to the Barons of the Exchequer in their recent arrangements in that Court) -	4800
Estimated expense of clerks and other incidental charges -	4000

Per annum **£8800**

Assuming that the following officers, now employed, are appointed as the four masters and prothonotaries, which we would suggest might be an eligible arrangement:

	<i>Present income.</i>		<i>Income under new system.</i>	
	<i>£.</i>	<i>s. d.</i>	<i>£.</i>	<i>s. d.</i>
Mr. Le Blanc, at present the master	1768	1 10	1768	1 10
Mr. Dealtry, Clerk in Court, Crown Office -	1823	12 5	1823	12 5
Mr. Goodrich, Assistant Master -	600	0 0	1200	0 0
Mr. Bruce, do. -	600	0 0	1200	0 0

£4791 14 3	5991 14 3
Estimated expense of clerks and other charges, as above -	4000 0 0
The total expense of the Court of King's Bench in the first instance would be -	£9991 14 3

The office of the four masters during the lives of Messrs. Le Blanc and Dealtry, would therefore cost 9991*l.* 14*s.* 3*d.* per annum; but upon their death or resignation it would be reduced to 8800*l.* per annum.

[Then follows a statement of the offices to be entirely abolished.]

#### COMMON PLEAS.

It is also proposed that there should be four Masters and Prothonotaries in the Court of Common Pleas, with the same equal powers of taxation, &c. as in the King's Bench. The charge of the new establishment to be as follows: **£.**

Four Masters and Prothonotaries, at 1200 <i>l.</i> a-year each, as in the King's Bench -	4800
Expenses of clerks, and other incidental charges, estimated with reference to the present state of business in the Common Pleas -	2000

Per annum **£6800**

It is suggested that the following officers, now employed, might be the four masters: viz.—

	<i>Present income.</i>		<i>Under new system.</i>	
	<i>£.</i>	<i>s. d.</i>	<i>£.</i>	<i>s. d.</i>
Mr. Hudson -	2034	1 1	2034	1 1
Mr. Ray -	2005	11 7	2005	11 7
Mr. Griffiths -	619	10 1	1200	0 0
Mr. Cancellor -	602	7 6	1200	0 0
	£5260	10 3	6439	12 8
Clerks as above -	-	-	2000	0 0
			£8439	12 8

The office of the four masters, during the lives of Messrs. Hudson and Ray, would therefore cost 8439*l.* 12*s.* 8*d.* per annum; but upon their death or resignation, it would be reduced to 6800*l.* per annum.

[Then follows a list of the offices proposed to be abolished.]

#### EXCHEQUER OF PLEAS.

The establishment of this office, as constituted under the provisions of the 2 & 3 W. 4, c. 110, is as follows: viz.—

Three Masters and Prothonotaries, at 1200 <i>l.</i> each -	3600
Clerk of the Rules -	1000
Filacer -	1000
Clerk of the Errors -	200
(These salaries are at the rates proposed by the Barons). -	5800
Clerks, and other incidental expenses -	4000
(Clerks as proposed by the Barons, 2500 <i>l.</i> )	£9800

It is proposed that the establishment should be assimilated to that of the Court of King's Bench, the business in these two Courts not materially differing.

Four Masters and Prothonotaries, at 1200 <i>l.</i> a year each, as proposed for the King's Bench - - -	4800
Clerks and other expenses, as proposed for the King's Bench - - -	4000
	<hr/> £8800

The following is a summary of the expenses of the establishments of the three Courts as proposed by us: viz.—

<i>King's Bench.</i> —Proposed im-	£.	s.	d.
mediate expense - - -	30,845	0	2
<i>Common Pleas</i> , Do. - - -	13,552	19	9
<i>Exchequer</i> , Do. - - -	17,747	8	2
Per annum	£62,145	8	1

<i>King's Bench.</i> —Proposed fu-			
ture expense, when compen-			
sations shall have ceased - -	8,800	0	0
<i>Common Pleas</i> , Do. - - -	6,800	0	0
<i>Exchequer</i> , Do. - - -	8,800	0	0
Per annum	£24,400	0	0

From the above statements it plainly appears, that if tables of fees were to be framed so as to produce 30,000*l.* in the whole in the three Courts, the charge of the proposed new establishment, after the compensations granted under the act of 1 W. 4, c. 58, shall have ceased, would be provided for, and a surplus of 5,600*l.* a-year would remain to be paid into the consolidated fund, or to meet the contingency of any falling off hereafter in the amount of fees received; add to which, that a very great advance will be made towards the object which, in compliance with your Lordships' minute, we have constantly in view, namely, the relief of the suitors.

As an important part of the arrangement of the official establishments of the several Courts, it is proposed that three of the Masters of each Court should be required to attend daily in term for the purpose of taxing costs indiscriminately in all the Courts, and superintending the general business of the office, leaving the other Master to attend the Court when sitting; and in vacation, when a Master is not required to attend each court, he should join the other Masters for the purposes of taxation and the general duties of the office, so that the taxing Board in term shall always consist of, at least, nine Masters in daily attendance, and in vacation, of nine or more.

As the quantum of business always has varied, and will continue to vary, in the three Courts, it may occur that the fees received in one Court will fall short of the sum required to pay the salaries and charges of the particular establishment, whilst the amount received in another Court may exceed such charge.

It is proposed, therefore, that the fees received in the three Courts should form a common fund, out of which the whole expenses thereof should be defrayed, and the balance, if any, at the end of every year, be paid into the consolidated fund. This might be easily man-

naged, if the officers of the three Courts were required to open one account at the Bank of England; to pay in the monies received either weekly or otherwise; to defray thereout, quarterly, the salaries and other expenses; and, at the end of the year, to strike the balance.

As the variation in the quantum of business may also have the effect of casting upon the officers and clerks belonging to one Court more work than they are enabled to accomplish, whilst from the same cause the officers and clerks of another Court may not be fully occupied: it is therefore proposed, that power should be given to the Judges to transfer, as occasion may require, the officers and clerks from one Court to another, and to authorise them to execute the duties in the Court to which they are removed, in the same way as they did in the Court from which they were transferred. This will prevent inconvenience to the suitors, and will tend to introduce one uniform mode of conducting the business in all the three Courts.

No argument, we apprehend, need be urged to impress upon your Lordships the impolicy of keeping up the present system of a multiplicity of offices (several of which are become nearly sinecure, or are discharged by deputies,) and almost innumerable fees; or the expediency of seizing the present opportunity to concentrate, simplify, and assimilate the business of the respective Courts, and adapt to the whole a defined uniform table of fees, which would at once accomplish the object of your Lordships' minute, by securing pecuniary relief to the suitors, and increased convenience, facility and dispatch, to the profession and the public.

As a sequel to this report, we think it right to add, that there are other offices (adverted to immediately below) which might be abolished with advantage to the public and ease to the suitors, either by a new adaptation of fees, or by a transfer of their duties, viz.

King's Coroner and Attorney	} Crown side of the Court of King's Bench, commonly called the Crown Office.
Eight sworn Clerks	
Secondary Clerk of the Rules	
Clerk of the Affidavits	
Examiner and Clerk of the	
Grand Juries.	

Sealers of Writs, &c. in the King's Bench, Common Pleas and Exchequer.

Chief Usher in the Court of King's Bench.

Ditto in the Court of Exchequer.

Chief Proclamator in the Court of Common Pleas.

Cursitor Baron of the Exchequer.

Upon these offices we submit, for your Lordships consideration, the following remarks —

#### CROWN OFFICE.

With respect to the Crown Office in the King's Bench, we think that the business of that office might be efficiently performed by the Masters of the Plea Side of that Court, adding to their number, if thought necessary, one more Master; or if that plan be objectionable, the office might, it is suggested, be remodelled,

by abolishing all the present officers, and substituting one Master and Prothonotary, and two or three clerks. The net amount of compensation awarded to the present officers under the act of 1 W. 4, c. 58, is 7111*l.* 18*s.* 7*d.*, and by their abolition a saving might be effected of one fourth part of the compensation allowances, (except of the compensation allowance to Mr. Dealtry, whom it is proposed to retain), which would amount to more than 1000*l.* per annum.

## SEALERS.

The present system of sealing writs, it is suggested, should be entirely abolished, and the Masters of the three Courts, upon issuing any process, required to affix to all writs issued by them, an official seal, denoting the authenticity of the process, which would save much time and inconvenience to the public; and a fee for such official seal might be added to the present charge for the writs, so that no loss would accrue to the Crown.

The Chancellor of the Exchequer seals all writs in the Exchequer, and the Duke of Grafton holds the seals of the Courts of King's Bench and Common Pleas. The former is not entitled to compensation under the 1 W. 4, c. 58, because he does not hold the office for life or a term of years; but the latter has a right in fee tail male, which right your lordships are authorized by the act of the 6 G. 4, c. 89, to purchase.

The net value of the office of the Duke of Grafton is 843*l.* 13*s.* per annum, one fourth part of which, being 210*l.* and upwards, might be annually saved by abolishing the office under the clause so often referred to in the act of the 1 W. 4, c. 58.

## CHIEF USHERS AND CHIEF PROCLAMATOR.

The Chief Ushers of the King's Bench and Exchequer, and the Chief Proclamator in the Common Pleas, have a right of appointing the under ushers and criers of the several Courts, who really perform all the duties; but this right might be purchased, and the future appointments be placed in the hands of the Chief Judges of the respective Courts.

## CURSITOR BARON.

The duties of the Cursitor Baron, since the passing of the act of the 3 & 4 W. 4, abolishing the Pipe Office and some other offices in the Exchequer, have been so much decreased, that little or no service now remains to be performed by him.

The Chief Ushers, Chief Proclamator, and Cursitor Baron, are all entitled to compensation under the act of the 1 W. 4, c. 58, during the lives of the respective holders, and a saving therefore of one fourth part of that compensation might be effected by their abolition, which would amount to about 200*l.* a year.

We have now in conclusion to remark, that in addition to the officers mentioned in this report, there are others, (such as Marshals and Clerks to the Judges, &c.), who receive fees from the suitors in the three Superior Courts

of Common Law, which fees, we apprehend, it will be within our province, under your Lordships' minute of the 11th of October last, to take into our consideration; but the suggestions contained in this Report, do not seem to us to apply to the case of such officers, and we therefore refrain at present from further comment upon them.

(Signed) EDWARD GOULBURN.  
FORTUNATUS DWARRIS.  
T. P. DICKINSON.  
M. D. HILL.

## DISPUTED DECISIONS.

FROM the decision of the Courts of King's Bench and Exchequer, on the subject of the power of the Courts to issue a *mandamus* to India for the purpose of examining witnesses, where the cause of action arises out of India, we beg leave humbly to differ. The case of *Doe d. Grimes v. Pattison*, 3 Dowling's Practice Cases, p. 35, is the decision in the King's Bench to which we allude; and the case of *Bain v. De Vetry*, in the same volume of the same work, at page 516, in the Court of Exchequer.

In the former case, the report, which is very short, is as follows:

*Doe d. Grimes v. Pattison.*

Gunning applied, under the 13 G. 3, c. 63, s. 45, and 1 W. 4, c. 22, s. 1, for a *mandamus* to examine witnesses in India, in a cause in which a question would arise as to the validity of a will. The cause of action arose in England. The only doubt was, whether the rule should be absolute or *nisi*, in the first instance.

*Littledale, J.* (after consulting with the clerk of the rules), directed that the rule should be *nisi*.

Rule *nisi* granted.

The rule was afterwards made absolute.

This is the report of the second case:

*Bain v. De Vetry.*

*J. W. Smith* moved for a rule for a *mandamus* to examine a witness in India. The cause of action arose in this country. Some doubts, he said, had been raised whether, by the stat. 1 W. 4, c. 22, s. 1, the power of the Court as to India is more extensive than it was by the former stat. 13 G. 3, c. 63, s. 45, which was confined to actions "for which cause hath arisen in India."

*Purke, B.*—Take your rule.

Cause was afterwards shewn; but no objection was made on this ground.

Rule absolute accordingly.

Now it will appear from these two cases, that in the former, no objection at all was made on the ground of want of jurisdiction; and in the latter, although suggested, it was not insisted on. But if the language of the two acts had been considered, it would have appeared that no such jurisdiction existed.

The words of the act of the 13 G. 3, c. 63, s. 45, are, "when and as often as the East India Company, or any person or persons, shall commence and prosecute any action or suit in law or equity, for which cause hath arisen in India, against any other person or persons, in any of his Majesty's Courts at Westminster, it shall and may be lawful for such Courts respectively, upon motion there to be made, to provide and award such writ or writs, in the nature of a *mandamus* or commission, as therein mentioned, for the examination of witnesses."

It will be seen from this, that if the cause of action arose out of India, the Court would, before the late act, have no power to grant a *mandamus*. Then the question is, whether the 1 W. 4, c. 22, s. 1, gives any further power to the Court in such a case. That section begins by reciting that certain powers "for the examination of witnesses in India, in the cases therein mentioned, are given by the 13 G. 3, c. 63;" and then proceeds to enact, "that all and every the powers, authorities, provisions, and matters contained in the said recited act relating to the examination of witnesses in India, shall be and the same are hereby extended to all colonies, islands, plantations, and places under the dominion of his Majesty in foreign parts, and to the Judges of the several Courts therein, and to all actions depending in any of his Majesty's Courts of Law at Westminster, in what place or county soever the cause of action may have arisen within the jurisdiction of the Court, to the Judges whereof the writ or commission may be directed, or elsewhere, when it shall appear that the examination of witnesses under a writ or commission issued in pursuance of the authority hereby given, will be necessary or conducive to the due administration of justice in the matter wherein such writ shall be applied for." It must be clear from examining these provisions, that no additional power was given to the Courts, so far as India was concerned, although the provisions of the Indian act were extended by it to his Majesty's other foreign dominions. As far as India was concerned, the Courts were still bound by the provisions contained in the 13 Geo. 3, c. 63, s. 45. As those provisions gave no authority to the Courts to issue writs of *mandamus*, for the examination of witnesses, where the cause of action did not arise in India, they have no power for that purpose now.

It has however been suggested, that under the 4th section of that act, the Court could have such a power. The words of it are,—

"That it shall be lawful to and for each of the said Courts at Westminster, and also the Court of Common Pleas of the county Palatine of Lancaster, and the Court of Pleas of the county Palatine of Durham, and the several Judges thereof, in every action depending in such Court, upon the application of any of the parties to such suit, to order the examination on oath, upon interrogatories or otherwise, before the master or prothonotary of the said Court, or other person or persons to be named

in such order, of any witnesses within the jurisdiction of the Court where the action shall be depending, or to order a commission to issue for the examination of witnesses on oath at any place or places out of such jurisdiction, by interrogatories or otherwise, and by the same or any subsequent order or orders to give all such directions touching the time, place, and manner of such examination, as well within the jurisdiction of the Court wherein the action shall be depending as without, and all other matters and circumstances connected with such examinations, as may appear reasonable and just."

Now, the word *mandamus* is not used throughout the section, and no reference is made to any provision in which it is used. It is quite clear that a *mandamus* could not issue under the authority of that section. It may be even doubted whether a commission could issue, as that section was clearly not intended by the legislature to apply to such a case. By a strict and literal construction of the words only could such a commission issue.

## INTERNATIONAL LAW.

### ARREST.—CONTRACTS.

THE Law of Nations is naturally founded on this principle, that different nations ought in time of peace to do one another all the good they can, and in time of war as little harm as possible, without prejudice to their real interests. The object of war is victory: victory aims at conquest: conquest at preservation. From this and the preceding principle, all those rules are derived which constitute the *Law of Nations*.—Montesquieu, 1st book, cap. 3.

It is not my intention on the present occasion to enter into so lengthened a treatise on the above subject, as my text would admit of, as it might lead farther into the labyrinth of politics than would be consistent with practical lawyers. Suffice it then to say, that Commerce may be considered as the mother of the Law of Nations. To those who would wish to trace out the Spirit of Laws which rule the intercourse between nations, I would refer them to the 20th Book, *passim*, of the above learned author. I shall confine myself to the way in which England acts towards foreigners, as regards their persons and contracts, and only so far as in practice we are called upon to have a knowledge of these laws.

The English may be called a trading people, and, as remarked by the above author, "supremely jealous with respect to trade, they bind themselves but little by treaties, and depend only on their own laws." Book 20, c. 6.

First, then, as regards the *person*.—An alien that is in amity, coming into England, is within



the king's protection; in return for which he oweth unto the king a local obedience or allegiance. So long, therefore, as he receives this protection, he is bound in allegiance, and bound to observe the laws of the realm; and if he be guilty of treason, felony, &c. he is punishable by the laws, the same as any natural-born subject. Several instances are given by Sir *Edward Coke* in *Calvin's case*, 7 Co. 1.—one of a Frenchman, and another of some Portuguese, who were tried here for treason. The case, however, is much altered where a party comes here as an alien enemy: owing no allegiance, he is no longer worthy of protection, but may be seized and put to death for his crimes by martial law. An instance of this may be mentioned in the reign of Henry 7, when *Perkin Warbeck* came over, and feigned himself a son of *Edw. 4*. Being taken in war, he was tried before the constable and marshal, instead of by the common law, and sentenced to be drawn, hanged, and quartered.

Being, however, at the present day at peace with the world, this one instance alone may suffice; and it may be more advantageous to consider how far an alien friend differs from a natural-born subject in regard to the liberty of the person. It does not appear that he does differ in this respect, although the debt for which he was arrested would not have given any right of arrest against his person in his own country. The first case which appears upon our Common Law Reports, is contrary to such position. I shall however state it. It is that of *Melan v. Duke de Fitzjames*, 1 B. & P. 138, in which a Frenchman was arrested here for a debt, from which his person, according to the law of France, would have been free. *Eyre*, C. J., and *Rooke*, J., consented to a rule for the discharge of the defendant on entering a common appearance. *Heath*, J., however, differed from the other two Judges, putting the case of a debt contracted in Ireland by an Irish peer, who there might claim his privilege from arrest, but when he came here that privilege ceased. In the instrument creating the debt on which the party was arrested, the defendant had bound himself as well as his property. By the law, however, of France, at that time (1797), a party could only be arrested in France in case the debt arose upon a bill of exchange or commercial engagement. This, therefore, was undistinguishable from the case put by *Heath*, J., of a personal contract in Ireland, the party being there protected by his privilege of Parliament, as the party in France was protected by its own law, affecting the party while within its limit. Justice *Heath's* opinion, however, seems to have been the soundest, as it has been since followed in several cases; and upon the case itself being quoted by Lord *Erskine*, then at the bar, in support of the doctrine that the Courts were bound to take notice, when brought before them, of the law of the country where a contract was made, Lord *Ellenborough* dissenting from that case, *Erskine* gave up the point. 2 East, 455. The case in East was this: a foreigner was arrested here on a contract entered

into in France, for the transmission of silver from thence at a period when that was prohibited by the laws of that country. (It did not appear, however, whether the law made void such contract, or only prevented the party recovering on such contract: the latter, however, I think, is to be presumed.) The defendant had also been held to bail in Norway; but it did not appear whether by the laws of that country such proceeding gave the plaintiff the same security for his demand as the plaintiff's arrest here could do, and the Court therefore refused to discharge the defendant. *Imlay v. Ellefsen*, 2 East, 453. Here, then, we have a decision, showing that the Courts here act in direct opposition to a positive law of a foreign country, where they find by the laws of that country a contract has arisen, but the policy of the law of that country abolishes the remedy on such contract. This may certainly raise a question of some importance,—whether it is good policy in our Courts to entertain a suit here, which the policy of the foreign country prevents its subject from doing there. Had this latter case been the only one in support of the doctrine it lays down, it might perhaps have been thought that the doctrine in *Melan v. Duke de Fitzjames* was the soundest; but such is not the case, as several others go the same length. In *Cowp. 343*, Lord *Mansfield* lays it down that "no country ever takes notice of the revenue laws of another." The case then before him being an action for the recovery of the value of some tea, sold to the defendant at *Dunkirk*, and there delivered, for the purpose (with the plaintiff's knowledge) of being smuggled into England; but the contract being complete at *Dunkirk*, the plaintiff could not be precluded from recovering the value in England. *Holman v. Johnson*, *Cowp. 341*. The next case of arrest I shall notice, is that of *De la Vega v. Vinnd*, 1 B. & Ad. 284. There a Spaniard arrested a Portuguese for a debt which had arisen on a contract entered into in Portugal; and by the law of that country it appeared that a party could not arrest the body of his debtor; the Court, however, refused to discharge the defendant on a common appearance. Lord *Tenterden*, expressly referring to *Melan v. Duke de Fitzjames*, said, that the distinction laid down by Mr. Justice *Heath* ought to prevail.

The opinion of Lord *Loughborough* in *Talleyrand v. Boulanger*, 3 Ves. 447, appears to have been in favour of discharging a party without special bail, and appears to have been grounded on the case of *Melan v. Duke de Fitzjames*. A direct decision, however, was not called for. In *Hack v. Holm*, 1 Jac. & W. 405, Lord *Eldon* granted a writ of *ne exeat regno* against a foreigner who had entered into a contract with an Englishman, but under which contract in Russia, his country, arrest could not take place.

The law, therefore, seems to be clear, that where a foreigner comes here, he comes subject to the law as he finds it, and he cannot exempt himself from its consequences by referring to the laws of his own country. In all

the cases put as above in France, Portugal, and Russia, the contract was admitted to be a substantial contract as between man and man; but it was on the remedies to be pursued on which the parties differed. The first question to be inquired into is, whether there is a subsisting contract in the country where it is entered into; and if such be the case, then the parties may respectively follow their remedies in the country they may happen to be in, if the laws of that country allow of a remedy.

One case may be given, to show that a contract may arise in a foreign country; but the policy of the laws here disallow that remedy,—and that is in the case of money won at play in France. There a Court of Honour exists, in which such money might be recovered; but in England this remedy is refused. See *Robinson v. Bland*, 2 Burr. 1077. We may here also observe, that if the parties contemplate the completing of the contract in any other country than the one in which the contract first arises, the remedy will then be that which the country pointed at gives;—as a bill of exchange, given in France, payable in England. See the last case.

[To be continued].

## SELECTIONS FROM CORRESPONDENCE. No. CVIII.

### MORTGAGE STAMP.

To the Editor of the Legal Observer.

Sir,

In your Number of 15th August (p. 309), a case is furnished by a correspondent, under the above head, as having been decided in the King's Bench last May; and had he given a full statement of the case, it would have been doubly valuable. The case arose at the last Lancaster assizes, under the following circumstances:—A party mortgaged his property for a term of years, and at a subsequent period, the mortgagee wishing to be paid off, the mortgagor borrowed a larger sum, and the property was conveyed to the latter mortgagee *in fee*, the term being merged. Two questions were reserved for the opinion of the Court,—1st, Whether this difference of estate given in security did not make a fresh transaction, and not merely a transfer of the old debt. 2dly, The point on which the judgment is above given. On looking, therefore, at this state of facts, it is plain enough what the opinion of the Court must have been on the first point, which must have been decided before the other could arise. In the absence, however, of this state of facts, it is impossible to tell that this point was ever before the Court; perhaps your correspondent will, on this hint, be able to furnish some remarks of the Court upon this subject.

M.

### PRACTICE IN THE EXCHEQUER.—TRIAL.

Sir,

The commission mentioned by "A Friend of Uniformity" (p. 298), is not a writ, and need not therefore be tested in term. Letters patent, which the commission is, (as may be seen by the form,) may bear teste in vacation. The separate commission to the justices of assize to try each Exchequer cause ought however, no doubt, to be abolished, and the causes should be tried under a general commission. At the same time there are many gross absurdities which require attention; for instance, a *subpœna ad test.* may bear teste before the action is brought; and so may a rule absolute to compute be dated.

J. C.

### PLEADING.—UNIFORMITY OF PROCESS ACT.

Mr. Editor,

By 2 W. 4, c. 39, s. 11 (the Uniformity of Process Act), no declaration, or pleading after, is to be filed or delivered between the 10th day of August and the 24th day of October; and by the 12th Gen. Rule of all the Courts, of Michaelmas term 3 W. 4, it is ordered, "that in case the time for pleading to any declaration, or for answering any pleadings, shall not have expired *before* the 10th day of August in any year, the party called upon to plead, &c. shall have the same number of days for that purpose after the 24th day of October, as if the declaration, or *preceding pleading*, had been delivered or filed on the 24th day of October."

Being concerned for a party who is defendant in a declaration delivered *prior to the 10th day of August in the present year, and whose time to plead under it expires on that day*, I wish to know whether the party is safe in refusing to plead until the 24th day of October next, or four days afterwards, (being a town cause,) on the ground that *the time to plead under the above rule begins to run, de novo, from that day*.

I am also at a loss to conjecture what "pleading" is meant by the words "declaration, or *preceding pleading*," in the above rule.

C.

### DOUBTS ON THE FEES OF THE HANAPER OFFICE.

Sir,

Perhaps, through the medium of one of your legal correspondents, you will oblige me, in an early number of your valuable work, by the information, whether the Bankrupt Act of 1 & 2 W. 4, c. 56, ss. 53 & 54, in abolishing the office of Clerk of the Hanaper, extended to the fees or rack-rent payable on issuing writs of *formædon*.

PATRONUS JUSTITIÆ.

## SUPERIOR COURTS.

## Rolls Court.

## PRACTICE.—PUBLIC CHARITY.

*A chapel, founded by private contributions for the use of a dissenting congregation, is not a public charity. The trusts of such a chapel may be brought before the Court by bill, and not by bill and information; and the Attorney General is not necessarily a party. If the bill does not bring all the parties interested before the Court, leave will be given to amend.*

This was a bill filed by two of the elders of the Scotch Presbyterian congregation at Woolwich, and a trustee of a fund given in the year 1730, for the benefit of the church, by Mrs. Drake, against the other trustees and elders, praying, in effect, that the trustees who had taken upon themselves the execution of certain trusts might be decreed to conform to them, by electing a minister duly qualified, according to the rules and regulations of the Scotch church, and that the lease of the chapel might be assigned to certain persons designated in a resolution made by the congregation in the year 1799, and that the chapel be used exclusively for religious worship according to the doctrines and discipline of the national church of Scotland.

Mr. Agar, Mr. Daniel, and Mr. Chandless, for several of the defendants, took three preliminary objections:—1st, that as the subject-matter of this suit was a charity, an information in the name of the Attorney General was requisite, and that a bill was an improper mode of proceeding; 2dly, if this view were erroneous, then that the Attorney General ought to be a party defendant, to protect the interests of the charity; and, 3dly, they contended that it was irregular for two members of a congregation to file a bill, without saying that it was in their name, and in that of the congregation.

Mr. Bickersteth and Mr. Blenman, for the plaintiffs, submitted, that it would be impossible for the Court to decide these preliminary points without going into the circumstances of the case. This church at Woolwich was used from 1798 for the accommodation of a congregation of members of the Scotch church. Dr. Bligh, its first pastor, was a regularly ordained minister of the Scotch church, and on his death the forms gone through by the Scotch church were followed. Mr. John Alexander Scott, a minister of the Scotch church, afterwards offered himself, and in accordance with the rules of that church, submitted himself to examination by the London Presbytery. In consequence of some difference of opinion, Mr. Scott resigned his pretensions, but subsequently, on the invitation of several of the elders, he accepted the office of pastor, and continued to act as such up to 1833, when he resigned. Since that period ministers of all denominations of Dissenters had been permitted to preach in this chapel; and consequently the plaintiffs had thought it

their duty to file their bill to have the chapel appropriated to that purpose for which it originally was intended. So far as to the merits. As to the objections raised, this chapel was not a charity in the sense referred to on the other side; it involved no public right, and consequently an information by the Attorney General was not required. On the same principle, the Attorney General's protection, by his being made a party defendant to the bill, was not requisite. As to the third objection, the whole tenor of the bill evinced that the plaintiffs were acting, not only for themselves, but on behalf of all the other members of the congregation, who were desirous of having the church appropriated to the administration of the service according to the doctrines and discipline of the church of Scotland.

His Honor the *Master of the Rolls*, in giving his judgment on these preliminary objections, said, he had looked through the pleadings and perused the cases cited at the hearing, as well as those which had occurred to him as material to be considered. The object of the suit was, that a certain chapel at Woolwich might be kept to the trusts for which the plaintiffs alleged it was originally intended. The three questions which he had now to decide were—1st, whether the property could be administered by the present plaintiffs, or an information by the Attorney General was requisite; 2dly, if the Court decided that the plaintiffs had a right to come into Court by bill, whether the Attorney General ought not to be made a party defendant, to protect the interests of the charity; and, 3dly, supposing the plaintiffs entitled to sue, could they do so in their own right, without framing the record so as to introduce the other members of the congregation, who might be interested in the property? On the first point he should observe that, by act of parliament, in no chapel could service be performed without the public having liberty of access. That, however, was not an argument of much value in this matter, for the regulation was only a matter of police and discipline. From the whole nature of the proceedings it was apparent that this chapel was not a charity in the meaning of the term, so as to render the Attorney General's protection necessary. In support of this position, his Honor referred to the cases of *The Attorney General v. Hewer and others*,<sup>a</sup> *The Attorney General v. Forster*,<sup>b</sup> and *Davis v. Jenkins*.<sup>c</sup> This case did not give any foundation for an objection that the Attorney General ought to be a party to a bill, such as the present; for the property in question was not a charity, but was the contribution of certain persons to be applied to a particular purpose, in which the Attorney General took no interest. The third question was one of considerable difficulty. Lord Eldon, in the case of *The Attorney General v. Newcombe*,<sup>d</sup> a case precisely similar to the present, said, that

<sup>a</sup> 2 Vern. 387.

<sup>b</sup> 1 Ves. 43; 10 Ves. 335.

<sup>c</sup> 3 Ves. & Bea. 151—156.

<sup>d</sup> 14 Ves. 1.

he had no hesitation in allowing the parties to amend. That such leave should be given when it could not affect the rights of the parties litigant, and might prevent further litigation, was only just; and therefore he thought that the defendants would make no opposition to allowing the bill in the present case to be amended. He would see if he could not frame an order which would meet the circumstances of the case.

*Milligan and others v. Mitchell and others*,  
Sittings at the Rolls, July 1st and 7th, 1835.

### Equity Exchequer.

FRAUD.—BILL OF EXCHANGE.—FORGED INDORSEMENT.—BONA FIDE HOLDER.—REAL INDORSEMENT.

*A bill of exchange obtained by fraud, and put into circulation with a forged indorsement, comes into the hands of an honest holder for full consideration, who, after the bill was overdue, became acquainted with the fraud, and obtained a true indorsement. This Court has jurisdiction to stop an action at law against the acceptors, and the holder is decreed to give up the bill to them to be cancelled.*

The facts of this case have been stated at large, together with the judgment of Lord Lyndhurst, C. B., granting an injunction, in Vol. 7, Leg. Obs. p. 382—3. The cause came lately, on the merits, before Mr. Baron Alderson, who took time to consider his judgment. It is not necessary to restate the facts and arguments here, as his Lordship has in the following judgment recapitulated so much of both as make the points decided sufficiently explicit.

Mr. Baron Alderson.—This was a bill filed by the plaintiffs, praying that the defendants might be decreed to deliver up a bill of exchange, mentioned in the pleadings, to the plaintiffs to be cancelled, and for an injunction to restrain the defendants from proceeding with their action at law, or from commencing any other action upon the same bill, and from parting with it out of their custody. The facts of the case, as stated on the mutual admissions of the parties, were these:—On the 9th of March 1832, Robert Hitchcock, agent for a person of the name of Heyland, under a power of attorney to collect rents, &c. wrote a letter to the firm of St. George Gregg and Co., of Dublin, inclosing a cheque on the Coleraine Bank for 500*l.*, and desiring to have in return a bill of exchange, payable in London, at sixty days, and drawn in favour of Heyland. In pursuance of this letter, the bill in question for 500*l.* was drawn by Messrs. Gregg and Co. upon the plaintiffs, Messrs. Esdaile and Co., bankers in London, and delivered over to Hitchcock, who, as soon as he got possession of it, put an indorsement on it in the name of Heyland, in whose favour the bill was drawn, and who was at that time absent from Ireland.

Hitchcock then put the bill into circulation through a person of the name of Stuart, and so early, that it was not possible for Gregg and Co., even if they were aware of the intention of Hitchcock, to prevent it. The defendant, Lananze, on the 12th March, became the purchaser of this bill from Stuart, without any suspicion of the genuineness of the indorsement, and paid full value for it. The bill was afterwards transmitted in the regular course of business to the plaintiffs, and accepted by them. On Gregg and Co. sending the cheque to the Coleraine Bank, it was dishonoured; and as to this part of the case, his Lordship adopted the view taken of it by Lord Lyndhurst, viz. that the whole seemed to be a contrivance on the part of Hitchcock to defraud all parties, and to obtain for his own use the amount of the bill. Subsequently to the bill becoming due, the defendant Lananze became acquainted with the fraud practised upon them, and to get rid of his doubt as to the validity of the original indorsement, he procured a real indorsement from Heyland, on terms, as it was alleged, that there should be an equal division of the amount of the bill. Lananze then brought an action at law against the plaintiffs to recover the amount of the bill, and they, in consequence, filed their bill for the purpose of obtaining relief. The first objection to relief being granted was, that there seemed to be no ground for interference on the part of a Court of Equity, because Lananze was the *bona fide* holder of the bill of exchange for a valuable consideration, and, if so, according to the authorities cited in argument, the suit ought to be dismissed. But the answer to that objection was, that although Lananze was in possession of the bill, and had paid full value for it, yet if the indorsement under which he received it was a forgery, it was the same as if there had been no indorsement at all, and therefore gave him no title. The instrument under which Hitchcock was empowered to act as agent to Heyland, as it appeared to his Lordship, conferred no power to indorse bills; general words were not sufficient to confer that power; it must be specially mentioned. He thought therefore, under the circumstances, that the first indorsement was proved to be no indorsement at all, and did not confer on Lananze the title of *bona fide* transferee of the bill; nor did the subsequent indorsement, in his opinion, alter the case, as it was made when the bill was overdue. Upon the whole, he thought that the plaintiffs were entitled to the relief they prayed; but as he was satisfied that Lananze was equally a victim of the fraud, he thought the decree ought not to be accompanied by an order against him for costs.—*Esdaile and others v. Lananze and others*, at Westminster, June 16th, 1835.

**Eschequer of Pleas.**

**STRIKING OUT COUNTS.—INCONSISTENT COUNTS.—INCONSISTENT PLEAS.—AMENDMENT.—TITHES.**

*If pleas can be considered as substantially presenting several defences, they may be pleaded together, notwithstanding the rule of H. T. 4. W. 4.*

In this case a rule *nisi* had been obtained to strike out one of two counts in a declaration, and to require the plaintiff to shew cause why he should not pay the costs. The facts appeared to be these. The case had been before a Judge at chambers, who had refused to make an order. The declaration was for certain tithes due from the defendant to the plaintiff. The first count was for treble value of tithes not set out, and the other count for tithes bargained and sold.

The peculiarity in the case was this. It was not known whether the defendant at the trial would set up a composition as a defence, or not. It was admitted that the plaintiff had not a good cause of action on both counts, but that if there was no composition he could recover on the first count. If there was, however, he could only recover on the second.

On the part of the defendant it was stated, that his intended defence was that there was a composition, and that it had been paid.

The Court said, that as the claims set forth in the two counts were in substance different, they must be permitted to exist together. This was not a violation of the rule of 3 & 4 W. 4. Reg. 1, s. 5.

The Court subsequently directed that the last count should be struck out, on the defendant's undertaking not to set up a composition at the trial; or in the event of his so doing, to consent to the declaration being amended. The rule must be absolute in these terms. The plaintiff will pay the costs incurred by the striking out of the count.

Rule absolute accordingly.—*Lawrence v. Stephens*, H. T. 1835. Excheq.

**PLEADING.—DEMURRER.—LIBEL.—FRIVOLOUS DEMURRER.**

*Where a party demurs to a plea, it is not a sufficient compliance with the Rule, to state in the margin generally that the matters disclosed in the plea do not contain any answer to the complaint alleged in the declaration; but it should go on, and point out the particular objection which the plaintiff proposes to raise to the plea.*

In this case a rule *nisi* was obtained for setting aside a demurrer, on the ground that the statement made in the margin of the plea of the ground of demurrer was insufficient, according to the late Rule of Court. It appeared that it was an action for a libel, contained in the Morning Herald newspaper. The defendant pleaded that the alleged libel was a fair and impartial report of a proceeding in a court of justice, publicly carried on against the plaintiff,

without any defamatory intention. To this plea the plaintiff demurred, and in the margin of the demurrer book stated, as the ground, that the matters disclosed in the plea contained no answer to the declaration.

Cause was now shewn against the rule for setting aside this demurrer, and it was contended, that the rule of court had been complied with, as far as the particular circumstances of this case would permit. It was in fact impossible to make a more particular statement of the point of law proposed to be insisted on by the plaintiff. The object of the rule was to draw the attention of the opposite party to the matter of law proposed to be insisted on by the party in support of this demurrer. Here all the information which was in the power of the plaintiff was given in the margin.

In support of the rule it was submitted, that the intention with which the rule was framed was, to point out some specific ground of objection to the opposite party's pleading, so that his attention, and that of the Court, might be directly called to it. Here, however, the plaintiff would have conveyed as much information with respect to the ground of demurrer, if he had introduced no statement whatever into the margin. It must be presumed that the plaintiff objected, in point of law, to the plea; and therefore, by stating that there was no sufficient answer, in point of law, contained in it to the declaration, nothing more was stated than would be presumed by law.

*Parke, B.*, was of opinion that the statement in the margin was insufficient. Some special ground of demurrer ought to have been stated in the margin; whereas here was nothing more than a repetition of the general demurrer. No matter what might be the cause of demurrer, this general statement would meet it. Neither the Court nor the opposite party would have its attention at all drawn to any specific point of objection by this general statement. The present rule might be discharged, on payment of costs, if the plaintiff would undertake to amend the statement in the margin.

Rule discharged accordingly.—*Ross v. Robeson*, T. T. 1835. Excheq.

**COSTS.—ARREST WITHOUT PROBABLE CAUSE.—ACCIDENT.—VERDICT.**

*Where a defendant has been arrested for a sum of 20*l.*, but the plaintiff only recovers a verdict for 8*l.*, yet the cause of the small amount of the verdict is the circumstance of the plaintiff being unable to prove an agreement in writing, in consequence of an accident, and there was contradictory evidence as to the value of the goods, the Court refused to allow the defendant his costs pursuant to the 43 G. 3, c. 46.*

On shewing cause against a rule *nisi* for giving the defendant his costs, pursuant to the 43 G. 3, c. 46, on the ground of the defendant having been arrested without reasonable and

probable cause, for a greater sum than the plaintiff recovered by the verdict of the jury, the following facts appeared:—It was an action of *assumpsit*, brought to recover a sum of 35*l.*, the alleged price of certain goods sold and delivered by the plaintiff to the defendant. At the trial the plaintiff was by accident unable to prove the agreement pursuant to which the sale of the goods had been made. That agreement being in writing, and not therefore available, the plaintiff's claim was diminished to the extent of 15*l.* With respect to the value of the goods there was contradictory evidence, and the plaintiff ultimately recovered a verdict for only 8*l.* The defendant, however, had been arrested for 20*l.* The present application was therefore made to give the defendant his costs, on the ground of the difference between the sum for which the arrest had taken place and that for which the verdict had been found.

Cause was shewn against a rule so obtained, when it was contended that the plaintiff could not, under the circumstances of this case, be called upon to pay the defendant's costs. He could only be called upon to do so in cases where there was an absence of reasonable and probable cause for the arrest. Here it could not be said that there was any such absence. Had it not been for the accidental circumstance of the defendant's son, who could have proved the agreement, being absent, the plaintiff must have recovered more than the sum for which the defendant had been arrested. Besides, there was contradictory evidence as to the value of the goods. Under these circumstances it was contended, that the arrest had not been effected without reasonable and probable cause for the sum indorsed on the writ.

In support of the rule, it was contended, that the plaintiff was bound by the finding of the jury. That finding was far less than the sum for which the arrest had taken place. The plaintiff was bound at the trial to be prepared with evidence to shew that his demand was well founded, to the extent for which he had effected the arrest.

The Court was of opinion, that, under the circumstances, it could not be said that the plaintiff had arrested the defendant for 20*l.* without reasonable and probable cause. The present rule must therefore be discharged.

Rule discharged.—*Shatwell v. Barlow*, T. T. 1835. Excheq.

**PLEADING.—GENERAL ISSUE.—DEMURRER.—  
STRIKING OUT PLEA.**

*If a defendant succeeds on demurrer to a plea going to the whole cause of action, the Court will allow him to strike out the general issue which he has pleaded at the same time with that plea.*

This was an application to strike out the plea of the general issue, which the defendant had put upon the record under the following circumstances: It was an action for false imprisonment, and the defendant pleaded, first,

the general issue; and secondly, a special plea, going to the whole cause of action. To the latter plea, the plaintiff demurred.

On demurrer, the Court held the plea sufficient, and judgment was accordingly pronounced in favour of the defendant.

The present application was therefore made on the part of the defendant, for leave to strike out the general issue, which still remained on the record, on the ground that the plaintiff could not recover, in case of his proceeding to trial, as the special plea, which went to the whole cause of action, had been decided against him.

The Court was of opinion that the application was reasonable, under the circumstances, and therefore gave leave to the defendant accordingly to strike out the plea of the general issue. It however intimated at the same time, that the more proper tribunal for an application like the present was at chambers.

Rule granted accordingly.—*Young v. Beck*, T. T. 1835. Excheq.

**PLEADING.—USE AND OCCUPATION.—PLEA OF  
PAYMENT.—SET-OFF.—ACCOUNTS STATED.**

*Since the new rules of pleading, a defendant cannot avail himself of an admission on the part of the plaintiff that he has been paid, under the plea of set-off.*

*In order to let in such evidence, a plea of payment must be put upon the record.*

This was an application for a new trial, on the ground of misdirection on the part of the under-sheriff, before whom the cause was tried.

It was an action for use and occupation. The defendant pleaded the general issue, and a set-off for fixtures and chattels bargained and sold, and money due on an account stated. The plaintiff, in his replication, took issue on both these pleas. The plaintiff, at the trial, proved the use and occupation, and the defendant then produced an account in the handwriting of the plaintiff, from which it appeared that a greater sum than the amount claimed by the plaintiff had been paid by the defendant. The under-sheriff was of opinion that evidence of payment could not be received on this record; but he left it for the jury to say whether, upon reading this paper in the handwriting of the plaintiff, they were of opinion that the plaintiff's claim had been settled. Should their opinion be that the accounts had been settled, they would find a verdict for the defendant: if not, they would find a verdict for the plaintiff. After some consideration, the jury found a verdict for the defendant.

The present application was now made for a new trial, on the ground that the under-sheriff ought not to have directed the jury to take the account in question into their consideration, but ought to have told them at once that they could not take any evidence of payment, whether direct or indirect, into their consideration.

Cause having been shewn against this rule,—The Court was of opinion, that the under-

sheriff was wrong in the mode in which he had left the case to the jury. The defendant had put no plea of payment on the record; no evidence therefore of payment could be admitted on the issue joined. It could not be admitted under the plea of set-off, although an account stated was therein mentioned. That could only refer to an account stated between the parties, so as to form a separate cause of action. The present rule therefore for a new trial must be made absolute, with leave however to the defendant to amend his pleadings on payment of costs.—*Linley v. Polden*, T. T. 1835. Excheq.

## NOTES OF THE WEEK.

### ROYAL ASSENTS.

21st Aug. 1835.

Certiorari.  
London Small Debts.  
Bankruptcy Funds.  
Chancery Offices Improvement.  
Ecclesiastical Revenues.  
Lunatic Acts Continuance.  
Sheriff's Declaration.  
Loan Societies.

25th Aug.

Polls at Elections.  
Prisons Regulations.

### HOUSE OF LORDS.

*Bills for second Reading.*

Residence of Clergy.  
Pluralities Prevention.  
Ecclesiastical Jurisdictions.  
Capital Punishments.  
Imprisonment for Debt.  
Abolishing useless Offices.

*In Select Committee.*

Wills Execution.  
Executors.  
Prisoners' Counsel.

*In Committee.*

Tithes' Recovery.  
Sinicure Church Preferment.  
Education & Charities.  
Church of Ireland.

*To be reported.*

Insolvent Debtors' Court.  
Municipal Corporations.

*Passed.*

Polls at Elections.  
Highways.  
Oaths Abolition Amendment.  
Clerk of Crown.  
Insolvent Courts.  
Turnpike Trusts.  
Illegal Securities.

### HOUSE OF COMMONS.

*Bills to be brought in.*

Law of Tenure.  
Law of Escheat.  
Poor Law Amendment.  
Registration of Births, &c.

*Second Reading.*

Law of Libel.  
Parish Vestries.  
Oaths Abolition Amendment.

*In Committee.*

Copyholds Enfranchisement.  
Registration of Voters.  
County Coroners.  
Durham Court of Pleas.  
Dissenters' Marriages.  
Stamps and Taxes.

*To be reported.*

Publication of Lectures.

*Passed.*

Marriage Act Amendment.  
Abolition of useless Offices.  
Certiorari.  
Letters Patent.

### STAMP AND TAXES BILL.

The only clauses in this bill which appear necessary to mention for the information of the profession, are the following:

The Stamp Duties on Policies of Insurances on Lives for sums not exceeding 100*l.* are reduced.

The Members of any one of the four Inns of Court may be admitted in any other of the Inns, free of duty.

### IMPRISONMENT FOR DEBT BILL.

In consequence of the discussion which arose on Tuesday night in the House of Lords, on the important petitions from Manchester, Westminster, &c. against the Imprisonment for Debt Bill, it appears that the bill will not be further proceeded on during this session, and that it will be brought into the Upper House, and referred to a Select Committee next session. The report of the debate in the House of Commons, at p. 356, was printed before this information transpired.

### PUBLICATION OF LECTURES BILL.

THIS bill, printed in the last number, p. 326, appears to be a piece of needless legislation, unless it were connected with a general revision of the law of copyright, by

an extension of the term of twenty-eight years, and an abolition of the library tax.

The law with respect to the copyright in lectures, we take to be this: If the lectures have been written, either entirely or partially, the Court of Chancery will prevent their publication, on the ground of the invasion of the author's copyright; and if the lectures (as in the instance of the late Mr. Abernethy) are entirely oral, and no notes of them can be produced, the Court will still restrain the publication, on the ground of an implied contract: the subscriber to the lectures being entitled to take notes for his own use, but not to publish them.\*

Now the present bill, whilst it gives no more than the author already possesses in regard to the extent or duration of the right, imposes a condition which must be troublesome and annoying. The object of the bill is to inflict a penalty of a penny a sheet on the pirated copies, besides forfeiture. This will afford a remedy by action for penalties, in addition to the present remedies by injunction in equity, and action at law for damages. But the bill by the 5th section, as it first stood, excluded from the intended protection any lectures "which should be delivered in any place *not licensed* by law for such purpose," as if it were intended to revive one of the Six Acts for preventing Sedition, by which all meetings of more than twelve persons must be licensed. These words are omitted, but the exception still remains against any

lectures "of the delivery of which notice in writing shall not have been given to two justices living within five miles from the place where such lectures shall be delivered, two days at the least before delivering the same."

Now we venture to assert, that no lecturer will thank the proposer of the bill for the boon he offers, and that it will be preferable to rely on the old remedy by action or injunction for any infringement of the lecturer's right, than sue for a penny a sheet for the pirated copies, on condition of his being obliged to give the magistrates notice of the delivery of the lectures. The remedy by injunction, which immediately stops the sale of the printed copies, is almost invariably resorted to, in preference to the penalties and forfeiture under the statute of Anne.

## ANSWERS TO QUÉRIES.

### Common Law.

#### ELECTOR.—QUALIFICATION. P. 224.

1. Let *B.* grant his son *A.* a rent-charge of 10*l.* payable for *A.*'s life, out of one of *B.*'s freeholds: this will accomplish the object of both parties as nearly as possible, the only difference being, that instead of *B.* having an absolute disposable power over the freehold at his death, it will be subject to the life estate of *A.* to the extent of 10*l.* H. C.

2. If the conveyance be not made fraudulently, on purpose to give a vote, a grant of an estate of 10*l.* or upwards, for the life of *B.*, will effect the object referred to by T. O. B. J. N.

3. I should recommend *B.* to execute a lease for twenty-one years of one of his freeholds to *A.*, conformably to the stipulations laid down in the after-part of the 22d section of the Reform Act, "for which (to use its language) he shall be *bond fide* liable to a yearly rent of not less than 50*l.*" Six months possession and registration must be borne in mind (sec. 26). ASPIRO.

#### ACCIDENTAL INJURY.—REMEDY. P. 224.

There can be, I think, but little, if any doubt, that the landlord is liable to the payment of the expenses incurred by the indiscretion of his daughter, inasmuch as he ought not to have placed the gun loaded within the reach of any one ignorant of the fact.

ASPIRO.

### Law of Landlord and Tenant.

#### NOTICE TO QUIT. P. 224.

The lease by *A.* to *B.* passed the reversion of *B.*'s tenancy during the twenty-one years comprised in *C.*'s lease, and consequently the

\* The case of Mr. Abernethy, which was decided by Lord Eldon on the 17th of June, 1825, does not appear in the usual reports of the Lord Chancellor's Court, but there is the following note in Mr. Jeremy's Equity Jurisdiction, p. 320.

"The principle of protection would be carried even to the case of literary compositions, not reduced into writing, but merely orally delivered; for in a case in which one delivered, in the theatre of Saint Bartholomew's hospital, lectures on surgery, which he was unable to prove to have been written, and some person who was there as a pupil, by virtue of a ticket purchased of the lecturer, or a stranger under the colour of being a pupil, had taken them down, and published them as such lectures; it was held that there was a property in the composition, sufficient to induce this Court to prevent publication by another; for, had the latter been a pupil, the act would have been a breach of contract, and had he been a stranger, it would have been a fraud; and that in either case this Court, upon the foundation of the legal right, would grant an injunction.—*Abernethy v. Hutchinson*, on motion, December 1824, and June 1825.



notice by C. is good, and he may bring ejectment, or distrain, or pursue any other remedy incident to the reversion. The non-receipt of rent by C., any exercise of ownership by him, or any acknowledgment by B. of being C.'s tenant, is unimportant, since the stat. of 4 & 5 Ann. c. 16, made attornment unnecessary to complete the title of the grantee of a reversion.

J. N.

## LANDLORD AND TENANT.—TENDER. P. 224.

Although A. might have tendered the key "at the expiration of his tenancy," he did not, probably, do so within the time prescribed by the act. It does not appear by the query, whether the tenancy was for years, from year to year, or a less period; upon which, I conceive, the point solely hinges; inasmuch as a notice to quit on the part of the tenant, appropriate to the nature of the holding, was necessary in the two last considerations, and none in the former, because both parties are aware of the period fixed for the determination of the term; still the time for tendering applies to it. *Doe d. Goddall v. Inglis*, 3 Taunt. 54; *Parker d. Walker v. Constable*, 3 Wils. 25; Year Book, 13 Hen. 8, 15, b.; *Doe d. Pitcher v. Donovan*, 1 Taunt. 555; *Right d. Flower v. Derby*, 1 T. R. 159.

ASPIRO.

## Law of Property and Conveyancing.

## TRUSTEE.—PURCHASER. P. 144.

I see no objection to the purchase made by A. of the trust estate, if all the circumstances are *bona fide*. His character of trustee was at an end; and besides, he did not purchase of his *cestuis que trust*, but of a third person, to whom the estate had been sold. As between him and B., there can be no objection to his having been the purchaser. If there has been any unfair dealing, or any understanding between them, detrimental to the *cestuis que trust*, then indeed the sale may be impeached; but if the transaction was honest, there can be no objection to his having bought the property.

SPES.

## AD VALOREM STAMP. P. 224.

B. may convey the equity of redemption to A. upon a 35s. stamp.

H. C.

## QUERIES.

## Law of Property and Conveyancing.

## AD VALOREM STAMP.

On the sale of lands a part of the purchase-money is left unpaid, and agreed to be left on security of the purchased premises, and this transaction is effected by one instrument; what stamp is requisite?

J.

## SETTLEMENT.—CONCEALED MORTGAGE.

A. gave instructions to his solicitor to draw a settlement of his interest in a leasehold messuage or dwelling house, upon certain trusts for his children after his death. A. did not disclose the fact of his having sometime previously mortgaged the property, so that no mention is made of it in the settlement. The premises were held by him under a lease for three lives and 21 years; but he renewed the lease for 75 years at the time he raised the money on mortgage thereof. The settlement was drawn under the impression that the old lease was subsisting. Would the circumstance of the settlement having been made subsequently to the mortgage pass A.'s interest therein? or is the present settlement void in consequence of not reciting the mortgage?

J. T. A.

## Law of Attorneys.

## LIEN FOR MONEY LENT.

Can you inform me of an instance of an attorney being allowed to hold deeds, &c. in his hands, for money lent and advanced? Chitty says, "that he has no lien upon them for any other debt but costs." *Lawson v. Dickenson*, 8 Mod. 306.

S. P. Q.

## THE EDITOR'S LETTER BOX.

The Statutes of the present Session of Parliament, *effecting Alterations in the Law*, are at present few in number, and of no great importance to the Profession. Probably there will be, by the end of the Session, sufficient to call for one Number at least in continuation of our *Commentaries on the New Statutes*: so as to complete the ANNUAL DIGEST of the STATUTE and COMMON LAW for the Year 1835.

We shall print a small number of the *Second Report* of the Commissioners on the *Criminal Law*, as an Appendix to the present Volume.

We are compelled to omit some Queries on account of the length of the statement of the circumstances. Our correspondents can surely reduce the point of law into a reasonable compass.

We are requested to inquire of the writer of the article "Mortgage Stamp," p. 309, whether the further sum was advanced by the same party who advanced the original sum; and who were the counsel and attorneys in the cause?

The Queries and Answers of J. C.; W. S.; T. B.; and J. H., have been received.

We cannot, in justice to others, insert immediately the Queries received this week, as requested.

If "Non-professional" intends to practise as a Conveyancer under the Bar, he must apply to one of the Inns of Court.

The case of the late Sir William Clayton and the Duchy of Cornwall, shall be considered.

# The Legal Observer.

Vol. X.

**SUPPLEMENT  
FOR AUGUST, 1835.**

No. CCLXXXVIII.

—“ Quod magis ad nos  
Pertinet, et nescire malum est, agitamus.”  
HORAT.

## LAW OF ATTORNEYS.

### PROFESSIONAL KNOWLEDGE AND DUTY.— FRAUD.

HAVING always noticed important cases affecting the practice of solicitors, we avail ourselves of a very full and able report of Lord *Eldon's* last well-considered judgment, carrying the jurisdiction in equity, in respect to professional ignorance and neglect, farther than any previous decision. The report also cites a judgment of Sir *Anthony Hart*, as Lord Chancellor of Ireland, bearing on the same point.

The following is the learned reporter's summary, which appears to be very accurate, and to comprehend all the leading facts of the case. This, with the judgment, will render it unnecessary to state the pleadings, evidence, or arguments of counsel :

On a contract for the sale of *part* of an estate, the purchaser requiring a fine to be levied of it for the purpose of removing admitted defects in the title, the vendor employed an attorney, who was his relation, and had been professionally employed by him on various occasions, to levy the fine and complete the contract. The attorney advised the levying of a fine of the *whole* of the vendor's estate, without telling him the effect of it : such fine was accordingly levied, and the vendor died without declaring its uses, and without re-publishing his will previously made, by which he devised the whole estate to his wife, who survived him. After the vendor's death, the at-

torney claimed the estate as his heir at law, alleging that the will was revoked by the fine ; and he brought actions of ejectment to recover possession thereof. The widow filed a bill in Chancery for relief ; and on an issue directed by that Court, a jury found that the attorney fraudulently omitted to tell the vendor what effect the fine would have upon a devise of the property comprised in it. The Court of Chancery, upon that verdict, decreed the attorney to be a trustee for the devisee of the lands and hereditaments, which so descended to him as heir at law. The House of Lords, affirming that decree, further held, that the attorney's alleged ignorance of the effect of a fine on the will of the lands comprised in it, and his omission to inquire whether the conusor, his client, had made a will, were such professional ignorance and neglect, as afforded a principle by which a court of equity might, independent of the ground of fraud, hold him to be a trustee for a third person, of any benefit resulting to himself from his professional ignorance or neglect to the prejudice of that person.

The following is the judgment of the Earl of *Eldon* :

“ Your Lordships are now to pronounce your judgment in a cause which, I am sorry to say, was instituted in the Court of Chancery so long ago as the year 1823. My Lords, if the view I take of this case be correct, it appears to me that the judgment might have been pronounced long since. The circumstances of the case are these : Richard Rich Wilford was seised, at the time of making his will, of lands and hereditaments at Chelsea, in the county of Middlesex, consisting of a mansion-house

called Ranelagh-house, with the appurtenances, together with certain pieces of land adjoining, comprising about two acres. He was likewise entitled to another estate near adjoining, called the Ranelagh estate, comprising about eighteen acres. He made a will, dated the 28th of March 1822, by which he devised all his real estate to his wife, the respondent in this appeal, in fee. Before making the will, he had entered into a contract with the Commissioners and Governors of Chelsea Hospital, on behalf of himself and the other proprietors of the Ranelagh estate, for the sale of part of that estate to them. It appears by the pleadings in the case, that the title to the Ranelagh estate was complicated, and, in consequence of that, doubts arose respecting the title to so much of that estate as was contracted to be sold; and therefore it formed part of the contract that the testator should levy a fine of the lands respecting which such doubt had arisen. It appears that the testator, upon many occasions before, had employed other solicitors than the appellant; I think Mr. Ashmore was one. The appellant, who is an attorney, was a relation of the testator. The necessity of levying a fine arose out of the persons, who were concerned for the Governor and Commissioners of Chelsea Hospital, thinking it would be desirable, as unquestionably it would be, to have a fine levied of those premises, in order that they, as the purchasers, might be sure of having a good title. It became therefore necessary to levy such fine. The appellant in this case being, as I understand, an attorney, was employed for the purpose of giving a satisfactory title to those who had bought this parcel of the testator's estate.

"My Lords, I observe it is stated that the appellant either was informed, or thought it was advisable, that a fine should be levied, not only of that part of the estate which had been contracted for by the Chelsea Hospital Commissioners,—not confining the fine, which was levied to those premises where necessity called for the fine, but he thought proper,—whether in consequence of its suggesting itself to him, or having it suggested by others, does not I think clearly appear,—but he thought proper to levy a fine, not only of that estate, but of the estates in reference to which no contract had been entered into with the Commissioners of Chelsea Hospital, and which required no attention whatever to be given to them. The result of that is this—that the fine that was necessary to complete the title to the Chelsea Hospital Commissioners operated in law as a revocation of the devise to the widow, of the whole of these premises, a parcel of which only had been sold to the Commissioners. It turned out that the gentleman who had advised this large extent of the fine, the attorney, was himself the heir at law of the testator, though he states that he had very great doubts about it, and did not then believe that he was. I wish to put it in the strongest way for him, that he did not know, and did not believe, that he was the heir at law of the testator, till he made that discovery, to say the least of it, shortly after the

death of the testator; and that, therefore, this misfortune to the wife in losing this property was owing to his want of knowledge that the title of heir belonged to him,—for a relation he must have known himself to be. The testator had been very bountiful in his exertions to serve this gentleman; and I do not mean to say that if the testator had had an opportunity of considering and re-considering what would be the effect of this fine, I am far from being certain that he would not have left this property even to this gentleman himself. He states that he did not know or believe, or to that effect, that he was the heir at law of the testator, and that he did not know the effect of the fine would be such as in point of law it has been; and therefore that his notion is, that he is entitled to have this property under the circumstances of this case.

"My Lords, I may be mistaken, or I may have forgotten perhaps, but I have taken great pains to refresh my mind upon this subject, though I have been very much absent from matters in courts of justice for somewhat now more than seven years: I have taken great pains to look into this subject, and I do profess myself, if I had heard the cause in the year 1823, it would have been utterly impossible for me to direct an issue to a Court of Law, consistently with my habit, if possible, to save parties the expense of trials of issues, if the case afforded a clear ground of equity between the parties; and in this case I think such clear ground was afforded. I should have thought it my duty, upon the principle which I am now about to state, at once to have said, "Whether you meant fraud, whether you knew that you were the heir at law of the testator or not, you, who have been wanting in what I conceive to be the duty of an attorney, if it happens that you get an advantage by that neglect, you shall not hold that advantage, but you shall be a trustee of the property for the benefit of that person who would have remained entitled to it, if you had known what you ought as an attorney to have known; and not knowing it, because you ought to have known it, you shall not take advantage of your own ignorance;" for I carry it so far, "you shall not take advantage of your own ignorance." It is too dangerous to the interests of mankind, that those who are bound to advise, and who, being bound to advise, ought to be able to give sound and sufficient advice—it is too dangerous to allow that they shall ever take advantage of their own ignorance, of their own professional ignorance, to the prejudice of others.

"My Lords, this principle I find laid down by Lord Hardwicke in different cases\*, and it is exceedingly well illustrated in the case stated from Ireland. I have in my possession at this moment the manuscript of that decree, which was quoted at the bar. I am sure it is genuine: I know the handwriting of Sir Anthony Hart, the then Lord Chancellor of Ireland. This manuscript which I now have, shews the diligence and accurate attention

which he gave to the subject, having corrected and re-corrected it, in order that the principle might be understood upon which the decree was made. My Lords, that case was this:—A gentleman at the bar, who appeared by the former transactions between the testator and himself to have been a very intimate friend of the testator, made himself executor to the testator under these circumstances: By the law at that time, if there was no personal estate given in legacies to other persons, or even if there were legacies given to other persons, the executor, by his appointment as such executor, would have taken the whole of the residue of the personal estate. It was not the intention of that testator to give this learned councillor anything more than the office of executor; but he insisted that, having got the office of executor, he was entitled to the residue of the personal estate; and it turned out as a matter of fact,—and the case was in this respect, I believe, perfectly honest,—that he was not aware of the doctrine at the time that he made the will which appointed him executor, that he would be entitled to this personal estate. But what said the Court to that? The Court said ‘That is what you ought to have known; you ought to have known it, and you shall not take for your own benefit that which you have derived from your professional ignorance;’—and the consequence was, that he was declared to be a trustee for the next of kin of the residue of the personal estate; and I humbly think this appellant is a trustee of that part of the real estate with reference to which there was no occasion whatever, in order to carry the contract with the Commissioners of Chelsea Hospital into effect, to levy any fine.

“This gentleman, I see, alleges that he did not know the testator had made a will; but he could not but know, considering the proposition I have stated, that if the testator had made a will, devising all the other estates to his widow—that if he levied a fine to the extent that this fine was levied, it must revoke his will. I say it was his duty to have asked the testator whether he had made a will, and not to have gone beyond the necessity that arose in that case for the purpose of making the title to the Commissioners complete, and of carrying that contract into effect; and it is as clear as the sun at noon day,—at least we know nothing to the contrary, and it is but fair to say it, looking at the whole of his answer,—that if he had known that the estate had been devised to the lady who had become General Wilford’s widow, he would not have levied a fine of that estate, unless under a deed that should give the same effect as to her interest as she would have taken under the will. I have no hesitation, therefore, in saying, that if I had heard this cause originally, I should not have directed any issues, because there is a principle of equity that considers that if there is negligence, it is quite enough; but instead of that, two issues were directed: one of those issues was found for Mr. Bulkley, but the other was found against him, and that certainly does

in the finding impute to him that he fraudulently omitted to do so and so.

“My Lords, I should feel at my time of life, what I thank God I do not feel, deep regret, if I had ever been too quick in charging anybody with fraud. I hope I never have been; but in the present case I must go the length of saying, that I cannot expound that declaration which was made to Mr. Bicknell by this gentleman, Mr. Bulkley—I cannot possibly expound that, but by forming at least a conjecture that my mind does not easily get rid of, that this gentleman had at least a conviction in his mind that it was better for him to take the chance of proving himself to be the heir at law after the death of this testator, than to take the chance of his deriving a benefit from this property under the will. And really, when one attends to the arguments of so able, acute, and learned a council as Sir E. Sugden, and when you have nothing to meet that which is the natural effect of the declaration made at a casual meeting of Mr. Bicknell and Mr. Bulkley—when you have nothing but the reasoning that you heard from below the bar upon the subject, I cannot but persuade myself that Sir E. Sugden himself thought that the account he gave of it would have as little influence upon your Lordships’ mind, as it had upon his own. See what the words are. Mr. Bicknell says ‘Have you inquired about a will?’ What is the answer? ‘What! was I to put a sword’—(mind you)—‘into the General’s hand’—(those are the words) ‘that he might cut my throat?’ What was the meaning of that? Plainly interpreted, it is this—that I would not lose the chance I have, by anything being done to counteract the effect of that which I have done. And who was it that was to interfere in order to counteract that? Why, it was the General himself he alludes to. ‘Would I put a sword into the General’s hands, in order that he might cut my throat?’ Is it possible to deny that there is ground for reasoning upon that declaration, that there was at that moment in the mind of Mr. Bulkley a notion that the effect of the fine would be disappointed by an act of the General himself, if he were aware of its effect? My Lords, the second issue was therefore found by the jury against Mr. Bulkley, and the finding of the jury was, that he did fraudulently omit to tell the testator the effect of the fine.

“I am very sorry to put this case, at least entirely, upon fraud; but my opinion is this, that the safety of mankind with respect to their property depends upon your lordships requiring from attorneys that knowledge which every attorney ought to have; because to tell me that an attorney does not know, if he levies a fine of the whole of a man’s property, that it will revoke his will, is not an argument to which I would be inclined to pay attention. There may be persons in the world who are so ignorant; but you cannot act upon their ignorance. My Lords, it is impossible to follow up these cases to their proper effect, as you do in the case of trustees, unless you hold attorneys

to this principle, that they shall give all the information that they ought to give; and unless you hold them also to this principle, that they shall not plead ignorance of that which they ought to know. I should have made this decree in the first instance, without troubling myself with fraud at all, by applying the very principles which have been applied to trustees, to persons who are entrusted with the due management, in point of legal proceedings, of the property of others; and the further principle, that they shall not take advantage of their own ignorance; and if Mr. Bulkley was in this case ignorant, much more, if his conduct was fraudulent—and I do not know how to set aside the finding of the jury; I should have held, that the omission to inquire whether there was a will, or the alleged ignorance that the will would be effected as to the other property to which the fine was meant to apply if it went beyond that property to which the levy of the fine ought to have confined it, formed sufficient grounds of equity for a decree against the appellant. I say that there is principle enough in the policy of the law, as administered in Courts of Equity, to say, he must be considered a trustee of that property on which the fine ought not to have been levied. Under these circumstances, called upon as I have been by some of your lordships to give my opinion in this case, such is the opinion I have formed. I think it impossible that this gentleman can hold this property, except as a trustee for the individual who was the devisee of that property under the will of the testator. My Lords, without detaining your lordships longer—for I do not like to stand up to support by much length of argument that which I take to be a plain principle of equity—and therefore, after stating the grounds upon which I have formed that opinion, it is for my noble and learned friend on the woolsack, who has been much more acquainted with the administration of justice than I have been, to inform your lordships whether I have taken a wrong view of the subject, or whether I am correct in the opinion I have formed."

Lord Wynford concurred in opinion with Lord Eldon, and went over the several grounds of the judgment, observing, that he hoped one of the observations of his noble and learned friend would have its effect upon the members of the profession of the law,—“ that they will all know, particularly with regard to that part of the profession to which the appellant belongs, that though there is no body of men that are more honorable in the discharge of those delicate duties that are cast upon them than the generality of them are, yet, notwithstanding I am satisfied of that, still I hope that the observation made by my noble friend will have its due impression upon them, that there is an established principle in the courts of equity, that no professional man can take

advantage of his ignorance, of his negligence, much less of his fraud."

The judgment below was affirmed, with 50*l.* costs.

*Bulkley v. Wilford*, 2 Clark & Fennelly, 102.

## DEBATE ON THE IMPRISONMENT FOR DEBT BILL.

As this measure is now about to be discussed in the House of Lords, it may be useful to select the following passages from the speeches of Mr. Freshfield and Mr. Richards, on the 24th July, on the question of going into a Committee of the whole House. We do this at the request of many of our subscribers, as well as on account of the importance of the subject.

Mr. Freshfield, having adverted to the impropriety of treating the subject as a party of government measure, proceeded as follows:— I not only admit that it is impossible to feel any objection to the principle, but I assert that humanity and justice concur in the propriety of the change, if it can be effected with due regard to the interests of society; and I would add, that I protest against the inference that those who are not prepared to adopt this bill in its present form are opposed to the claims of the many unfortunate persons who are deprived of their liberty under the laws as they now exist. Sir, I feel as sincerely as the Attorney General can, for those my suffering fellow-subjects, and I will concur with him in an immediate measure for their relief. My belief is, that such a measure would be so well received on both sides of the House, that it might pass through all its stages in two days. If, therefore, no such relief is attempted, do not let the blame rest with me. We have now to deal with the bill in the shape in which it is presented to us; and it is scarcely necessary to say that it ought not to be considered as a question of debtor or creditor, but of both. If the creditor is injured and made to suffer great loss in the first instance, it must ultimately fall upon the debtor; and while the conflicting interests are adjusting themselves, trade and the general interests of the community must suffer. To decide promptly in favor of the imprisoned debtor, is a short mode of determining the question, in which we exercise our humanity cheaply, because we spare ourselves the labor of grappling with the difficulties which surround the subject. Again, if those who are to decide are convinced by being told that the law of arrest can only be upheld for the benefit of interested persons who profit by the process of the Courts, and that its abolition is only opposed by such persons, then I am aware it would be in vain to argue the question, because it will have been determined by the feelings, and without an effort to ascertain the truth by a full and unprejudiced ex-

amination. The change proposed, however, is very considerable, as affecting future transactions, and raises important considerations of justice and policy; but as to past transactions, it withdraws from the creditor one of the protections which he may have considered a part of his inducement to give the credit either of money or goods; and it imposes upon the debtor liabilities and consequences which he could not have contemplated, and never intended to incur.

That the propriety of this change is not so obvious as to commend itself to the judgment of a mind anxious for the adoption of the right principles, must be admitted, when it is seen that the Common Law Commissioners were not only not unanimous in recommending the measure now under consideration, but that the majority of the Commissioners on the one hand, and the dissenting Commissioners on the other, have published in the Fourth Report and the Supplementary Paper, their reasons for and against the recommendation, giving, therefore, to the House and the public the means of judging upon the weight of the argument on either side; and with both these documents upon the table, I would not presume to occupy the time of the House by going over the powerful reasoning urged on each side: that reasoning is public property, and honourable members will use it as their convictions may dictate. For myself, I may be allowed to say, that with the strongest predilection in favour of every opinion deliberately formed by my honourable and learned friend, the Member for Huntingdon, yet upon this occasion I yield my unqualified preference for the judgment expressed by the learned Commissioner who has signed the Supplementary Paper; and I may be allowed to say, as the result of a long and intimate friendship with him, that if ever there was a man desirous of doing justice, of ascertaining the truth, of acting with kindness and humanity towards his fellow-men—devoid of prejudices—of a mild and modest disposition, and yet by the powers of his mind well calculated to detect sophistry and arrive at a just conclusion, aided by great learning in his own profession—that learned friend is the individual eminently entitled to this character.

Then, Sir, referring honourable members to those documents for the more full considerations bearing upon the subject, I would venture to caution the House against some erroneous inferences which might be drawn from the evidence, when we find a large class of eminent persons stating, that they attach no value to the power of arrest—while others say, that the power is essential, and that credit could not continue to be given if it was taken away—and another class stating, that they are willing to give up the power, if other facilities for recovering their debts are substituted—and again, the Report annexes certain returns, for the purpose of shewing that arrest for debt is not effectual in the recovery of the creditor's demands. The truth is, those opinions proceed from persons in totally different walks in trade

and commerce, and truly states what the different classes believe as the result of their experience. The higher classes of commercial men—the merchant and banker—seldom, comparatively speaking, resort to the power of arrest, and they do wisely in their circumstances; but they are wrong in supposing the power of no value to them—that is not only a *non sequitur*; for I confidently believe, as the result of my own experience, that it is because of the existence of the right, that they have not occasion more frequently to resort to it, and that they do not do justice to the extensive operation of the *preventive* principle which obtains for them the payment of their debts, because they have the power of enforcing them. Another class of traders know with much more certainty, because their transactions are not so extensive, and the value of each, therefore, of more comparative importance, that they do recover, by means of arrest, debts which, in their judgment, would be desperate without that power; and I own I am of their opinion, although I do not mean to assert that instances do not occur in which they involve the honest but unfortunate debtor in consequences which should attach (if at all) only to the dishonourable and the fraudulent. Those creditors who are in favour of the power of arrest, but would prefer a course, if it could be found, at once less harsh and more effectual, are only in the condition of both sides of the House, or, more properly speaking, of members taking the opposite side of the question; for no man is in love with the practice for its own sake, and the only question between us is, what will be the better course,—to leave things as they are, to reverse, or to modify them?

The returns referred to by the Report do not appear to me to prove much. It is attempted to be shewn, that of the number of persons arrested, a smaller proportion pay their creditors' demand, than of those persons who are served with copies of writs, upon which bail is not required. I do not think that any such deduction can be fairly and satisfactorily drawn from the returns; but to enter fully into the reasons for that opinion, would involve so much of technical reasoning, as to be distasteful to the House; I will, therefore, merely say:—First, that the returns afford no means of judging what may have taken place between the debtor and creditor. After his arrest, or even after the suing out a bailable writ, and without any arrest, and consistently with those returns, a very large proportion of the debts may have been paid or compromised, which the Commissioners suppose to have been lost. Secondly, the bailable writs necessarily include the more desperate class of debts, in which the circumstances of the debtor are most doubtful, or in which his remaining in the country to the end of the suit is less probable, and, therefore, this class will necessarily present a less favourable result than the other. Thirdly, the writs not bailable are not only more numerous, because they are most generally for very small demands, but they include

a large class of claims not questioned by the debtors, but who are apprehensive that they cannot safely pay, in consequence of the equivocal circumstances of the creditor; and in such cases, if a payment is made after an action commenced by the creditor, it is deemed a payment by coercion of law, and is safe, though the creditor should become bankrupt. It is also uncertain, notwithstanding the returns, what proportion of the cases of writs not bailable are abandoned as hopeless, and yet the inference drawn from the returns would be that the proceedings ceased, because the debts were paid.

The great effect predicted as likely to follow upon the abolition of the power of arrest, is an improved system of credit, and that traders will be less inclined to afford unreasonable facilities for contracting debts. Sir, this is a large question of policy to which I should find it very difficult to do justice, and I doubt whether many honourable members are prepared to shew the point to which credit is wholesome, and that at which it becomes injurious: I believe it is a subject on which the less we interfere the better, and which is calculated to baffle the efforts of the most acute mind to arrive at a right conclusion. We live in an artificial state of society, in which credit represents the transactions of the civilized world in an enormous disproportion to the security existing in actual property, capable of being suddenly realized; and we may well say, in the language of a learned Grecian, that he who does not know that credit is the readiest capital for acquiring wealth, knows positively nothing. But if withdrawing the power of arrest is calculated to make creditors more cautious, it is likely to bring another opposing motive into operation, as it will tend to make needy and extravagant persons more willing to obtain credit, and less anxious as to the means of payment when the peril of arrest is removed.

I know it is said, as to a very low, but very important class of dealing, that credit is injurious, and is given in consequence of the power of arrest in execution by the Courts of Request. This is said in Spitalfields, and such districts, to induce small shopkeepers to credit the wives of artificers for gowns and other articles of dress, to the great injury of their families. Sir, I believe the case more imaginary than real,—I believe it is not the character of the wives of the poor to distress their families by their improvidence, which, in such a case, would be positive wickedness; and if the Legislature will protect the females against the temptations and injury to which their husbands are exposed by the encouragement of gin-palaces and beer-shops, I should be inclined to promise the husbands perfect safety from the imputed extravagance of their wives. But upon the subject of this lower class of dealing, I must be allowed to remind the House, that credit is of the utmost importance; and I am persuaded that no greater injury could be done to the public than to introduce a want of confidence, by withdrawing from it the present protection. Sir, with this credit

is connected the means by which the poor, but honest artificers and labourers, are enabled to support their families when out of work, or in reduced work, as well as at the period of greater success and prosperity. Suppose the full wages or the usual produce of full work to be 12s. per week, and that the poor man receives this for three-fourths of the year, and the other fourth he does not obtain more than 4s. each week,—a case, I am afraid, of very common occurrence,—his average wages would be 10s. per week for the year. It is obvious that he could not live upon his reduced income of 4s. per week; and if he could obtain no credit, he must obtain relief from the parish, at least upon the old system; and if the present poor law would exclude him from this relief, it is, in my mind, an objection to the system, and my argument in favour of the necessity of credit becomes more strictly applicable in the case supposed. The poor man preserves his respectability,—he lives at the lowest possible rate, eking out his 4s. a-week by the least amount of credit for the necessities of life, and when again in full work, he proceeds to reduce and pay off his debt; but, in the mean time, I know from actual inquiry, that the amount due to the small shopkeeper is equal to all he owes to the flour-merchant, the wholesale grocer, &c., and renders it necessary that he should take the full period of credit which his punctuality and the confidence of his creditor may incline him to give; and in each instance the means of enforcing payment by the existing process forms the foundation of the dealing, and cannot be interrupted but at the expense of the poor man's independence and comfort, and the tradesman's loss, and, may I not add, at great inconvenience and loss to the public.

Sir, I fear that I may weary the House by pressing still further this part of the subject, especially after assuming that honourable members will pursue the investigation for themselves, by reading the evidence collected by the Commissioners. It is, however, due to the Commissioners that I should shew the extent to which change has been recommended by those learned persons, and point out what appears to me the discrepancy between the Attorney General's Bill and their Report. In page 27 of the Fourth Report, I find the following passage:—

"The principle of securing the person of the debtor is, to a certain extent, unexceptionable. . . . . A debtor, in withdrawing either himself or his property from the claims of justice, is guilty of a fraud; and we are of opinion that, where a sufficient ground can be shewn, it is just and politic that the law should interfere to prevent the execution of a meditated fraud. But fraud is not to be presumed in any case; and, therefore, an arrest on the ground of meditated flight cannot, on principle, be justified without some ground or sanction, at least the oath of the alleged creditor, that he believes the debtor is about to abscond himself, and that an arrest is essential to his (the creditor's) security."

Here, the House will perceive that, even if the present unlimited power of arrest was to be taken away, the Commissioners did not consider that the creditor was to be refused the resort to that power where he had reason to believe that the debtor was about to absent himself; and the only sanction they thought necessary to protect the debtor against oppression, and his other creditors against the injustice to which that oppression might lead, was the oath of the alleged creditor; and for that suggestion the Commissioners had the precedent of the act of 1797, which deprived the creditor of the right to arrest his debtor unless his affidavit contained a statement that no tender had been made to pay the debt in Bank of England notes. But, Sir, that the Commissioners did not intend to recommend any more strict limit upon the power of the creditor, will appear from a further part of the Report, page 33, in which, after pointing out some provisions to be made, for the security of the creditor, they proceed as follows:—

“ We recommend that no one shall be arrested for debt, unless the plaintiff, or some one on his behalf, shall make oath that a debt to the amount of 20*l.* is due, and that he believes the defendant is about to abscond.”

And in a subsequent part of the same Report, the Commissioners recommended that—even where the debtor was not likely to abscond, but was in circumstances which involved fraud—a discretionary power of arrest should be confided to the Judges of the Superior Courts, and with power to discharge prisoners after arrest, on cause shewn, with costs where such arrest should appear to have been malicious, and without probable cause. But the framer of the bill has not been content with this mode of securing the interest of the creditor, and protecting the liberty of the subject, for, in clause 127, it is provided, not that an action shall lie, in case a debtor is arrested maliciously, and without probable cause, but that in case any debtor who has been arrested either upon *meine* process, or after final judgment, shall bring an action against the person at whose suit he has been arrested, for such imprisonment, it shall be incumbent on such person to prove that he had probable cause for believing that the party arrested was about to abscond to avoid payment of his debts, or about to leave the realm of England and Wales. Thus, in a transaction necessarily conducted by the debtor with the utmost secrecy, discovered by the creditor with difficulty, and even through confidential informants, it is thought just and consistent with the principles of our law, to cast the *onus* upon the creditor, to prove the ground of his belief—and even with great precision, for he is to prove the motive of the debtor, in the one case, and the extent to which he intended to abscond, in another—that he was about to leave the realm of England and Wales, and this although the hints or sources of information may have been the wife of the debtor or the wife of the creditor.

I shall trouble the House no further upon that part of the measure which proposes to prohibit arrest for debt, except in cases of fraud. If the Legislature shall think proper to adopt such a measure, I am sure it will be after full consideration of its consequences; but I feel equally sure that it will not be without the substitution of some satisfactory measures for the better protection of the rights of creditors; and it will now be my purpose to shew that the substituted measures proposed by this bill would involve consequences more injurious to the interests of debtors and creditors, than any inconveniences connected with the continuance or abolition of the power of arrest. Although the abolition of imprisonment for debt is put forward in discussions upon the bill, as the point likely to secure popularity for the measure, yet, in dealing with it on paper, a different and more logical course is adopted. Accordingly, in the bill we find, first, the new system for facilitating the recovery of debts, which appears to me so objectionable, that the bill may be said to fail at the very threshold; and I regret that the time occupied in discussing the other part of the bill, and the very discouraging state of the House this evening, preclude my entering as fully as I could have wished into this part of the question. It is proposed that, immediately after process shall have been served upon a supposed debtor—it may be at the very instant that he is taking his departure by a public conveyance, upon a journey of business or pleasure—the creditor may proceed to a Judge, and upon an affidavit stating the amount of his debt, he is entitled of right, with no discretion on the part of the Judge, to an order for judgment at the end of ten days, unless within the ten days the defendant shall give security, to the satisfaction of an officer of the Court, for the payment of the debt and costs, or shew sufficient cause why the judgment should not be given.

Now let us examine this provision in detail. The creditor is to shew, by affidavit, the amount due to him: it is not required to be by the affidavit of a person who could be a competent witness to prove the fact before a jury, but by his own affidavit; thus obtaining a judgment for a debt which may not be due, or which could not in law be enforced, except under this bill. The debtor may, however, be sufficiently prompt to have instructed his lawyer to resist the award of judgment; but how is it to be effected? is it sufficient that he swears to his having a good defence? Certainly not; he must shew, by affidavit, sufficient cause why the judgment should not be signed against him—that is, he must shew, conclusively, that no debt is due—because the preceding member of the sentence requires as one alternative, that he shall give security for the payment of the debt and costs—that must be as a condition for his having the permission to try the legality of this demand, for there is no other case to which the security can be applicable. Thus a debtor must find security, and perfect that security within the very short



period of ten days from the service of the rule, and which may be served at the most remote point of England or Wales; or he must satisfy the Judge that it is not a case even for trial, but in which no possible demand can be made; thus substituting the Judge for a jury, and discussing the question upon affidavits, instead of, as at present, by *videlicet* examination—introducing, in all probability, the evils of perjury to an extent a thousand-fold greater than at present—rendering the just decision much more difficult, and the expense in most cases greater.

I have supposed the case of a person setting out upon a journey at the moment he is served with a process; in such a case he might not be aware of the necessity of giving up his journey, and proceeding directly to his legal adviser, and it is clear if he did not, it would be impossible to protect him from the rapid judgment which the bill provides. Suppose, also, the case of a disputed debt, in which the supposed debtor, feeling conscious that nothing was due, and somewhat indignant at the proceeding, he is very likely not to take immediate steps to provide himself with security, and to instruct his attorney, and if not, he will have a judgment against him in ten days. The judgment being complete, the debtor is allowed ten days to raise the amount with the costs, and at the end of that time he is to be summoned, as in the case of bankruptcy, to appear before a Commissioner (a class of persons to be appointed under this bill in all parts of the country) and to be examined as to his property. If he does not attend—or attending, if he does not answer satisfactorily—he is to be committed to prison. When before the Commissioner, that officer is to take an account of property sufficient to pay the creditor's demand; and the Commissioner's memorandum, made upon the rule for judgment, is to operate as a conveyance or transfer to a trustee of the freehold, leasehold, or stock in the funds, or debts belonging to the debtor; and the trustee has no rules laid down for the government of his conduct; he may sell the property of the creditor for its full value, or half its value, for anything to be found in the bill. If he recover more than the debt, he is to return the surplus to the debtor; but if less, then this humane process is to be repeated. The debtor is to be again summoned, and again examined or committed to prison, and if he has any further property, he is again to have the benefit of a trustee.

Let it be remembered, this is all for the benefit of the one creditor proceeding, and not for creditors generally. But let it be supposed that two or three, or half-a-dozen creditors follow each other closely in their proceedings, is it not obvious that the debtor must be ruined? He may be entitled to recover from his debtors twice as much as he owes, but as the first creditor would take his choice, and get the Commissioner to assign, perhaps, 25 per cent. more of debts than his demand, on account of the doubt whether they would be recovered in full,—the same

course being pursued in the case of each of the next three creditors, it is obvious that the man who could pay 40s. in the pound, if allowed time to arrange with his creditors, might have the whole of his funds locked up by creditors to half the amount of his property, and the observation applies to property of every description. The consequence of these proceedings would be, that certain creditors would obtain payment in full, and others nothing, even in the case of honest debtors; because it is not easy to prevail upon debtors to make a voluntary surrender of their property, to secure an equal distribution; the truth being that ninety-nine men out of one hundred are sanguine enough to believe that they will be able to overcome their difficulties; and, as the law now stands they are frequently right, because the law's delay renders the creditor more reasonable, and affords the debtor the chance of an arrangement; and I am firmly persuaded, that notwithstanding the bold assertions as to the extent of *law charges* consequent upon the present system, there will be a much larger expenditure if this ill-advised measure should pass, because the power given to each creditor will operate either upon their hopes or their fears,—in the one case giving them a confident expectation of payment, in the other an apprehension that other creditors will obtain a preference: it will also be most obvious that the dishonest debtor will have facilities under this bill, which he has not now, for giving preference to favoured creditors, while he may keep up the appearance of actual resistance. Allow me to offer one observation as peculiarly applicable to debtors who are in trade, and, therefore, subject to the bankrupt laws. This bill declares that a debtor, not paying his creditor in full, within twenty-one days after judgment, commits an act of bankruptcy on the twenty-second day: thus if he has paid 19s. in the pound, and becomes bankrupt, the money so paid is secure in the pocket of the creditor; it can never be questioned as a preference; but, on the other hand, an inducement is held out to avoid bankruptcy by obtaining, from other sources, the means of paying the 5 per cent. remaining due upon the judgment, and this preference is rendered more complete and more unjust.

I must not pursue the subject further, or I should have been glad to read and comment upon several parts of the Fourth Report; I shall content myself, therefore, with an earnest request that honourable members will read it for themselves, before they decide upon the present bill, especially the statements of the Commissioners upon the interesting question of *preference*, to be found in pages 15 and 20. I will venture, however, to assert, in defence of the Commissioners, and in condemnation of the present bill, that if there was one consideration which pressed more upon the Commissioners than another, and which they aimed most sedulously to attain, it was to defeat preferences, and secure an equal distribution of a debtor's effects for the benefit of his creditors; and if there be a feature more promi-

ment than another, in the bill now under consideration, it is the certainty that, by means of it, preferences will be secured in the instances of debtors of every description; and the equal distribution of the debtor's effects, for the benefit of all his creditors, will rarely occur.

Sir, I humbly offer as my opinion, that the present bill is not called for by any party, and it is strongly objected to by great numbers of respectable and well-informed petitioners; but if any measure is to be forthwith adopted, I would recommend, consistently with the principles of the Fourth Report,—first, that no arrest of a debtor's person shall take place, if he will make a cession of his property for the benefit of all his creditors; secondly, to extend the Lords' Act (32 G. 2, c. 28, s. 16) to all persons now or hereafter to be in custody, without any limit as to the amount of their debts; thirdly, to give power to a Judge to authorize arrest in cases of fraud, or where the creditor shall swear to his belief that the debtor is likely to abscond.

Mr. Richards.—What is now the state of the law for the recovery of debts? A creditor may either serve his debtor with a copy of a writ, which is merely commencing an action; or he may arrest the person of the debtor, and hold him to bail. If the action proceed, and the creditor obtain judgment, he may then take out execution either against the goods or the person of his debtor. Now, I am quite ready to confess, that the power of arrest in the first instance, on what is called *meine process*, is liable to abuse. When this question was last under discussion, the learned Attorney-General cited an instance of gross abuse in the case of the Duke de Cadaval. The Duke was, it appears, threatened with arrest for a large sum which he did not owe. I will say nothing of the conduct of the plaintiff in this case, because he is not present. I allude to the case, in order that I may declare my willingness to agree in the adoption of some measure to prevent the recurrence of such an abuse. Let it, if honorable gentlemen please, be made highly penal to arrest on a fictitious debt. But, because the law was in this instance abused, and, perhaps, has in some other instances been also abused, do not therefore condemn the law. And here I may remark, that an abuse of the law, like that in the case of the Duke de Cadaval, is obvious and striking; whilst the thousands and millions of instances in which the law works beneficially, are unperceived and unnoticed. The power of arrest may, no doubt, occasionally be abused; but the knowledge which every debtor has, that unless he pays his debts his person may be seized, is productive of the best effects. The fear of arrest is, in the highest degree, a salutary fear. It is salutary both for debtors and creditors. If the debtor find his circumstances embarrassed, what, under the influence of the fear I have mentioned, does he do? He, generally speaking, practises the most rigid economy; he increases in industry; he puts his shoulder to the wheel; he makes the greatest exertions; and

by these means he commonly surmounts his difficulties. This is a course beneficial to the debtor himself, and beneficial to the community. But, supposing such exertions should not in every instance be crowned with success; and supposing that an unfortunate debtor meet with, what is exceedingly rare, a hard-hearted creditor; why, in this case, such debtor may either become a bankrupt, or take the benefit of the Insolvent Act. Honourable gentlemen who support this bill, seem to consider the law of debtor and creditor to be the same as it was formerly. They speak of imprisonment for debt as if it were as formerly, unlimited in duration, or at the mere pleasure of the creditor. What is the fact? Why, under the act which constituted the Insolvent Court, the 7 G. 4, c. 57, a debtor, unless fraud be proved against him, can get discharged, on an average of time, in about two months! What then becomes of the maudlin lamentations of mistaken philanthropists and visionary doctrinaires on the hardship and cruelty of imprisonment for debt?—those gentlemen whose microscopic eyes can discern in a column the discoloration and roughness of the stone, but who are quite blind to its noble proportions, and exceeding usefulness. But proposing, as this bill does, to take away from creditors the power of arrest and imprisonment for debt, what is it that is offered by the learned Attorney General as a substitute?

The effect of the first provision will be to bring before the Court or a Judge—in almost every case where an action is brought to recover a debt—the question, whether the defendant should be called upon to give security?—a question that will involve the *whole merits of the case*. The merits will thus be tried by one or more of the Judges *on affidavit*, instead of being discussed before a jury! On affidavit! Why, I thought that we had had enough of trials on affidavits in the Court of Chancery! and yet it is gravely proposed, instead of taking evidence *visd voce*, to take it on affidavit! But the whole merits of the case must be discussed, and the contest at this preliminary stage will be so important, that not only will long affidavits be filed, but counsel will be employed, and long speeches made. This excrescence upon the action will therefore vie in its dimensions with the action itself; and the expense and delay of the whole proceeding for recovery of a debt be incalculably increased.

Another objection to this bill is, that the larger proportion of this new business must fall, not on the Court, but on a single Judge at chambers; for it is only in term that recourse can be had to the Court at large. But the province of the single Judge at chambers is, even at present, confessedly too wide! It is impossible that he should sustain this additional burthen; nor, if he could, is it fit that so much should be left to his sole and unassisted discretion. I appeal, on this matter, to every professional gentleman who hears me. But this is not all. This preliminary trial will be heard before a single judge *in private*; no reporters for the public press will be present.

Like the proceedings of the Inquisition, all will take place in secret. There will, on the part of the Judge, be no fear of public opinion, for all will be conducted under the shade of secrecy!

Again, it is unjust, in the highest degree, that a defendant should be called upon to give security for a debt and costs before the cause is tried. Suppose an action brought, without just cause, against a poor defendant, (a case not uncommon now, and sure to be rendered more frequent by this clause,) how is the defendant to find security for debt and costs? No friend can be expected to give security for him, if his circumstances are not such as to protect the friend from ultimate loss. The only chance of obtaining such a favor would be to convince his friend that the action was ill-founded, and was consequently sure to fail. But how often does it happen, that a man is right without being able to satisfy those around him that he is so, till the case is fairly tried? and after all, it would not be enough to satisfy them that he is right, unless he could also give them some assurance that justice would prevail, and would not be defeated by the subtleties of the law or the uncertainties of evidence. It is true, that a defendant need not give security for debt and costs, if he can on oath show sufficient cause why final judgment should not be signed against him. But this will oblige him, with the aid of counsel, to enter on the whole merits of the case;—in fact, to try the matter. Such are some of the objections to this bill, as it respects the debtor. I will proceed to consider the machinery of the bill, as it appears in the clauses 3 to 12, for obtaining for the creditor a discovery of the property of the debtor.

Although these provisions are specious, they will be found in practice very inadequate to replace the present practice of arrest for debt,—for which they are intended as a substitute. Every such plan is subject to the insurmountable objection that it assumes the possibility of obtaining, by examination of the debtor, a full and fair discovery of his property. That the discovery is frequently and even generally delusive, until the debtor be subjected to a strict and searching examination on the part of his creditors, is known, or ought to be known, to every professional man who has practised in bankruptcy; and yet I cannot find, that the clauses in question contain any provision enabling the creditors to examine—the whole of that duty being apparently left to the Commissioner; and even this officer does not appear to be invested with the power of calling for books or papers. Such examination, however, whether conducted by the Commissioner, or the creditors, or both, is sure to be ineffective, unless it be aided by information obtained from other sources with respect to the transactions of the debtor. It is only by such means that the matter can be properly sifted. In bankruptcy such means are resorted to, and employed with great effect; and without them the discovery in bankruptcy would, notoriously be a mockery! But they are in general in-

applicable to the kind of case contemplated by the clauses in question. They involve great labour and expense: for in the whole compass of litigation, there is no kind of operation so costly as that of search and inquiry into facts. And how is the opposing creditor to be indemnified? From what fund is he to be repaid the expense of procuring that information which is required for cross-examining the defendant and eliciting his several resources? In the clauses, as framed, there is not even a provision that points that way: and it would be impossible to frame any that would be effectual. For it would often happen that the estate of the defendant would not be sufficient to reimburse the plaintiff for the expense of the inquiry; and, at all events, the latter would have to defray the expense in the first instance, out of his own pocket; which would often prove an effectual bar to the institution of any inquiry. The clauses are founded on a supposition which betrays either great want of thought or incredible ignorance of human affairs,—that upon the simple interrogation of a Commissioner, a defendant against whom a judgment has been obtained, can be compelled to make such a specification of the state of his property as will enable the plaintiff to have effective recourse to it:—the truth being that *to turn a debtor inside out*, if I may so speak, is a most arduous operation, even when the most troublesome and expensive inquiries have been set on foot by a large body of creditors, well able to bear the expense, and when the results of that investigation are skilfully applied by counsel employed to examine. It is quite clear, that if these clauses pass, and in connexion with them, the clause abolishing arrest, the plaintiff's remedy will be virtually confined hereafter to the writ under which he now seizes such goods as he can find, viz. the writ of *fiery facias*; and every practitioner knows that this would be a very defective and inadequate power, if it were to stand alone. The cash, book-debts, and securities belonging to the defendant would be utterly beyond the plaintiff's reach; for it is absurd to suppose that any effective discovery of them could be obtained. By the present law, they are within his reach in this way,—that he is enabled to seize the person of the debtor; and the latter, to redeem his person, readily consents to make his property, of whatever description, available. The House will perhaps permit me to quote a short passage on this head from a letter which I have received from a gentleman, once extensively engaged in the practice of the law, but who has now retired from the profession. He says: "In my early days, on one occasion, I consulted the marshal of the court, as to the preferableness of taking an execution upon a judgment against the body or the goods of a debtor, who certainly had goods, but it was uncertain where we could put our hands upon them. 'Oh,' said the marshal, 'let us take the body of the defendant, and he himself will soon find the goods.'" It is to be remarked, that the clauses in question do not even make it penal to suppress the discovery of property;

or to deliver in a false specification; for the subsequent clauses, 117 and 119, apply only to the case of voluntary cession; and clauses 120 and 121 only to the cases of destroying books or absconding.

With respect to the clauses 14 to 117, the whole of the machinery contained in them is calculated, in the highest degree, to encourage fraud, to ruin creditors, and to impair credit. By surrendering 50*l.* a man may, at any time, wipe off debts to the amount of 100,000*l.*

The protection supposed to be afforded to creditors, by requiring the certificate to be signed by four-fifths of their number, will prove delusive, and so will the provisions for preventing fraudulent transfers and concealments. On this subject, it is sufficient to refer generally to the experience of persons practising in bankruptcy. Even under that system, these checks are often very inoperative; but in the case of an insolvent not in trade, where the estate to be divided is generally smaller, and the claims upon it more trivial, certificates will be granted with even greater facility than in bankruptcy, and inquiries into fraudulent transfers and concealments more frequently abandoned, from the apprehension of incurring expense. It is to be observed too, that the penal provisions, even if enforced, are defective. The fraudulent concealment of property is by clause 117 only a misdemeanor, punishable with imprisonment, without or *with* hard labour; and of these penalties the latter will certainly never be inflicted. In such cases, where there is a discretion in the judge, it is sure to be exercised on the lenient side.

It is plain then, Sir, that this bill will be alike injurious to debtors and creditors. In the former it will beget remissness and improvidence, and these will frequently lead to embarrassment and fraud. The inducement to prudence and industry will, by this bill, be in a great measure taken away; and the impunity afforded by the bill to perjury and fraud will operate as a premium to the practice of them. The honest and industrious creditor will no longer be protected. Cheated, defrauded, laughed at, he will be driven to despair. This bill will make knavery your only profitable trade.

But it may be said, that an end will be put to the system of giving credit; and I hold in my hand a pamphlet, (which appears to have been pretty widely circulated, for it is the second edition,) entitled *Credit Pernicious*. "I suspect," says a correspondent of mine, "that Sir John Campbell is a disciple of this school, and that the present scheme is but a feeler to the object contemplated by Mr. Archibald Rosser!" Whether this conjecture be well founded or no, I will not determine. But, if the object of the bill be to put an end to credit, it will entirely fail. Credit, in spite of this bill, will be as extensively given as ever; but not at the same rate of profit. In war and in stormy weather, the rate of insurance on vessels at sea is in proportion to the supposed risk; and, in like manner, the prices of all articles that are sold on credit will, when this

bill shall have passed, be charged much higher than they are now.

Sir, a good deal has been said on the evidence taken by the Common Law Commissioners, appended to their Fourth Report. Now I ask, if this evidence warrant the passing of the bill now before the House? What are the facts? Of 445 bankers, merchants, barristers, attorneys, and traders, only sixty-one expressed any opinion favourable to the abandonment of arrest in execution, and few of these sixty-one spoke positively. Again, it appears, that in every state in Europe, except Portugal, arrest in execution is allowed. Further, eighteen out of twenty-three foreign jurists have expressed opinions against the abolition of arrest in execution. The weight of evidence, therefore, is decidedly against this bill. Nor, Sir, do the sentiments expressed by the four Commissioners who signed the Report, go the length of recommending such a bill as this: far from it; and the Supplementary Paper, published by Mr. Serjeant Stephen, in the Fourth Report, dissents in the strongest manner from the conclusions on which the bill is founded. That most learned and able person sets forth at large the reasons which induce him, very reluctantly, to differ from his learned colleagues. I have no hesitation in declaring that my arguments against this bill are chiefly derived from the paper written by that eminent individual; and I take the liberty of recommending to honorable gentlemen, before they vote in favour of this bill, carefully to peruse that admirable paper.

Sir, if it were proposed to apply this bill to a new country, I should not much wonder, but that a set of gentlemen, calling themselves, *par excellence*, political economists, should wish to apply it to England, does, I must say, fill me with astonishment! That in a country burthened with a public debt of 800 millions, and embarrassed with private debts to an incalculable amount;—in a country where employment for labour is, in a great measure, furnished by means of a refined and extensive system of credit, it should be desired to pass a bill like this, appears to me little short of madness! True it is, that it will break down the aristocracy—true it is, that it will give to the Crown enormous patronage; but I can hardly believe, that any sane person can wish to degrade the nobility and gentry of the country. Nor can I suppose, that the purity-administration we are now blessed with can desire to use, as *spartula*, to satisfy the appetite of their hungry followers, the patronage created by this bill. Be this as it may, some of the effects of this bill will be to create an immense mass of patronage, and to weaken and destroy the landed interest!

One word as to the petitions that have been presented in respect to this bill. There are, I believe, sixty-six petitions. Of these sixty-six petitions, fifty-three are from bankers, merchants, and others, *against* the bill. The thirteen in favour of it are, I think, from debtors confined in the different gaols of the kingdom. I will here beg leave to read a short extract from a tract, in the British Museum,

entitled, "*Reasons for the continuance of the process of arrest, for the good of the commonwealth, 1659*," cited by Mr. Serjeant Stephen, in the fourth Report of the Common Law Commissioners. "To exempt the person from arrest, will much gratify that sort of people who want honesty to pay their debts, and will be glad that their persons may be free,—they will be sure to have nothing beforehand, lest the creditor should find any thing; whereas the fear of a prison or arrest would make them follow their callings, spend less, and save something to pay their debts." Sir, these are the words of our ancestors; not listening to the notions of theorists, but following the sober and wise lessons taught by long experience. Since this tract was published, nearly two hundred years have elapsed, during which period the power of arrest and imprisonment for debt have existed,—and in spite of numerous errors on the part of governments,—in spite of great difficulties and some calamities,—England, owing chiefly to the protection afforded to industry and property by the law, and also to a refined system of credit, stands pre-eminent amongst the nations of the world. Let us not, by suicidal experiments, such as this bill, hurl her from the proud station which she occupies.

On a former occasion, the learned knight, his Majesty's Attorney General, spoke of his motives. Now, I have no doubt that in bringing in this bill, he is actuated by benevolent motives; but so was the knight of *La Mancha*. His intentions were excellent; but his attempts to redress supposed and imaginary grievances were not the less absurd and mischievous. The learned Attorney General, unquestionably, means well; and I bow, with much deference, to his great knowledge and long experience in the practice of the profession to which he belongs. There is no man whose opinion I would sooner take on a point of law. But he will pardon me for saying, that, as respects the nature and effects of commercial credit, I consider him extremely ignorant. And, in no unfriendly spirit, I would advise him to discontinue his chivalric endeavours to assist trade and commerce by rash and unadvised alterations in the law of debtor and creditor.

Experience, which is our safest guide, proves, that all the ingenuity of legislators is not a match for the cunning and craft of knavish men to remove and conceal all their visible and tangible property; that oaths tendered to such persons are of no avail; and that any reliance on them will only serve to increase perjury and fraud; and that the best test of the ability of, and the strongest inducement to, a debtor to pay his debts, is the power of arrest and imprisonment possessed by a creditor. The bill, which goes to take away this power, is totally uncalled for. The country has difficulties now to contend against, without those which this bill would create; and, thinking, as I firmly do, that a more absurd, mischievous, and dangerous bill was never laid on the table of this House, I must give it my decided negative.

## REMARKABLE TRIALS.

No. XXXI.

STEPHEN PROSPER BANCAL, FOR MURDER.

STEPHEN PROSPER BANCAL, a surgeon of the navy, was brought up for trial, on the charge of having premeditatedly taken away the life of Zelia Troussel, the wife of M. Priolland. Bancal, then aged 27, accompanied his sister in 1826 on a visit to the family of M. Troussel, a rich merchant of Angoulême, where he saw, for the first time, Madame Priolland, aged 20. Though the duration of his visit was only eight days, yet so great an intimacy sprung up between Madame Priolland and him, that they corresponded for five months, which then ceased by the desire of M. Priolland. Bancal then left France for Senegal, and up to 1831, he and Madame P. met but twice, and both times in the presence of her husband. In 1834, Bancal returned from Senegal, and passed some weeks in daily and intimate intercourse with Madame Priolland, whose husband was in Mexico. It was in one of these interviews, according to the prisoner's statement, that Madame Priolland proposed to him the project of putting themselves to death,—a proposal which at first he looked upon as mere badinage, but which soon took serious possession of his mind. The last moments passed by Bancal with Madame Priolland were occupied by devising the manner of their death. Bancal proposed the vapour of burning charcoal; but this Madame Priolland objected to, as she said she wished to see herself die. It was finally resolved that she should open her veins, and that when she fainted from loss of blood, that he should divide an artery; but in order to be assured against any chance of failure, he was to be provided with a sufficient quantity of acetate of morphine. These resolutions were formed at parting in February last, and they were to meet again on the 14th of March, at Poitiers, never again to separate. In the interval, Madame Priolland placed her daughter, ten years of age, to a boarding school, and made other arrangements, and joined Bancal at the time appointed. It was here, for the first time, if the prisoner's statement is to be believed, that any criminal intercourse took place between the parties. On the 17th of March they arrived at Paris, when letters were written by both, vaguely announcing their end. Bancal, in a letter to his mother, talked of a duel, from the effects of which he was not likely to recover, and Madame Priolland represented herself as dangerously ill. The 25th of March being the time fixed on for the accomplishment of their intent, they paid their bill at the hotel, and ordered a dinner for themselves and a friend at half-past six o'clock. This friend, named Casemecasse, to whom they intended to bequeath the trust of seeing them buried in one coffin—(they had written a letter to that effect, which he was not to receive till next morning)—came at the appointed hour, and remained with them until ten at night, without remark-

ing any thing in their manner that could awaken suspicion of what was to happen. Bancal accompanied him down stairs, and embraced him affectionately; and Madame, during his absence, ordered a foot-bath to be brought into her chamber, so that on his return every thing was in readiness for the tragedy, which began about eleven o'clock. The following are the details, as given by Bancal himself, in his first examination before the magistrates:

"On the night of the 23d of March, at eleven o'clock, Zelia asked me to put an end to her life. I bled her twice in the legs, and she lost a great deal of blood, and would have fallen from the chair on which she was sitting, had I not with great difficulty supported her. However, after some time my strength failed me, and she slipped down on the floor. My first efforts to lift her up and place her on the bed were ineffectual; but at length I succeeded, and we lay side by side. The hours wore away, and she still lived. I asked her if she desired to live? She answered, 'No!' I then spoke of making use of the bistouri which I had, but she objected, saying, she could not support the idea of the iron entering her heart. I then asked her if she would take some of the acetate of morphine, which I had provided. She answered 'Yes!' and I immediately gave her a dose, having first tasted it myself, and added some sugar to destroy the disagreeable taste. I then took a dose myself. We remained for a long time in that state. We felt both of us vertigo, and at length vomiting came on. I then divided the artery of her left arm, from whence the blood sprang forth. At that instant she saw day-light appear. I had made her suffer very much; but I had no idea it was so difficult to cause death. I asked her again if she wished to live. She replied, 'No,' and begged me to put an end to her. 'I do not wish that they should see me (said she); they will soon be here: I do not wish to see them. You spoke to me of means: employ them.' I then stabbed her with a bistouri, but no blood followed: the blow was too feeble. I stabbed her a second time; that was a good one (*celui-là fut bon*). She pressed my hand, and never after made the least movement. I then stabbed myself thrice with the bistouri. I lost a great deal of blood, but I did not kill myself. I plunged again the instrument three times into my wounds, and turned it in them, but without succeeding. That is all."

On the 24th of March, Casemecasse received the letter written to him the night before, and hastened to the hotel, where, after causing the door of Bancal's chamber to be opened by a locksmith, Bancal and his ill-fated victim (she quite dead), were found stretched upon the same bed. A stream of blood was flowing abundantly from a wound in the left breast of Bancal, and who until the bistouri was wrested from his hand, was still endeavouring to stab himself with it. On a table lay a letter from Bancal to Casemecasse, in which were retraced, hour by hour, all the agonizing details and harrowing incidents of the dreadful scene. On

the same table was another paper, signed by both, declaring that it was with their own free will and by their own hands, that they had destroyed themselves.

For some days it was supposed that Bancal could not survive. He, however, recovered, but again attempted his own life on the 3d of April with a knife, which he had contrived to get possession of. Since then he has promised not to commit suicide. In a letter to the magistrate, he says, "I shall resign myself to live, since I am condemned to do so."

Such is a report of the case previously to the trial before the Court of Assize at Paris. The trial commenced by reading the act of accusation. The prisoner was then closely interrogated, from whence it resulted that he had for some time been acquainted with the lady Madame Priolland, of whose murder he was accused; that he had kept up an intimate correspondence with her previous to his leaving France for Senegal; that during his absence he had formed one of those connexions common in the latter country; but that on his return in 1834, he had renewed his intimacy with Madame Priolland. It appeared further, that the idea of mutual destruction originated with the lady, and that he had been himself only consenting to the act. After entering into lengthened details relative to the mode in which their deaths were to be effected (by administering poison and bleeding) and which, though employing the same means, was successful only with the female,

The *President* demanded whether he persisted in stating that Madame Priolland was desirous of his putting an end to her life, and received an affirmative reply.

The following witnesses were then examined:—

The first was M. Casemecasse, the friend of the prisoner, who seemed to have been the witness of the last acts of the two intended victims. Madame Priolland wrote to him in these words:—"This evening, after you are gone, we shall enter Charon's bark. The money we leave will meet the necessary expenses, and procure us a wooden cross, with our names, *Zelia* and *Prosper* inscribed on it; nothing more." He it was who received a bulletin written by the prisoner, describing the dying moments of Madame Priolland, and who first ran to their assistance, and opened the door of the chamber of death. The witness stated that he dined with them on the evening of the fatal attempt. Madame Priolland was very gay; she sang a romance, which had some reference to the wooden cross for which she wrote. When questioned which of the two appeared to have the ascendancy over the other, he replied, "Madame Priolland."

Another witness, Mr. *Mascrey*, stated that a few days before he had paid Madame Priolland the amount of a bill for 3000 francs. He was well acquainted with the lady, whose gentleness of disposition he described as being one of her greatest charms. He did not conceive that she was a person of an excited imagination; that, brought up by a mother who was very re-

ligious, she was not in the habit of reading romances. The same witness had never heard of domestic disagreement in her house, nor did he ever hear of Madame Priolland entertaining any aversion for her husband.

Four medical men successively verified the exactness and sincerity of the declarations of the prisoner, relative to the various circumstances connected with the long and frightful homicide, of which Madame Priolland became the victim. All were of opinion that she made no resistance, and felt at a loss to explain how the prisoner could have survived the two attempts made by him to commit suicide.

The *Attorney General* (M. Plougouln) then addressed the Court. He said that Providence had withheld the suicidal hand of the prisoner, that he might be brought to the scaffold, to offer an example to the miserable partizans of new doctrines. Without, however, dwelling on the acts of those who sustained this fatal theory, he energetically declared that no consent on the part of the victim could extenuate the crime. This consent must have been given in a moment of frenzy, which should have had no weight or authority with one who preserved his reason. Moreover, suicide was an excuse which was not admissible in such a case. The act of suicide is merely an endeavour to escape from human laws. He cited different judgments of the Court of Cassation, in which it was laid down that homicide was never admissible, save as a means of legitimate self-defence, and that suicide itself cannot be urged as a plea, unless the object attempted be completed. M. Plougouln concluded by calling upon the jury to condemn the prisoner, in the name of morality and of civil law. "Our justice," he added, "may extend to indulgence; but it will be no longer justice if it extend to impunity."

The prisoner's defence was conducted by M. Hardy, who said that he saw only madness and fever in the acts now brought forward for judgment, and threw the blame of these acts upon the state of public morals and literature, which Government, he averred, did nothing to repress. Nothing, he urged, could be effected by Courts of Justice in attempting to re-establish the moral code. Without, however, developing his ideas further, he admitted the power of religion to produce that restriction of morality. M. Hardy sustained, that *co-operation in suicide was not murder*. He admitted the extent of the evil, but declared that there was no law which could punish it, and affirmed that Bancal could not be condemned.

M. Plougouln, after some interval, again renewed his accusation and argument, which was eloquently answered by M. Hardy, and the jury retired to deliberate. At a late hour they returned into Court, and the foreman stated the finding of the Jury: "Upon my honor and conscience, before God and before men, the verdict of the Jury upon all the questions of the case before it, is, *No*; the prisoner is not guilty."

## PARLIAMENTARY RETURNS.

### COURTS OF REQUESTS, WESTMINSTER.

Return to an Order of the Honourable the House of Commons, dated 8th April, 1835, for

Returns from the Clerks of the Courts of Requests in the city and liberty of Westminster, of the total amount of all sums of money paid into their respective Courts as fees, by virtue of an act of parliament, 24 G. 2. from 31st Dec. 1830, to 31st Dec. 1834, both inclusive;—setting forth the amount in each year respectively, and also stating the nature of the security the suitors have for monies paid into the said Courts by their debtors, if any.

From 31st Dec. 1830, to 31st Dec. 1831, the total amount of fees received in both Courts were	£	s.	d.
	2050	15	1
Expenses*	-	-	- 829 11 4

Net fees, after paying expenses - 1221 3 9

High Bailiff's proportion of the net fees - 333 13 11

The two principal Clerks' proportions of the net fees, each 443 14 11

In 1832, total amount of fees received	-	-	- 2007 3 8
Expenses	-	-	- 911 5 6

Net fees, after paying expenses - 1095 18 2

High Bailiff's proportion of the net fees - 315 8 1

The two principal Clerks' proportions of the net fees, each 390 5 1½

In 1833, total amount of fees received	-	-	- 1948 8 6
Expenses	-	-	- 868 11 1

Net fees, after paying expenses 1079 17 5

High Bailiff's proportion of the net fees - 313 12 8½

The two principal Clerks proportions of the net fees, each - 383 2 4½

In 1834, total amount of fees received	-	-	- 1831 7 6
Expenses	-	-	- 835 0 11

Net fees, after paying expenses 996 6 7

High Bailiff's proportion of the net fees - 280 10 7½

The two principal Clerks' proportions of ditto, each - 357 17 11½

\* The expenses consist of the rent, taxes, and repairs of the two Court Houses; the salaries of two under-clerks, four high bailiffs' officers, and other persons employed; and the printing, stationery, and other necessary expenses attending both Courts.

In obedience to the latter part of the above order, the undersigned Clerk begs to state, that the Legislature has provided no legal security to the suitors for money paid into the said Courts by their debtors.

JOHN HODGSON, Clerk.

May 12, 1835.

Mr. Christopher Cuff, the other principal Clerk, having been elected to his office so recently as the 22d April last, has not the information necessary to enable him to join in making the above return.

## LIST OF NEW PUBLICATIONS.

Archbold's Summary of the Law relative to Pleading and Evidence in Criminal Cases; with the Statutes, &c. 6th edit. By J. Jervis, Esq. Price 18s. boards.

A Digest of Cases in the Arches and Pre-rogative Courts of Canterbury, contained in the Reports of Sir George Lee, 1 Phillimore, Addams, and Haggard. By Edwin Maddy, Esq., D.C.L. Royal 8vo. Price 15s. bds.

Character of Lord Bacon, his Life and Works. By T. Martin, Esq. 12mo. Price 6s.

Plain Instructions for Overseers and Electors in the Registration of Voters for Counties, Cities, and Boroughs, in England and Wales. By W. D. Cooke, Esq. 18mo. Price 2s. sewed.

The Duties and Liabilities of Executors and Administrators under the Stamp Acts. By J. N. Mahon, Esq. 12mo. 7s. boards.

Reports of Cases in the King's Bench Practice Court. By A. S. Dowling, Esq. Easter Term, 5 W. 4. Vol. III, Part V. Price 10s.

New Cases in the Court of Common Pleas, Easter Term, 5 W. 4. By P. Bingham, Esq. Vol. I, Part IV. Price 9s. 6d.

## INCORPORATED LAW SOCIETY.

### MEMBERS ADMITTED.

August, 1835.

Blower, Joseph, Lincoln's Inn Fields.  
Kensit, Thomas Glover, Skinners' Hall.

## MASTERS EXTRAORDINARY IN CHANCERY.

*From July 21 to Aug. 18, 1835, both inclusive, with Dates when gasetted.*

Ainsworth, William, Preston, Lancaster. July 28.

Beckingsale, William Jefferies, New Sarum, Wilts. July 28.

Craig, George, Braintree, Essex. Aug. 18.

Eades, George, Evesham, Worcester. Aug. 11.

Flook, William Land, Bristol. July 24.

Floud, Thomas, jun., Exeter. July 21.

Greene, Thomas, Chichester, Sussex. Aug. 18.

Hill, Joseph Hickson, Kingston-upon-Hull, York. July 24.

Loynes, Robert Thurston, Wells next the Sea, Norfolk. July 28.

## DISSOLUTIONS OF PROFESSIONAL PARTNERSHIPS.

*From July 21 to Aug. 18, 1835, both inclusive, with Dates when gasetted.*

Peters, George Frederick, and Robert Collins, Bristol, Attorneys, Solicitors, and Conveyancers. July 21.

Phelps, Stephen Francis, and John Tivitoe Thring, Warminster, Wilts, Solicitors, Attorneys, and Conveyancers. Aug. 7.

Pocock, Thomas, William Fisher, and James Clift, Ely Place, Holborn, Attorneys and Solicitors, as far as regards Thomas Pocock. Aug. 18.

Wright, James, and John Mason Guest, Underhill, London, Attorneys and Solicitors. Aug. 11.

## BANKRUPTCIES SUPERSEDED.

*From July 21, to Aug. 18, 1835, both inclusive, with Dates when gasetted.*

Bishton, John, Langley Field, Dawley, Salop, Iron Master. Aug. 18.

Crosby, John, Nottingham, Dyer. July 24.

Gadsby, John, Nottingham, Baker. July 21.

Hall, Joseph, jun., Kidderminster, Worcester, Victualler & Dealer in Spirits. Aug. 11.

Jacobs, Simon, Manchester, Merchant. July 28.

Jones, Thomas, Birmingham, Collar Maker. July 28.

Moore, Daniel, Bordesley Iron Works, Aston, near Birmingham, Iron Master. Aug. 11.

Price, Alfred, Priest Court, Foster Lane, Cheapside, Scraw Bonnet Maker. Aug. 11.

Warren, John Wittewronge, Blandford, Dorset, Draper. Aug. 4.

## BANKRUPTS.

*From July 21, to August 18, 1835, both inclusive, with Dates when gasetted.*

Ash, Thomas, Birmingham, Druggist and Grocer. *Newton*, South Square, Gray's Inn : *Harrison*, Birmingham. July 28.

Allan, John, Grove Street, Walworth Common, Surrey, and Alfred Place, Spa Road, Brompton, Brewer. *Knabbery*, Carthusian Street, Charterhouse Square : *Johnson*, Off. Ass. July 31.

Alred, James, Idle, York, Cloth Manufacturer. *Strangways*, & Co., Barnard's Inn : *Blackburn*, Leeds. Aug. 4.

Bone, Margaret, South Shields, Durham, Widow, Ship Owner, Grocer, and Spirit Merchant. *Lowrey*, Pinner's Court, Broad Street, London, and at Tynemouth. July 21.

Boniface, John, Eastergate, Sussex, Malster. *Sowton & Co.*, Chichester : *Sowton*, Great James Street, Bedford Row. July 24.

Bates, Wm., Lower Shaw Hill, Skircoat, Halifax, York, Merchant. *Jacques & Co.*, Barnard's Inn : *Stocks*, jun., Halifax. July 24.

Beeden, Jonathan, Campey Ash, Suffolk, Innkeeper and Builder. *Frankham & Co.*, Basinghall Street : *Cubbold*, Ipswich. July 24.

Blandy, Charles, Worcester, Scrivener. *Becke & Co.*, Essex Street, Strand : *France*, Worcester. July 24.

Brown, Thomas, Mark Lane, Sack Manufacturer. *Stafford*, Buckingham Street, Strand, and Lombard Street Chambers, Clement's Lane : *Johnson*, Off. Ass. July 28.

Bentley, John Edward Collingwood, Great Newport Street, Long Acre, Dealer in Pictures and Curiosities. *Amory & Co.*, Throgmorton Street : *Casson*, Off. Ass. July 31.



- Beard, Tho., sen., Longhope, Gloucester, Victualler. *Webster & Co.*, Bedford Row; *Cadle*, Newent. Aug. 7.
- Burckin, Hancock, Sheffield, York, Table Knife Manufacturer. *Brookfield & Co.*, Sheffield: *Preston*, Tokenhouse Yard. Aug. 7.
- Beck, Peter, Bolton-le-Moors, Lancaster, Grocer. *Hitchcock*, Manchester: *Johnson & Co.*, Temple. Aug. 7.
- Bessell, Edward, Corbet, Edward Street, Portman Square, and of Waterloo Place, Shepherd's Bush, Middlesex, Lodging-house Keeper. *Adwards*, Off. Ass.: *Pellock*, Basinghall Street. Aug. 11.
- Brooke, James, Lincoln, Chemist and Druggist. *Atkinson & Co.*, Church Court, Lothbury: *Broughton & Co.*, Bawtry. Aug. 11.
- Blenkin, Geo., and Wm. Shackleton, Kingston-upon-Hull, Merchants and Seedsmen. *Shaw*, Ely Place: *Richardson*, Hull. Aug. 11.
- Battley, Robert, South Shields, Durham, Woollen Draper and Clothes Dealer. *Johnson & Co.*, Temple: *Seddon & Co.*, Manchester. Aug. 14.
- Brown, John, Corbridge, Northumberland, Spirit Merchant. *Ingledew*, Newcastle-upon-Tyne: *Williamson & Co.*, Verulam Buildings, Gray's Inn. Aug. 18.
- Crompton, Thomas Livesey, Worthington Mills, Standish, Lancaster, Paper Makers. *Addington & Co.*, Bedford Row: *Melkison*, Manchester. July 24.
- Collingwood, Thomas, Abingdon, Berks, Corn Dealer. *Ford*, Great Queen Street, Lincoln's Inn Fields: *Frankham*, Abingdon. July 24.
- Croston, Tho., jun., Liverpool, Painter, Plumber, and Glazier. *Toulmin*, Liverpool: *Norris & Co.*, Great Ormond Street. Aug. 7.
- Clements, Robert, Upper Berkeley Street West, Connaught Square, Middlesex, Bricklayer and Builder. *Low*, Upper Gloucester Place, Regent's Park: *Canham*, Off. Ass. Aug. 14.
- Castellor, John, Brownlow Street, Holborn, Plasterer. *Badham*, Warwick Court, Gray's Inn: *Goldmid*, Off. Ass. Aug. 14.
- Dickinson, Wm., Cateaton Street, London, Wholesale Shoe Manufacturer. *Bricker*, Off. Ass.: *Babington*, Lawrence Pountney Hill. July 21.
- Evamy, Richard, Southampton, Hop Merchant. *Sherpe & Co.*, Southampton: *Jones & Co.*, John Street, Bedford Row. July 24.
- Elton, William, Basinghall Street, Dealer in Woollen Cloths, and Merchant. *Jacobs*, Crosby Square: *Tarquand*, Off. Ass. July 31.
- Emmett, Thos., Holborn Hill, Pia and Needle Maker, and General Hardwareman. *Devision*, Broad Street: *Canham*, Off. Ass. July 31.
- Eagleton, Benjamin, Town Malling, Kent, Tailor. *Fisher*, Guildford Street, Russell Square; *Wilmott*, Rochester: *Whitmore*, Off. Ass. Aug. 7.
- Evans, Daniel, Newport, Monmouth, Tailor and Draper. *Price*, Lincoln's Inn Fields: *Battiscombe*, Bristol. Aug. 18.
- Franklin, Robert, Ferryby Sluice, Lincoln, Miller. *Shaw*, Ely Place: *Thornay*, Hull. July 24.
- Fewster, John, of the Lordship of Myton, Kingston-upon-Hull, Builder. *Wainman & Co.*, Chancery Lane: *Dryden*, Hull. July 24.
- Frood, Thos., Plymouth, Devon, Ironmonger, and Ship, Chandler. *Mentle*, Great, Surrey, Street: *Edmonds*, Plymouth. Aug. 7.
- Francys, Samuel, Liverpool, Bookseller and Printer. *Taylor & Co.*, Bedford Row: *Carson*, Liverpool. Aug. 14.
- Fennings, Richard, Chancery Lane, Law Stationer. *Groom*, Off. Ass.: *Swain & Co.*, Frederick's Place, Old Jewry. Aug. 18.
- Gray, John, Wentworth Place, Mile-End-Road, Linen Draper. *Abbott*, Off. Ass.: *Sole*, Aldermanbury. July 21.
- Goodall, Richard Wright, Birmingham, Florist. *Addington & Co.*, Bedford Row; *Marshall*, Birmingham. July 31.
- Greenwood, John, Halifax, York, Music Seller. *Theobald*, Thavies Inn, Chancery, Off. Ass. Aug. 7.
- Hobbs, John, Carrington Mews, Mayfair, and Beaumont Mews, Mary-le-bone, Livery Stable Keeper and Hackneyman. *Low*, Upper Gloucester Place, Regent's Park: *Canham*, Off. Ass. July 21.
- Hartley, Winchcombe Henry Savile, Upper Gloucester Place, Regent's Park, Music Seller and Publisher. *Lee*, Winchester; *Sheppard*, Lower Grosvenor Street, Grosvenor Square. July 28.
- Hall, Thos., and Thomas Hodgkinson, Nottingham, Hop & Porter Merchants. *Bowley*, Nottingham: *Johnson & Co.*, Temple. July 24.
- Hirschfeld, Ferdinand, and George Wilkinson, Windsor Terrace, City Road, Wax Chandlers & Oil and Spermaceti Refiners. *Smith*, King's Arms Yard: *Goldmid*, Off. Ass. July 31.
- Hammond, Robert, Warwick, Plumber & Glazier. *Sherpe & Co.*, Old Jewry: *Meynes*, Warwick. July 31.
- Hughes, William Henry, Portsmouth, Southampton, Fruit Merchant. *Wimbers & Co.*, Chancery Lane: *Callaway & Co.*, Portsmouth. Aug. 7.
- Haas, Robert, Kingston-upon-Hull, Spirit Merchants. *Ross & Co.*, Gray's Inn Place: *England & Co.*, Hull. Aug. 11.
- Hooper, George, Downton, Wilts, Tanner. *Cobb*, Salisbury: *Brundrett & Co.*, Temple. Aug. 11.
- Hutton, James, Flocadilly, Baker. *Gowers*, Cook's Court, Carey Street: *Tarquand*, Off. Ass. Aug. 18.
- Ives, Charles, Hockwold-cum-Wilton, Norfolk, Grocer. *Turner & Co.*, Basing Lane, Broad Street, Cheapside.
- Jones, Wm., Wigmore Street, Mary-le-bone, Carpenter, Builder and Auctioneer. *Hill & Co.*, Welbeck Street: *Goldmid*, Off. Ass. July 31.
- Keeney, John, Chancery, Lancaster, Grocer and Flour Dealer. *Cumley & Co.*, Southampton Buildings, Chancery Lane: *Lodge & Co.*, Preston. Aug. 18.
- Leat, Mary, Nine Elms, Battersea, Surrey, Whitening Manufacturer. *Turner*, Clifford's Inn: *Whitmore*, Off. Ass. July 24.
- Long, Wm. Edward, St. John's Wharf, Battersea, Surrey, Coal Merchant. *Sles*, Parish Street, Southwark: *Canham*, Off. Ass. Aug. 11.
- Linnett, John, Austrey, Warwick, Schoolmaster and Bookseller. *Power*, Atherstone: *Hawkins & Co.*, New Boswell Court. Aug. 11.
- Lewis, Wm., Liverpool, Merchant. *Gross*, Barry Street, Strand: *Johnson*, Off. Ass. Aug. 18.
- Messenger, Thomas, Liverpool, Corn and Provision Merchant. *Burdwell*, Liverpool: *Blackstock & Co.*, Temple. July 21.
- Merredith, Charles, Rochdale, Lancaster, Ironmonger. *Norris & Co.*, Great Ormond Street: *Heston*, Rochdale. July 21.
- Myers, Michael, Saint Peter's Alley, Cornhill, Fishmonger. *Sydney*, New London Street, Fenchurch Street: *Goldmid*, Off. Ass. Aug. 18.
- Otley, Edward, jun., Savage Gardens, Trinity Square, Tower Hill, Wine and Spirit Merchant. *Edwards*, Off. Ass.: *Bracy*, Change Alley, Cornhill. Aug. 11.
- Parkin, Thos., jun., and Donald Brown, Hatton Court, Cadeneedle Street, Ship & Insurance Broker. *Gunn*, Off. Ass.: *Tyde*, Beaufort Buildings, Strand. July 24.
- Penfold, Hugh, Salisbury, Linen Draper and Toyman. *Hodding & Co.*, Salisbury: *Philpot & Co.*, Southampton Street, Bloomsbury. July 24.
- Parker, George, Higham Ferrers, Northampton, Boot and Shoe Maker. *Brooking & Co.*, Lombard Street: *Tarquand*, Off. Ass. Aug. 4.
- Peel, Robert, Halifax, York, Card Maker. *Stansfeld & Co.*, Halifax: *Wiglesworth & Co.*, Gray's Inn Square. Aug. 18.
- Roberts, Geo. Wintle, Adams Court, Broad Street, London, Merchant. *Gross*, Off. Ass.: *Smith*, Barge Yard, Bucklersbury. July 21.
- Read, Thos., Bulwell, Nottingham, Lime Burner and Retail Beer Seller. *Folence*, Essex Street, Strand; *Grogg*, Nottingham. July 24.
- Rankin, Richard, Liverpool, Joiner and Builder. *Blackstock & Co.*, Temple: *Brooker & Co.*, Liverpool. Aug. 18.
- Rowe, Richard, Fulwood's Bents, Holborn, Victualler. *Lloyd*, Crown Court, Cheapside: *Whitmore*, Off. Ass. July 21.
- Shout, Benjamin, and Charles Henry Nicolas, Millbank Street, Westminster, Fish Sauce, Pickle and Blacking Manufacturers. *Adams*, Ely Place: *Lackington*, Off. Ass. July 21 & 24.
- Scott, Abraham, Hipperholme-cum-Brighouse, Halifax, York, Innkeeper. *Jaynes & Co.*, Barnard's Inn: *Stocks*, jun., Halifax. July 24.
- Selley, Charles, Cheltenham, Gloucester, Innkeeper and Coal Merchant: *Shirreff*, Lincoln's Inn Fields. July 31.
- Starling, Charles, Knightwatch, Worcester, Miller. *Sanders & Co.*, or *Oswell & Co.*, Worcester: *Becke & Co.*, Essex Street, Strand. July 31.
- Stelfox, Joseph, Manchester, Shoe Dealer. *Johnson & Co.*, Temple: *Bagshaw & Co.*, Manchester. Aug. 4.
- Scholefield, John, Moorhouse, Milnrow, Rochdale, Lancaster, Woollen Manufacturer. *Hardman*, Rochdale: *Hawkins & Co.*, New Boswell Court. Aug. 11.
- Slack, Joseph, Newcastle-upon-Tyne, Ship and Insurance Broker and Timber Merchant. *Chater*, Newcastle-upon-Tyne. Aug. 18.
- Tomalin, Thos., Luton, Bedford, Baker. *Turner*, Clifford's Inn: *Cham*, Luton: *Goldmid*, Off. Ass. July 24.
- Tunstall, George, Worcester, Hop Merchant. *Michael*, Red Lion Square: *Amos*, Evesham. July 28.
- Taylor, Edmund, Lower Place, near Rochdale, Lancaster, Cotton Spinner. *Bower*, Chancery Lane: *Gunn & Co.*, Manchester. Aug. 14.
- Wood, Charles, sen., and Charles Wood, jun., Poppin's Court, Fleet Street, Printers. *Dewey*, Dorset Street, Fleet Street: *Tarquand*, Off. Ass. July 24.
- Williams, Thomas Robinson, Leonard Strete Cox, and George Chambers, Lamb's Buildings, Bunhill Row, Patentees and Manufacturers of Japanned and Silk Wares; and as to Leonard Strete Cox and George Chambers, of St. Dunstan's Hill, London, Wine Merchants. *Coe & Co.*, Pancras Lane, Bucklersbury: *Whitmore*, Off. Ass. July 28.
- Winchurs, Samuel, Birmingham, Brass Founder. *Jelms*, Chancery Lane, *Wright*, Birmingham. July 28.
- Wright, Wm., Rougham, Norfolk, Horse Dealer. *Sewell*, Swaffham: *Ling & Co.*, Bloomsbury Square. July 31.
- Wyatt, John, Warminster, Wilts, Cabinet Maker. *Holme & Co.*, New Inn: *Chapman*, Warminster. Aug. 7.
- Wallace, Wm., Newcastle-upon-Tyne, Chemist & Druggist. *Ingledew*, Newcastle-upon-Tyne: *Williamson & Co.*, Raymond Buildings, Gray's Inn. Aug. 11.

# The Legal Observer.

Vol. X. SATURDAY, SEPTEMBER 5, 1835. No. CCLXXXIX.

— "Quod magis ad nos  
Pertinet, et nescire malum est, agitamus.

HORAT.

## LAW OF RETAINERS.

THE Practice in retaining Counsel continues in a very unsettled state, and questions frequently arise between practitioners, which are equally annoying to the counsel and the client. These points are usually referred to the decision of some eminent barrister. We have from time to time stated the practice as it appears in the books,\* but many cases are disposed of by private reference, without any discussion in Court. We are enabled to lay before our readers a few of these cases and opinions, and shall from time to time continue the collection. We hope ultimately that by this means the existing rules will be ascertained, although some of them may not be altogether approved. It is at all events important that the practice should be well known, as the first step towards its amendment.

Before stating the cases, it may be useful to give a summary of the practice, so far as we understand it to prevail. We shall do this without, at present, condemning or defending the grounds on which any of the regulations may be founded—our first object being to have the practice clearly ascertained.

A general retainer entitles the party to the services of the counsel retained in any action or suit for or against such party. The counsel so retained is bound to give his client notice when any special retainer is offered against him. If the client does not send a special retainer in the particular cause, the counsel may take the retainer of the other party.

If there be no general retainer, the counsel must accept the first special retainer

\* The cases reported are as follow: *Cholmondley v. Clinton*, 19 Ves. 261; *Ex parte Elsee*, and *Ex parte Lloyd*, Montagu's Cases, 61; *Baylis v. Grout*, 2 Myl. & K. 316.

that is offered; but this special retainer applies only to the particular cause, as specified in the retainer.

A special retainer for one plaintiff, or one defendant, may be superseded by a retainer for more than one plaintiff, or one defendant.

Any change in the parties to the cause subsequent to the retainer will render it void.

No special retainer can be given unless the action or suit has been actually commenced.

Neither advising on the case or evidence, nor drawing the pleadings, constitutes a retainer; and the counsel must accept the retainer of the opposite party, if first tendered, without previously giving notice to his former client.

Having thus stated the general rules, so far as we have been able to ascertain them, we now proceed to the cases and opinions which we have been favored with or collected.

It will be seen from the opinions on the following case, that where the same question may be litigated by several defendants in separate actions, a general retainer by the defendants, although given after a retainer by the plaintiff in one of the actions, will supersede a particular retainer.

In February 1798, a policy of insurance, with three names upon it, was put into the hands of *A. B.*, an attorney, to proceed against the underwriters. Actions by original were directly brought by *A. B.* against three of the underwriters, for whom *C. D.*, an attorney, appeared, and directly filed a bill in equity for all the underwriters against the assured. In July 1786, *A. B.* retained Mr. Erskine for the assured in one action only against the assurer. About three weeks after this, *C. D.* gave a general retainer to Mr. Erskine for all the underwriters, with the usual fee of five guineas. In June 1787, *A. B.* gave notice of trial for the sittings after Easter term in the said three actions, upon which *C. D.*, on behalf of

the underwriters, moved for and obtained the usual consolidation rule. *A. B.* has made his election to try only that cause wherein he retained *Mr. Erskine*, and insists that he is entitled to have *Mr. Erskine* as his counsel under that single retainer; whereas *C. D.*, on behalf of the underwriters, insists that under the general retainer he is entitled to have him as a counsel for the underwriters. Which of the retainers is binding?

The following is *Mr. Mingay's* Opinion.

"Having been myself in a similar situation, I decided the question on the opinion of several gentlemen at the bar, as well as my own. I have no difficulty in saying that the general retainer is binding."

*Mr. Lee's* Opinion is as follows.

"A special retainer, in a cause where more parties than one may separately litigate, as in this case, has already been decided insufficient to engage a counsel against a general retainer for the underwriters. *Mr. Erskine* ought therefore to return the special retainer, and keep the general one."

*Mr. Baldwin* gave the following Opinion.

"I concur entirely with *Mr. Lee* and *Mr. Mingay*. A further reason why, in the present case, *Mr. Erskine* ought to return the special retainer, is, that there were in fact different actions brought at the time, so that the counsel must either lose the four other retainers, or the four other defendants might have no effect from the retainer; for *A. B.* would only proceed in one cause where the other retainer was given."

In a somewhat recent case, similar to the above, except in some minor and unimportant circumstances, a general retainer was given to *Mr. Serjeant Wilde*, for the defendants, as underwriters, the plaintiff having previously given retainers in two actions on the same policy. The plaintiff had commenced three actions, but proceeded in two only. The opinion of the present *Mr. Justice Bosanquet* (then *Mr. Serjeant Bosanquet*) was taken whether *Mr. Serjeant Wilde* should accept the brief of the plaintiff or the defendant, on the trial of one of the actions. The opinion was as follows:

"I am of opinion that *Mr. Serjeant Wilde* is bound to accept the brief of the defendant. When the general retainer was given on behalf of the defendants, three actions at the suit of the plaintiff were pending, in which two special retainers only were given: these were superseded, according to the established rule, by the general retainer; and I think that the plaintiff cannot deprive the defendants of the benefit which they had acquired under the general retainer by suffering one of the three actions to drop."

*Mr. A.*, in the expectation that several actions would be brought against him, gave a general retainer to *Mr. Serjeant B.* A short time afterwards an action was commenced by

*Mr. T.* against *Mr. A.* and a *Mr. B.*, who are not partners, nor in any way jointly connected, except in the subject-matter of this action. *Mr. A.* and *Mr. B.* have distinct interests in this action, and appear by different attorneys. The attorney of *Mr. T.* tendered to *Mr. Serjeant B.*'s clerk a special retainer in this cause, entitled *T.* against *B.* and *A.* *Mr. Serjeant B.*'s clerk at first objected to take it, urging that he had a general retainer from *Mr. A.*, one of the defendants. *Mr. T.*'s attorney, however, insisted that his retainer was good, and that the general retainer given by *Mr. A.* did not extend to actions brought against him and others jointly, nor of course to this brought against him and *Mr. B.* *Mr. A.*'s attorney, on the contrary, insists upon his general retainer, and contends that as *Mr. A.* has no partner, he is entitled to the assistance of *Mr. Serjeant B.* in all actions brought against him, although other parties may be named defendants with him, and that otherwise he might be deprived of the benefit of the general retainer by a person unconnected with him being joined defendant in the action; the consequence of which would be, that in many instances the general retainer would be unavailing.

Opinion of *Mr. Scarlett* (now Lord *Abinger*).

"If *Mr. A.* makes a separate defence, it appears to me that his general retainer entitles him to the preference of the serjeant. Perhaps it is not necessary to say any more on this case, as it is alleged that *A.* and *B.* appear by separate attorneys, and stand upon separate grounds of defence."

In consequence of this opinion, *Mr. Serjeant B.*'s clerk took the special retainer of *A.*'s attorney, adhering to the general retainer, and refusing the retainer of *Mr. T.*

The Solicitor General was retained in a cause of *Harvey & ux. v. Cooke & others*, for the plaintiffs, which was heard at the Rolls, in 1827, and in which cause the plaintiffs obtained a decree.

The bill in that case was on behalf of one of eleven residuary legatees, for an account and distribution of the testator's property, and that a release stated should be set aside; and it was decreed accordingly.

The plaintiffs in another cause of *Collier v. Cooke*, are two sisters of the female plaintiff in the former cause, and their husbands and they claim exactly in the same right as *Mrs. Harvey*, viz. as residuary legatees, and pray by their bill to set aside the same release, and also the benefit of the decree and accounts in the former suit, and that theirs may be considered as a supplemental suit thereto; and their solicitor is the same.

The defendant *Cooke*, who is the executor of the testator, is the principal defendant in both causes; and various charges of fraud and undue concealment are made against him in both bills.

In the bill in *Hurvey v. Cooke* it was considered necessary to make all the other residuary

legatees defendants, and consequently the only daughter of the defendant Cooke, being one of the residuary legatees, was among the rest made a defendant, and being a *feme covert*, of course her husband, Samuel Platt, was made a defendant with her.

After the decree in *Harvey v. Cooke*, proceedings were threatened by some of the other residuary legatees against Mr. Cooke, of which of course Mr. and Mrs. Platt were aware; and Mrs. Platt's interest as residuary legatee being much outweighed by her father's interest as executor, they were naturally, from their near connection with the principal defendant, anxious to defeat the proceedings of the residuary legatees in their apprehended suit, and accordingly delivered a general retainer to the Solicitor General (then Mr. Sugden), the leading counsel, who had been previously retained in the former suit in the interest of the residuary legatees.

This general retainer was for Samuel Platt and wife. However, when the bill in the second suit came to be prepared, being in its nature supplemental, it was not considered necessary to make all the residuary legatees again parties, and therefore Samuel Platt and wife are not parties to this suit.

The same morning on which the plaintiff's solicitor filed the bill, he, on his way from the Six Clerks' Office, left at the Solicitor General's chambers a special retainer for the plaintiffs in *Collier and others v. Cooke and others*, being the earliest moment at which he could regularly do so.

It so happened, that since the decree in the former cause, a material defendant, a Miss Rowley, had died, and on Mr. Samuel Platt being her executor, the suit of Harvey and Cooke was revived against him as such, and he was also in the same character a necessary party to the second bill.

Platt proved Miss Rowley's will on the 1st of April, 1828, and the former suit had been revived against Mr. Samuel Platt, as executor, previous to the delivery of the general retainer.

Some time after the filing of the second bill and the special retainer for the plaintiffs, a special retainer in that suit for the defendant, Samuel Platt, was left with the Solicitor General. The same solicitor acts in both causes for the defendants Cooke and Platt.

The decree in *Harvey v. Cooke* was appealed from, and now stands No. 4 in his Lordship's paper.

The further directions in the same cause are also ordered to come on at the same time.

On the 18th of December last, the plaintiffs in *Collier v. Cooke* gave notice, and instructed the Solicitor General to move that the said cause might also be heard with the appeal, on an affidavit of the plaintiff's solicitor that orders had been obtained by both plaintiffs and defendants to read the answers, depositions, decree, and report in *Harvey v. Cooke*, on the hearing of this cause; that no other evidence had been given by the defendants in the second cause; and that the questions in both causes

were the same; and which order was not opposed by the defendants, and was made accordingly.

The cause of *Collier v. Cooke* appears therefore in the paper, with the appeal and further directions in *Harvey v. Cooke*.

A brief has been delivered to the Solicitor General, on the appeal, and also a brief on the further directions in *Harvey v. Cooke*, on behalf of the respondents (the plaintiffs), about which there is and can be no question.

A brief has also been delivered to the Solicitor General by the plaintiffs in *Collier v. Cooke*, who claim precisely in the same interest with the respondents in the former cause.

A brief has also been delivered to the Solicitor General by the defendant Samuel Platt, in *Collier v. Cooke*.

The question is, which of the briefs in *Collier v. Cooke* ought to be returned?

The defendant Samuel Platt insists that he is entitled to the services of the Solicitor General, on account of the general retainer for "himself and wife," which was first in point of time.

The plaintiffs say, that such general retainer being for "Samuel Platt and wife," is limited to the cases in which the husband sues or is sued in her right (as no doubt it was contemplated would have been the case here, when the retainer was given), and that the plaintiff's retainer being given before the second special retainer for Samuel Platt only, must prevail over it, as the brief delivered is not on behalf of Samuel Platt and wife, but Samuel Platt alone: that the point is similar to that of a general retainer for two partners, which only affects their *joint* rights, and does not give any preference to one of them suing or being sued separately, although a retainer for *one* would prevent counsel from appearing against the *two*.

The following is the opinion of Mr. Bell: -

"I am of opinion, that a general retainer for Samuel Platt and wife, not describing them as executor and executrix, does not operate as a general retainer for Mr. Platt alone, and especially in a suit where he alone is defendant, as executor, as his wife has not proved the will; so that I think the special retainer in *Collier v. Cooke*, which is that for the plaintiff, must prevail, if we consider that as an original suit. If we consider it as a supplemental suit, there may be a question whether counsel could accept this retainer, if Mr. and Mrs. Harvey objected; but Mr. and Mrs. Platt are no parties to the supplemental suit, but only Mr. Platt; and though they were parties to the original suit, they did not, nor could, retain him in that. It therefore appears that Collier's retainer must in either case prevail, as Mr. and Mrs. Harvey do not object."

19th Oct. 1830.

Two gentlemen attending an arbitration, disputed and exchanged blows; the clerk of one, alleging that he received personal damage in the conflict of the principals, brought an

action of assault against the other. *A.* was leading counsel for one party in this action at the ensuing assizes; it was not then tried, but stood over as a remanet for the next. At these next assizes, the brief of *A.* was delivered to another leader, without any communication with him, and he was out of the cause altogether. The gentleman who received his brief, knowing those facts, consulted the leader of the circuit whether he should hold the brief, and the leader decided that the brief ought not to be held by any but *A.* himself. The client, who was his own attorney, declined to give the brief back to *A.*, and the cause was referred to arbitration, for want of counsel.

This happened at the Derby assizes, more than a year ago.

It may be useful to add the following queries, which do not appear to be met by the general rules above stated. We shall gladly attend to any further communications on the subject.

If a brief be not delivered after retainer, must counsel receive a brief from the opposite party, after giving notice to the party retaining?

If the party retaining does not give a brief on each occasion that the cause is before the Court, may the opposite party do so, the first retaining party having notice?

Can a counsel, retained, and having briefs delivered up to and at the time of the hearing of the cause or trial of the action, take a retainer from the opposite party, on appeal or writ of error, without giving notice to his former client?

## REVIEW.

*Defence of Transportation, in Reply to the Remarks of the Archbishop of Dublin, in his Second Letter to Earl Grey.* By Colonel George Arthur. London: Cowie & Co. 1835.

We are induced to notice this work on account of the Reform which is in progress in our Criminal Laws, and the discussion which has taken place on the subject of Secondary Punishments, with a view especially to diminishing the instances in which the punishment of death is inflicted. We some time ago noticed the views of Dr. Whately, the Archbishop of Dublin, on this subject, (see vol. 5, p. 89;) and therefore must allow Colonel Arthur a hearing on his side of the question.

The following are the effects of transportation, as ably stated by the present author:

"Considered as *colonization*, or the removal of criminals from one part of the empire to another—from a thickly to a thinly peopled tract, transportation tends to prevent crime—

"First—By transferring that part of the population which is the least able to resist the temptation to commit crime, to a situation in which this temptation will operate with less force.

"Second—By transferring men to a situation in which their minds will be operated upon, by causes the very reverse of those which in England have, in so many thousand instances, converted poverty into pauperism, and gradually released the lowest class from the influence of moral restraint.

"Third—By culling out the criminals from among a crowded population, and the placing of them in a situation where they may be closely watched, even after the expiration of their sentences. When a convict is discharged from a penitentiary in England, he is, in the great majority of cases, almost immediately lost sight of; but when such a person is released from transportation, he does not even depart from the place of punishment—he remains, as it were, in prison, even after he has become free, and thus always continues, in some measure, at least to be under supervision.

"Fourth—By removing criminals in this manner, they are, as it were, taken from a situation in which they acted upon others, to one in which they are themselves acted upon. It is their interest in England, to teach others crime; but here it is the interest of others to teach them industry. It is, indeed, the interest of society in England to repress crime, but the particular individuals of whom that society is composed, are not, each, under the influence of self-interest, induced to attempt individually the reformation of a certain number of criminals. The result of such a course in Van Dieman's Land, has been so favourable, that of sixteen thousand men now under sentence, upwards of four thousand have never received any, even the slightest punishment, for misconduct.

"Fifth—By the removal of thieves from the scene of their activity, the number of the class is reduced, not only *there*, but as I have already shewn, *universally*.

"Sixth—By the removal of thieves, their competition as penitentiary labourers with the industrious poor is prevented, and the descent of the latter into pauperism, which is the parent of crime, is delayed, or at least not accelerated.

"Considered as a means of *reformation*, it proves beneficial in preventing crimes:—

"First—Because while the convict is subjected to reformatory discipline, the knowledge that the habit of labour he is acquiring will enable him to obtain an adequate livelihood in his station, after the expiration of his punishment, comes in aid of the restraint under which he is placed, and encourages him to persevere in a course of good conduct. An apprentice to a trade or profession, which he knows will avail him after his apprenticeship has expired, is usually a very different person from an apprentice who does not entertain any such anticipation.

"Second—Because the convict is generally taught farm labour, and he may continue, after

his sentence has expired, to work in the open field in the country,—a condition the most favourable of all to perseverance in good behaviour: whereas the kind of labour which a convict is usually taught in a penitentiary, is the least favourable to his permanent reformation, viz. some manufacture already overstocked with workmen, and in which he probably cannot obtain employment after his release, except (and then only if he be more than usually fortunate,) in a town,—the situation of all others the most dangerous to the stability of his newly acquired habits.

“No other punishment possesses all these advantages in the same degree. But nevertheless, I am far, as I have already said, from being of opinion that any description of punishment will ever be found, which will entirely prevent crime: nevertheless, we should always be endeavouring to approach this object, however hopeless we may be of ever completely attaining it. And in this respect much progress has been made of late years, in rendering the system of transportation in every respect more efficient than it was formerly.

“It is now made a severe punishment to all classes of convicts, nor is it, by any means, so unequal in severity as some have imagined.

“No such variety exists in the treatment of convicts in the service of settlers, as have been asserted. The range within which it can prevail, is limited. It can neither (making an allowance for occasional exceptions) rise to improper indulgence, nor fall to tyranny: for in the one case, as I have shewn, the settler's own interests would be compromised; and in the other, the criminal would seek protection from the magistrate. Besides, the diet and clothing of the convicts are fixed by regulation.

“Improper conduct is also more certainly prevented by the circumstance, that the present prosperous condition of the majority of the settlers, and the advanced state of their homesteads, enable them to act upon some determinate system, rather than upon one of temporary expedients. But when, several years ago, the emigrant took up his abode at the distance of perhaps thirty miles from any other occupant—when his means were small—when his supplies of meat, flour, and clothing were precarious—when there were no paid, and few honorary magistrates—when there were no proper means of effectively punishing for misconduct—when there were no enclosures within which the working cattle could be kept at night—when they might stray into the bush, in which it might be pretended by an unwilling servant that they could not be found; it is evident that he must have had many difficulties to contend with as to the discipline of his household, which now do not present themselves, conducted as the work on very many of the farms is, with much of the regularity and precision observed in England. Nor is the improvement in the management of the gangs employed, and coerced by the government, less remarkable.

“In the commencement of the colony, the

material for coercion was wanting: irregularities of every kind unavoidably prevailed.—Vendors of spirits, since restrained under severe penalties, traversed the country. Inebriety was especially prevalent, and frightful were the excesses sometimes indulged in. But after a while, emigration was encouraged by his Majesty's government: free settlers began to arrive. As the colony became known, these gradually increased in number, and after the peace, many half-pay officers joined in the stream. These emigrants generally brought with them free servants, and almost imperceptibly the constitution of the community was modified, until the number of the emigrants nearly equalled that of the convicts.

“Under these circumstances, it became the policy of the government to discontinue grants of land to expirees, and to foster, by every prudent means, the success of the emigrants. From this and other causes, the latter became, almost to the exclusion of the former, the landholders of the territory, the assignees of convicts, and the holders of such public offices as were not filled from England.

“The market upon which the convict settlers had originally depended for the purpose of their farm produce, was the commissariat. The fixed price was, under all circumstances, ten shillings a bushell for wheat. But this course was discontinued as soon as the farmers became more numerous and industrious, and a larger quantity of corn was produced. Tenders were then invited; the emigrant settlers competed with the emancipist settlers; and wheat was offered at from six to seven shillings per bushell. The expiree, notwithstanding his previous occupancy, and his having had the choice of the best lands, and those nearest to the market, fell a victim to the habits of inebriety, which he had contracted at the commencement of the colony. The slovenly and interrupted farming which answered his purpose when there was no competition, and the price was large, could not withstand sober industry and low prices; and a very large proportion of the best lands originally granted to expirees, passed in consequence into the possession of free emigrants.

“The first point being gained, namely, the infusion of healthy blood into the constitution of the colony; the next object was the accomplishing of the subordination and discipline, which were so eminently desirable, but evidently could not be effected by any sudden change of measures. It was necessary, first to subdue the mind of the convict—to deprive him gradually of improper indulgences—to accustom him to restraint—to make him feel, by degrees, that he was under mastery. And it was expected, that when the early prisoners were thus reduced to the condition it was proper they should fill, little difficulty would be incurred in dealing with such as might afterwards arrive. Like elephants, the tame would assist in subduing the wild.

“In accomplishing this end, it was necessary to break up the spirit of free masonry and mutual dependance which once existed among

them; to distribute them throughout the country; to separate them into different classes; to introduce a regular system of rewards and punishments; and in order to give full effect to these, to consider every case, whether for punishment or reward, with an attention to the most minute details, in order to convince them, that while the strictness of the government was to be feared, its justice and consideration might be relied upon.

"By steadily pursuing this course for a considerable period, the government has gradually acquired a strong moral influence, and has approached an almost perfect system of discipline, while it has been enabled to mitigate the severity of particular acts of punishment, such as had formerly been had recourse to, in order to compensate for a defective supervision. It now governs by a system of surveillance and police prevention, and not by aggravated punishments, which, when frequent, are rather the opprobria of penal discipline, indications that the scheme is imperfect, than the evidence of a rigorous and well sustained coercion."

## THE PROPERTY LAWYER.

### No. XLIX.

#### ON THE LIABILITY OF AN ASSIGNEE TO BE SUE FOR BREACHES OF COVENANT.

The assignee of leaseholds is only liable upon the covenants contained in the lease, in respect of the privity of estate; and as no privity of contract exists between him and the original lessor, it follows that his liability can only last so long as he remains possessed of the estate. As soon as he assigns the whole of it over, the privity is destroyed, and his liability ends, though the assignment be made without notice to the lessor. *Pitcher v. Tovey*, 1 Show. 340; S. C. 4 Mod. 71. and references in Comyn's Land. and Ten. 2d edition, p. 27. Nor will an assignment to a mere pauper be deemed fraudulent, the assignor still retaining his right of action against the lessee upon the privity of contract. *Valiant v. Dodmede*, 2 Atk. 546. This being the rule of law, the question has been, whether an assignee would at law be liable, after he had assigned, to an action for breach of covenant incurred in his time. His liability in equity to account is quite clear; see *Treackle v. Cole*, 1 Vern. 165; 1 Eq. Ca. Ab. 47; *Philpot v. Hoare*, Amb. 480; 2 Atk. 219; *Valiant v. Dodmede*, *ubi sup.*; *Onslow v. Corrie*, 2 Madd. 330, 341. By the following case it is now decided that he is also liable at law.

Covenant by the plaintiffs, as assignees of the

reversion, against the defendant, as assignee of the lessee. The declaration, after stating the making of the lease, and the title of the plaintiffs, and the conveyance to the defendant, assigned by way of breach the non-performance of a covenant in the lease to repair, alleging it to be "after the assignment to the defendant, and during the continuance of the demise, and whilst he was possessed of the demised premises with the appurtenances." Plea, that after the defendant became the assignee of the demised premises as in the declaration mentioned, and before the commencement of the suit, to wit, on the 28th day of August, in the year 1834, he the defendant, by a certain indenture of assignment then made and duly signed by him the defendant, and sealed with his seal, for the considerations therein mentioned, did bargain, sell, assign, transfer, and set over unto one William Plunkett, his executors, administrators, and assigns, all and singular the premises in the declaration mentioned, together with the said indenture of lease and the several assignments thereof, and the full benefit and advantage thereof respectively, and to have and to hold the said premises unto the said William Plunkett, his executors, administrators, and assigns, from the date hereof, for all the residue then to come and unexpired of the said term of years demised by the said indenture of lease, subject, nevertheless, to the payment of the yearly rent thereby reserved, and to the performance of the covenants therein contained, and which on the lessee's or assignee's part were to be observed and performed; by virtue of which said indenture of assignment the said William Plunkett afterwards, to wit, on the day and year last aforesaid, entered into the said demised premises, with the appurtenances, and became and was thereof possessed, for the residue of the said term then to come and unexpired, whereof the plaintiffs, on the day and year last aforesaid, had notice; (concluding with a verification). Replication.—That the said breach of covenant, alleged and complained of in the said declaration, was committed by the defendant after the said assignment to him in the said declaration, and whilst he continued such assignee, and before the making or signing of the said supposed indenture of assignment in the said plea mentioned; (concluding to the country). Demurrer.—That the replication is not sufficient in law, because it does not traverse any matter alleged in the plea or put in issue thereby, or confess and avoid the allegation therein, or admit or deny that the said assignment in the said plea mentioned was before the commencement of the suit or otherwise, and leaves the traversable fact tendered by the plea wholly unanswered, &c. &c. Joinder.

Lord Abinger, C. B. said,—This is an action brought by a lessor against an assignee of the lease, upon a covenant running with the land, for a cause of action accruing in the time of the assignee, and before the assignment made by him. The defence is, that the assignment by the defendant took place before the action was brought, and that, in order to render an

assignee liable, it must appear not only that he is sued upon a cause of action arising in his own time, but likewise that the suit was commenced before the assignment, for that by such assignment the privity of estate upon which only the lessor can proceed, is determined. By the neglect of the assignee to repair, a breach was incurred in his own time, and a right of action thereupon vested in the plaintiffs. What is there, then, to divest that right of action, and to deprive the party of his remedy, his right to which was complete before the assignment? The argument for the defendant would establish the position that all assignees, by a secret assignment to an insolvent, may divest themselves of all liability for any breach of covenant which they may have incurred. The principle of law is, that so long as the privity of estate continues, the assignee is liable upon all covenants running with the land. If, upon the breach of any such covenant, the lessor may sue him during the continuance of the assignment, what is there to prevent him from bringing his action after the assignment? There may be cases of specific breaches of covenant, where to hold the contrary would be to commit great injustice. A covenant may exist with regard to maintaining machinery or other valuable property, the omission to perform which by the successive tenants of the premises, nothing could repair. If the assignee can free himself by assignment from the liability to make good his own default, is his assignee to be charged with the whole amount, or to whom is the lessor to resort? It can never be contended, that by an assignment to a beggar, an assignee shall be allowed to free himself from his vested liabilities.

The rest of the Court concurred.

Judgment for the plaintiff.—*Harley v. King*, 2 C. M. & R. 18.

## THE RUSSIAN CODE.

### No. III.

IN our last article on the subject of this very interesting Code, we concluded by stating the contents of the Second Book, on the subject of the maintainance of the roads, military supplies, &c.

We now proceed to the third Book. That is occupied with the legislation on the finances. It consists of a series of regulations, forming so many special codes; the first of which contains the land tax, the stamps, the excise: the second, the customs: the third, the coinage, the mines, the salt pits; the fourth, the quit-rents of the peasants in the dominions of the state: the fifth, those dominions themselves.

The inequality of the classes in Russia, has been the origin of the Fourth Book. It

comprehends the laws concerning the nobility, the clergy, the citizens, the free peasants—who are subdivided into different sorts;—the serfs; the persons who are not inhabitants of the kingdom—among whom are the wandering tribes, and the jews; and finally, foreigners. All matters respecting the population, which are to form the basis of the poll-tax and conscription, are also stated in this book.

The Fifth Book contains the Civil Laws, and those which affect the division of Property.

The civil laws are divided into seven titles: first, the rights and obligations as to family;—secondly, property in general;—thirdly, the mode of acquiring property;—fourthly, contracts;—fifthly, summary proceedings;—sixthly, judicial proceedings;—seventhly, execution.

The first title treats, first, of marriage, and then proceeds to the connections of parentage and affinity:—comprehending, under that head, the connection of father and son; the paternal power; adopted and illegitimate children; finally, the right of guardian and ward.

Three chapters compose the title concerning property in general. The first enumerates the several sorts of property. The distinction between hereditary and acquired property is of very great importance in Russian legislation.

The second chapter defines the nature and extent of the different rights to property, whether in fee-simple, fee-tail, or joint-tenancy. In this also are stated the important rights resulting from prescription, contract, and legal proceedings, whether for debt or damages. The modes of acquiring and preserving property in general are stated in the third chapter;—where also is contained the law as to written instruments, whether public or private.

The third title, which is also divided into chapters, treats of the different means of acquiring private property, namely, by gift;—that is to say, by donation of immoveables on the part of the sovereign; donation during life and by will; donation of marriage portion; donation by will. Secondly, by succession. Thirdly, by exchange and sale.

The fourth title is devoted to contracts, in the following order. First, the formation, execution, and dissolution of contracts in general. Secondly, the modes of strengthening contracts,—namely, security, penalty, &c. Thirdly, the various sorts of personal contracts.

The two following titles owe their origin



to the distinction peculiar to the Russian legislation;—that where the right, the *jus petendi*, is not contested, the plaintiff may, by means of summary execution, compel the defendant to fulfil his engagement, to give up the inheritance, to cease the cause of complaint. But as soon as there is a contest as to the right, there is a suit, which must be decided by judicial authorities.

The Sixth Book comprehends a great variety of matters, under the head of "Regulations of Political Economy." It is divided into five parts, with numerous subdivisions, forming so many different codes.

The first part states the organization of the establishment of credit, which are of two sorts: Banks of State, and Commercial Banks. To the first belongs the Bank of Loan (which might almost be considered as a sinking fund.—Its operations are confined to advances on real property); the Bank of Commerce, with its branches at Moscow, Archangel, Odessa, and Riga; finally, the Bank of Paper Money.

The Commercial Banks have been founded by private persons under the patronage of the government. They are to the extent of three. At the head of the particular provision regulating these different institutions, is the Council of the establishments of credit, and the Commission of the Sinking Fund.

Agricultural, manufacturing, and commercial industry are considered under three different heads. The author, quitting the order adopted by the economists, begins by considering commercial industry. He then proceeds to manufacturing industry,—inserting by the way the regulations as to the highways, land-carriage, navigation, police of civil buildings, of fires; and ultimately arrives at the fifth and last part of this book—agricultural industry.

We shall confine ourselves to the analysis of that part which treats of commerce. The first title contains regulations as to commerce and traffic. It establishes three classes or corporations of licensed merchants, and points out the cases in which commerce may be carried on without license.

The second title contains the commercial engagements and contracts. The word "engagements" in the Digest, is to be understood as meaning bills of exchange, and the word "contracts," as meaning only those for the payment of servants; orders for money; partnership.

The third title is exclusively devoted to maritime commerce.

The organization of the tribunals of commerce, the, form of proceeding, and bankruptcy, are the materials of the fourth title. In the same manner as in France, disputes between partners are to be submitted to arbitration; but what is peculiar to Russia on this point is, that the disputes between authors, editors, translators, and booksellers are also to be decided in a similar way.

The fifth title contains the different establishments created for the protection and favour of commercial interests,—and particularly the consulates; exchanges; merchant's books, and bill brokers; weights and measures; fairs and markets.

The Seventh Book of the Digest contains regulations as to internal police. It may be considered under three heads: administrative, sanitary, and judicial. We shall consider them according to this order.

The administrative police comprehends the various measures for the prevention of famine; the hospitals and other charitable institutions; passports, and vagabonds.

The sanitary police is contained in three regulations:—one, on the administration respecting public health; another, on the protection of it; a third, on judicial medicines.

The judicial police has for its object the prevention of crimes. When a crime is committed, the judicial authority inquires into it; but as soon as the sentence is pronounced, the malefactor comes under the power of the judicial police. These two objects, forming as it were, the prologue and the epilogue of penal procedure, have given rise to two regulations; the first of which gives means for preventing and repressing crime; the other contains the regulations of the prisons and the persons transported into Siberia, which may be considered the *Botany Bay of Russia*. Nothing can be more complete than this part of the Code. It is not merely the number of the articles, (which amount to 756) but their classification and sagacity, which constitutes the merit of that code. It is divided into five chapters, each corresponding to a class of crimes: namely, offences against the exercise of religious worship; the security of the state; public morality; security of person; security of property. Offences of the second class are subdivided into different sorts: namely, publications and advertisements without authority; contempt of official publications, spreading false news; forging ukases; distribution of pamphlets; clandestine printing and sale of books; il-

legal though not seditious assemblies; and false alarms, secret societies, resistance to public authority, conspiracy, sedition, revolt. At the head of this chapter, and conjointly with the first of these infractions, is pointed out the mode of publishing, in the cities and communes, the laws, decrees, and all other injunctions of authority.

The Eighth and last Book contains the penal legislation. The distribution of the French Code forms nearly the basis of it, with this difference,—that the four great divisions of the latter have been melted into two; the first of which states the philosophical and general principles; the other, the punishment of each crime. The punishments are those of death; political death; privation of civil rights; corporal punishment; hard labour; transportation; forced enlistment; fines; confiscations and ecclesiastical censures. The punishment of death is only applicable to the two first species of state offences, treason and murder, infractions of the law of quarantine, and military offences in the field. The political death, which is equivalent to civil death, is preceded by an imitation of the punishment of death. The condemned person is placed with his head on the block, or he is fastened to the gibbet. He is then sent to the mines, or he is transported to Siberia for life. By corporal punishments are meant beating with a club in various degrees, and fasting on bread and water. The nobles, the ecclesiastics, the superior citizens, the merchants of the two first orders, and those who have received honours, are exempt from this punishment. The law also traces the sphere of its action over Russian subjects, over foreigners residing in Russia, and over Russian subjects residing in foreign countries. We may also remark, that the penal code embraces all the legislation as to crimes and contraventions in fiscal matters.

We have now gone through the Eight Books of which the Code is comprised; and from our analysis we trust that our readers may form a competent idea of its contents. In order to complete the details, we shall make some observations on the division of it into articles, tables, and summaries.

The number of all the articles in the Digest amounts to 35,555, and adding those in the appendices, the total number is 41,965. This important remark may be made that by the melting together of several thousand legislative acts, the greater part of which contained several hundreds of le-

gislative provisions, a number of articles, comparatively much smaller, has been framed. Thus, the 3,160 articles of which the Civil Code consists, contain 5,095 provisions, scattered among 1,889 legislative acts, published from 1649 till 1832. The Penal Legislation, which contained 3,471, spread over 1,502 legislative acts, only presents 1594. This difference is explained by the consolidation and condensation of several provisions into a single one. Very frequently, ten, twenty, or sixty provisions were condensed or contracted into articles of two, three, or ten lines.

Although, from the division of the whole work into eight principal Codes, each of which has its determined contents, the search for articles cannot be very difficult, various ancillary means have been furnished.

First, to each part summaries have been added, from which it will be easy to discover, if not the article itself, at least the chapter and the section in which it is to be found. For still greater facility, all those minor summaries have been collected in one general summary.

Secondly,—To each part a chronological table has been attached. This table, which is printed in two columns, indicates, by order of time, the date of all the legislative acts, arranged with reference to the article which is substituted for them. In this way, the double mode of investigation, whether by sources or results, is facilitated. Thus, without difficulty, the reader passes from an old order of things to a new one; and all the advantages of memory and habit, which are so important to functionaries familiarized with the transaction of affairs, are fully preserved.

Thirdly,—A complete alphabetical index of the work refers to all the subjects contained in the fifteen volumes of the Digest. This is so complete, that it is seldom necessary to have recourse to the text of the law itself. Finally, in order to distinguish the text from the appendices, the references to the latter are printed in *Italics*. There is one defect, however, and that is, that a fresh numbering of articles is introduced in each Book. This, of course, renders the references to the laws somewhat difficult, from the variety of paging consequent on the plan.

## USAGES OF THE PROFESSION.

### EXPENSE OF LEASE AND COUNTERPART.

Has it been decided that a lessee, in the absence of any agreement, is bound to pay the expense of the counterpart as well as the lease? and if so, where is the case reported? Also, where the lessee expressly agrees to pay the expense of the lease, would it include the counterpart? M. G.

## SELECTIONS FROM CORRESPONDENCE.

### No. CIX.

#### ATTORNEYS' RE-ADMISSIONS.—CERTIFICATE.

Sir,

HAVING seen in your Legal Observer of 8th of Aug., C. W. M.'s letter on the subject of "Re-admission of Attorneys ceasing to practise," I have looked through all the acts of parliament relating thereto, and as I find nothing to contradict his opinion, namely, *that it is not obligatory upon an attorney who has actually ceased to practise to be re-admitted before he can take out a certificate and recommence business*, I feel induced to testify my conviction that he is perfectly correct in his construction of the act; which, in my opinion, is a paragon of an act, it being clearer than ninety-nine out of a hundred.

Were there any misconception on C. W. M.'s part, there would, no doubt, be many of your correspondents desirous of setting him right; but as it strikes me his observations are unanswerable, it may happen his remarks may pass over in silence, notwithstanding it is a question of importance to a considerable portion of the profession.

We have seen applications to the Courts by gentlemen to have their names taken off the roll of attorneys, (two or three instances within my knowledge, with a clerical view,) but if the mere ceasing to take out a certificate would effect this, why is there occasion for such application and expense? To be struck off the roll is a *disgrace* arising from some offence; and this *serious penalty* is never put in practice by the Bench of Judges without mature deliberation.

I believe, when the name is once placed thereon, it would be a high offence was any one to obliterate it, and that a person *once admitted* is always considered to be an enrolled attorney, though he cannot be stiled (which I have often seen introduced in affidavits) "a practising attorney."—Once a captain, always a captain. T. C.

## SUPERIOR COURTS.

### Lords Commissioners' Court.

#### INSOLVENT DEBTORS' ACTS.—BANKRUPTCY.— JURISDICTION IN BANKRUPTCY.

*A trader, who has taken the benefit of the acts for relief of insolvent debtors, may be declared a bankrupt, on a debt due before the petition for relief was filed.*

*A person who becomes a purchaser of the bankrupt's property under the order of sale made by his commissioners, and who by his acts recognises the title and accepts it, is bound to perform his contract; and the Court of Review in Bankruptcy has jurisdiction to compel specific performance.*

Two petitions were presented by William Barrington the younger, in the matter of William Barrington the elder, a bankrupt. One of them prayed that the fiat of bankruptcy issued against the latter in February 1833, might be superseded, on the ground that the bankrupt was at that time taking the benefit of the act for the relief of insolvent debtors; that he had served notice on all his creditors, including the petitioning creditor, in compliance with the requisitions of that act; and that the claims of such creditors as came in were adjudicated on by the Insolvent Debtors' Court, and that all his property had actually vested in the assignee of that Court.

The second was a petition of appeal (permitted by the Court instead of a case, according to the act 1 & 2 W. 4, c. 56, s. 3). It prayed for a reversal of an order of the Court of Review, by which order it was declared that the petitioner should, within one month from the date thereof, specifically perform a contract, into which he entered for the purchase of certain property belonging to the bankrupt, set up to sale under the usual order in bankruptcy.

The facts, applying to both petitions, were these:—The bankrupt was owner in fee of some land at Sandbach, in the county of Chester, and he demised the same to one Beech, in 1825, for a term of years, by way of mortgage, to secure the re-payment of 400*l.*, with interest. Beech died in 1828, and Barrington becoming a bankrupt in 1833, the Commissioners took the usual account of the mortgage debt, and interest thereon, and found that 490*l.* was due for principal and interest, and they made the usual order for sale of the mortgaged property. The bankrupt had sometime before (in 1829 or 1830) filed his petition in the Insolvent Debtors' Court, and professed to have given the required notices; but the executors and representatives of Beech, and the petitioning creditor for the fiat, denied that such notice was given to them. The bankrupt did not, nor did his son, the present petitioner, make any objection at first to the fiat, but both acquiesced in it; and the latter attended the sale of the mortgaged property under the above mentioned order of the Commissioners, and became the purchaser of the

bankruptcy interest therein, for 370*l.*, giving his note for 37*l.* as deposit. He afterwards received an abstract of the title, and he granted a new lease of that property to the tenant then in possession. He, however, refused to pay the note for 37*l.*, when it fell due, or to accept a conveyance of the property, and he then, for the first time, objected to the title, on the grounds of the proceedings in the Insolvent Debtors' Court. The Court of Review have lately, upon the petition of the assignee under the fiat of bankruptcy, and of the representatives of Beech, made the order for specific performance, which is now appealed from, chiefly on the ground that the Court of Bankruptcy has not jurisdiction to order specific performance.<sup>a</sup>

The questions raised by both the petitions were argued for several days, at different times, by Mr. Jacob and Mr. Bethell, for the petitioner; and by Mr. Swanson, Mr. Teed, and Mr. Russell, *contra*.

Sir Lancelot Shadwell, giving his judgment on the first petition, said that the petitioner was the son of the bankrupt, and interested in his estate. The prayer of the petition was, that a fiat of bankruptcy against the elder Barrington might be set aside, on the ground that he had taken the benefit of the act for the relief of insolvent debtors; that all his property was in the hands of the assignees of that Court; and that all matters relating to the claims of the creditors had been there already finally decided. His Lordship had looked through the acts<sup>b</sup> of parliament constituting the Court for the Relief of Insolvent Debtors, together with the amended act now in operation, and he was clearly of opinion that it was not the intention of the legislature, when these acts were passed, that persons who availed themselves of the relief they afforded to insolvent debtors should be exempt from the operation of the bankrupt laws, if such persons brought themselves in other respects within the operation of those laws. Several of the clauses of the Insolvent Debtors' Act provided expressly for cases which might happen, when commissions of bankruptcy were taken out against parties who had previously petitioned for relief as insolvents. The filing of the petition, for instance, was made an act of bankruptcy within a certain time, and the assignment to the provisional assignee of that Court was thereby expressly vacated. Those acts did not interfere in any part, in direct and express terms, with the operation of the bankrupt laws; and under such circumstances, this Court could not say, in the absence of any positive enactment, that a commission of bankruptcy was invalid. It might be observed, indeed, that a person who had taken the benefit of the Insolvent Debtors' Act, and afterwards become possessed of equitable interests, had it in his power to prevent the assignment or war-

rant of attorney from reaching such interests for the benefit of his creditors, and that a commission of bankruptcy would therefore be necessary, in order to obtain substantial justice for the claimants on the property of the debtor. His Lordship was therefore of opinion, that the suing out a commission of bankruptcy, under the circumstances stated, was perfectly legal and regular, and that the petition to supersede the commission must be dismissed.

Sir J. B. Bosanquet, concurring in the opinion now expressed, felt it unnecessary to remark on the failure of proof of the notice said to have been given to the petitioning creditor. It was a point well worthy of observation; but concurring in the decision, he felt it unnecessary to enlarge on the facts involved in the question at issue.

In a further argument, on the question involved in the second petition, it was contended, on one side, that the Court of Bankruptcy had jurisdiction to enforce specific performance (*Ex parte Gould*)<sup>c</sup>, and that the granting a new lease, in the present case, was a waiver of all objection to the title (*Burnell v. Brown*)<sup>d</sup>; while, on the other side, it was urged that the equity of redemption of this property had vested in the assignee of the insolvent; that the Court or Commissioners of Bankruptcy could not make title to the property; and that the case of *Ex parte Gould* did not apply, for there was no objection made in that case to the jurisdiction. The acceptance of the title was strenuously denied, and the evidence on that point was contradictory.

Sir Lancelot Shadwell, in giving judgment on the second petition, after stating the facts, observed, that doubts had been raised whether this Court could hear this appeal, it being alleged that it was not matter of law or equity, or a question involving the rules of evidence; and that the Commissioners and Court below had no jurisdiction to make the original order for sale, or to enforce the specific performance of the contract of purchase. He read the third section of the act constituting the Court of Bankruptcy, and was of opinion, that under the words of that section, the Court properly entertained this appeal, which it permitted by petition, instead of case, that being a matter in the discretion of the Court. No point was indeed made here in the argument, whether admissible evidence was refused, or inadmissible evidence received, by the Court below; but it occurred to himself, and to his brother Commissioner, that much depended on the evidence; and that as there was some evidence of the petitioner's acceptance of the title, the Court of Review ought to have decided upon that evidence, which was sufficient to enable them to draw a conclusion from it. Whether that Court would have done better if it had decided the other way, was not the question for this Court. The order for specific performance was made on the authority

<sup>a</sup> See *ex parte Sidebotham*, in the matter of *Barrington*, 1 Mont. & Ayr. 655; 3 Dea. & Ch. 818; and 10 Leg. Obs. 51.

<sup>b</sup> 7 G. 4, c. 57; continued by 1 W. 4, c. 38.

<sup>c</sup> 1 Glyn. & J. 231.

<sup>d</sup> 1 Jac. & W. 168.

of *Ex parte Gould*, which was decided by the Vice Chancellor in 1822, and which is cited by Mr. Montagu, in his report of this case, without observation or objection; and that learned gentleman was not likely to pass the case without observation, if it appeared to be a questionable decision. Even a single decision, if not appealed from or impeached, ought not, as Lord Eldon used to say, be disturbed on slight grounds. Considering that on that authority the Court below had jurisdiction to make this order, he said this Court would make no order on this petition.

Sir J. B. Bosanquet expressed his concurrence, and thought it only necessary to say that there was some evidence before the Court below, of the acceptance of the title by the petitioner.

*Ex parte Barrington, in the matter of Barrington.* Sittings before the Lords Commissioners, at Westminster and Lincoln's Inn, May 15, 16, June 6, July 13, 1835.

### Eschequer at Pleas.

#### JUDGMENT SIGNED.—WRIT OF INQUIRY.— SUMMONS TO SET ASIDE JUDGMENT.

*Judgment was signed in 1833, after which no steps were taken until the year 1835, when notice was given to the defendant, personally, that a writ of inquiry would be executed on the 28th of May. The defendant, on the 27th of May, took out a summons to set aside the judgment, on the ground of irregularity, which was returnable at three o'clock on the next day. The writ of inquiry did not come on till four o'clock, and, in consequence, the summons acted as a stay of proceedings. On an application to the Court to set aside judgment, &c., it was held, that it came too late, and that the summons was not sufficient to make the writ of inquiry irregular.*

A rule had been obtained to set aside the judgment, and all other proceedings in the action, on the ground of irregularity. It appeared that judgment was signed in the month of November, 1833, but no further step was taken until the 1st of January, 1835, when the plaintiff gave a term's notice of his intention to execute a writ of inquiry. In April, he gave a second notice, that the writ would be executed on the 28th of May. It was now contended, that as the defendant had appeared on the day when the writ of inquiry was executed, and had then taken an objection that the judgment was two years old, and that it had been signed without a plea being called for, the present application was too late.

In support of the rule, it was urged, that the judgment was clearly irregular, because it was signed after the delivery of the plea. The defendant, besides, was ignorant of the fact of the judgment having been signed, until he received the notice of executing the writ of inquiry. The latter notice was also irregular, as, in the first place, it was headed, "*Henry*

*Taylor Roberts, gent., one, &c. v. Cuttill,*" instead of "*Henry Taylor Roberts v. Cuttill,*" which was the real name of the cause; and secondly, because it was served personally upon the defendant, instead of upon his attorney, upon whom the declaration was served. The execution of the writ was likewise irregular. A summons to set aside the judgment for irregularity was taken out on the 27th of May, and was made returnable on the next day at 3 o'clock. The writ of inquiry was not executed until 4 o'clock on that day, and, in consequence, the summons acted as a stay of proceedings from the hour of 3 o'clock. The writ of inquiry ought at any rate to be set aside.

In reply to this, it was stated, that the cause having been set down for the 28th of May, the whole of that day must be taken together. It might have been taken on at 11 o'clock, when the Court sat; and its being postponed was attributable to other cases being in the list before it. With regard to the notice being personally served on the defendant, it was sworn that his attorney could not be found.

The Court thought that the addition to the plaintiff's name at the head of the writ of inquiry was unimportant, and that the service of the notice on the defendant, instead of his attorney, was quite sufficient. The objection of the case having laid by so long, came too late. As to the alleged irregularity in the execution of the writ of inquiry, after the first summons was returnable, although it acted as a stay of proceedings for the time, yet the defendant being in attendance at 11 o'clock to try the writ of inquiry, he was there quite regular, and the accident of the case not coming on till late, did not render it otherwise. The rule, therefore, should be discharged.

Rule discharged.—*Roberts v. Cuttill*, T. T. 1835. Excheq.

#### NUISANCE.—PLEA, THE GENERAL ISSUE.— ARBITRATION.—NONSUIT.—COSTS OF DEFENDANT'S WITNESSES.

*An action for nuisance, when the general issue only was pleaded, was referred to an arbitrator, the costs to abide the result. It was found that the defendant was not proved to have committed the nuisance, but that it was an injury to the plaintiff. The arbitrator, however, ordered the defendant to remove the nuisance, and directed a nonsuit to be entered. It was held, that was substantially a finding for the defendant, and that he was entitled to the costs of all his witnesses, whose testimony was necessary under the general issue, but that the master could not allow more than was actually paid for their expenses.*

In an action on the case for a nuisance, the general issue was pleaded by the defendant, and the case was referred to an arbitrator, by consent of both parties, the costs to abide the

result. On inquiry, the arbitrator found that the plaintiff could not prove the defendant had done the wrong; but he found that the nuisance was an injury to the plaintiff. He, however, ordered the defendant to remove the nuisance within a certain period, and directed that a nonsuit should be entered. The costs were taxed by the master, and

A rule *nisi* was obtained by the plaintiff, for a review of the taxation. The objection taken was, that although the award was in favor of the plaintiff, in point of fact, yet the defendant had been allowed costs for all his witnesses, instead of for those only whose testimony was necessary to disprove the fact that he was the cause of the injury.

It was contended for the defendant, that as there was only one issue, and as a nonsuit was entered, the defendant was as much entitled to his whole costs as if the plaintiff had been nonsuited in Court. The costs, however, were only claimed up to the time of the trial.

In support of the rule, it was said that the parties must be bound by the terms of the reference; and it was submitted, that all the real points in the case were found for the plaintiff. It was difficult to say precisely what evidence was necessary to prove the defendant's case; but four witnesses only having been called to that fact, no more should have been allowed.

The Court thought the defendant was entitled to have the costs of all his witnesses, up to the period of trial, whose evidence might be material under the general issue, as it was fit he should come fully prepared to meet the case. This had been the established practice hitherto, and no difference could exist whether the case was disposed of by an arbitrator or by a jury.

For the plaintiff, another point was urged, that the master had allowed costs according to a scale which would amount to more than was really paid.

The Court thought that more than the expenses actually incurred ought not to be allowed. The matter should therefore, on this point, be referred back to the master.

Rule absolute on the last point, and discharged on the other.—*Radcliffe v. Hall*, T. T. 1835. Excheq.

#### DELIVERY OF PLEA.—JUDGMENT SIGNED.

*A plea delivered early on the morning after the period for pleading had expired, was held to be in good time, and judgment signed in default of the plea was declared irregular.*

A rule *nisi* had been obtained to set aside an interlocutory judgment, signed for want of a plea, on the ground that the plea was delivered before judgment was signed.

Cause was shewn, when it was stated that the defendant had obtained time to plead, which expired on the morning before the judgment was signed. On the next morning,

the clerk to the plaintiff's attorney left the office a short time before 11 o'clock, to sign judgment, immediately after which the plea was delivered, but before 11 o'clock, and before judgment was signed.

The Court was of opinion that the plea was delivered in time, as judgment could not be signed before the office was opened on the second day.

Rule absolute.—*Leigh v. Bender*, T. T. 1835. Excheq.

#### DECLARATION.—AMOUNT CLAIMED.—PLEA.—SPECIAL DEMURRER.

*A plea concluding to the country was held bad, upon special demurrer, where the defendant had pleaded, as to one portion of the amount claimed, that he was not indebted; and as to the other, that it was paid before the suit was commenced.*

This was an action of debt for goods sold, work and labor, money paid, and on an account stated. The total amount claimed in the declaration was 80*l.*, and it was alleged by the plaintiff, that the defendant promised to pay that sum "on request." The defendant alleged in his plea, that he was not indebted as to the sum of 40*l.*; and in a second plea, that he had paid the remainder before the commencement of the action. The plea concluded to the country.

On special demurrer, the plaintiff assigned as a cause, that the plea did not aver that the money was paid "on request," or that the plaintiff received it in satisfaction of the sum set forth in the declaration, and of the damage sustained by reason of its detention. The plea was also uncertain, in not shewing whether the money was paid in pursuance of the contract, or whether it was paid "on request," as a satisfaction for the damages. It should also have concluded with a verification, instead of to the country. It was perfectly consistent with this plea, that the contract might have been broken, the money not being alleged to have been paid on "request."

The Court was of opinion that the plea was bad, on the grounds stated. If the defendant had paid the money into Court in the usual way, he must have paid costs; but if the plea had been good, the plaintiff would have been deprived of those costs.

Judgment for the plaintiff.

Leave to amend, on payment of costs, was afterwards obtained by the defendant.

*Mack v. Rust*, T. T. 1835. Excheq.

#### WRIT OF DISTINGUAS.—ENTRY OF APPEARANCE FOR DEFENDANT.—EXECUTION OF THE WRIT.

*The Court will order an appearance to be entered for a defendant, after a distinguas shall have been served, and 40*s.* levied, without an affidavit of facts.*

A motion was made to enter an appearance for a defendant. It appeared that a *distinguas*

had been executed, and the sheriff had levied to the amount of 40s. The officer, however, declined entering an appearance, unless an affidavit of the facts was produced. No such affidavit being required by the act, the present application was made. The course pointed out by the act was, that the *distringas* should be served personally upon the defendant, or at his residence. The notice expressly pointed, that unless the defendant caused an appearance to be entered, the plaintiff would do so, and proceed to judgment and execution.

The Court thought the affidavit was unnecessary, and granted the application.

*Page v. Hemp*, T. T. 1835. Excheq.

**NEW TRIAL OF CAUSE HEARD BEFORE A SHERIFF.—PRODUCTION OF SHERIFF'S NOTES.**

*The Court will not grant a new trial of a cause heard before a sheriff, in the absence of the sheriff's notes and an affidavit of facts, either of which, however, will be sufficient.*

This was a motion for a new trial upon a question on the evidence. The cause had been tried before the sheriff, whose notes were not now forthcoming, nor was there an affidavit of the facts produced.

The Court refused to grant the application. In the absence of both the sheriff's notes and an affidavit of facts, the verdict must be presumed to be correct.

Rule refused.—*Muppin v. Gillatt*, T. T. 1835. Excheq.

**WRIT.—SPECIAL ACTION.—DECLARATION ON PROMISES.—MOTION TO SET ASIDE DECLARATION.**

*Where the writ alleges a 'special ground of action, and the declaration is only "on promises," the motion should be to set aside the writ, and not the declaration.*

A rule had been obtained to set aside a declaration, on the ground of irregularity. The original writ called upon the defendant to answer to a "special action," while the declaration delivered was "on promises." Cause having been shewn,—

The Court decided that the declaration was not irregular. The motion should have been made to set aside the writ.

Rule discharged.—*Moore v. Archer*, T. T. 1835. Excheq.

**POWER OF THE COURT TO ORDER A PLAINTIFF TO GO ON WITH HIS CAUSE.**

*The Court cannot order a plaintiff to proceed with his cause, or to enter a stet processus, at the expiration of three months.*

The defendant moved for a rule to shew cause why the particulars of the plaintiff's demand should not be delivered within a certain period; and why, in the event of his not complying with an order to that effect, judgment of *non pros.* should not be entered against him. It appeared that the defendant was served with a writ of summons about three

months before, and he directly took out a summons for particulars, before the declaration was delivered. Although repeated applications had since been made to the plaintiff to go on with the action, or to enter a *stet processus*, yet he refused to pursue either course.

The Court could not grant such an application. The rule was, that if the plaintiff did not proceed in 12 months, the case was out of Court. The Court could not appoint a shorter time, unless a new rule was made to that effect.

Rule refused.—*Kirby v. Snowden*, T. T. 1835. Excheq.

**NOTES OF THE WEEK.**

**ROYAL ASSENTS.**

31st Aug. 1835.

Clerk of Crown.  
Illegal Securities.  
Insolvent Courts.  
Marriage Act Amendment.  
Highways.  
Turnpike Acts continuance.

**HOUSE OF LORDS.**

*Bills for second Reading.*

Residence of Clergy.  
Pluralities Prevention.  
Ecclesiastical Jurisdictions.  
Abolishing useless Offices.

*In Select Committee.*

Wills Execution.  
Executors.

*In Committee.*

Sinecure Church Preferment.  
Education & Charities.  
Church of Ireland.  
Stamps and Taxes.

*Passed.*

Capital Punishments.  
Tithes' Recovery.  
Municipal Corporations.  
Tithe on Turnips.  
Cruelty to Animals.

*Postponed.*

Imprisonment for Debt.  
Prisoners' Counsel.  
Offences against the Person.

**HOUSE OF COMMONS.**

*Bills to be brought in.*

Law of Tenure.  
Law of Escheat.  
Registration of Births, &c.

## Second Reading.

Law of Libel.

Parish Vestries.

## In Committee.

Copyholds Enfranchisement.

Registration of Voters.

County Coroners.

Durham Court of Pleas.

Dissenters' Marriages.

## Passed.

Oaths Abolition Amendment.

Stamps and Taxes.

Publication of Lectures.

## \*Postponed.

Poor Law Amendment.

## TITHE TURNIP BILL.

We believe that the case to which the Duke of Richmond referred in the debate on this bill, is that of *Kemp v. Pechell*, 6 L. O. 412, and we cannot find that it has been elsewhere reported. The judgment delivered was: "That turnips severed from the ground for sheep to feed on, though not removed from the spot where they grew, are subject to tithes *in kind*, and not to *agistment* tithe, like tares and vetches. *Semble*, such tithes are to be set out as the farmer sets out the turnips for himself." The authorities cited in support of the judgment are, 1 Wood's Tithe Cases; 2 Gwyl. 592; 1 Eagle & Young, 675, 690; 10 East, 5; 3 Price, 394; S. C. 1 M'Cle. 113; 6 Price, 338.

The bill just passed in the House of Lords, provides that turnips severed from the land, if consumed on the same, shall be considered as *agistment* tithe. The bill does not extend to any land discharged from tithe.

## ANSWERS TO QUERIES.

Law of Property and Conveyancing.  
AD VALOREM STAMP. P. 224.

The General Stamp Act, p. 1571, folio edition, expressly declares that the ad valorem duty must be paid upon the conveyance.

J. C. G.

## DOWER. P. 143.

Had the habendum been to *E. F.*, his heirs and assigns, to the uses mentioned in this case, the wife of *A. B.* would not have been dowerable, as decided by *Ray v. Pung*, referred to by *W. W.*, because the uses would have been executed by the statute 27 Hen. 8, c. 10; that statute having regard only to the case where one person stands seised to the use of another. In the present case, I apprehend

*A. B.* took an estate (or a common law use) in fee, by virtue of the habendum; and the succeeding limitation of a power of appointment being for the benefit of *A. B.*, became void or inoperative, as inconsistent with the previous limitation of the fee. *Vide Goodill v. Brigham*, 1 Bos. & Pul. 192. I therefore think the wife of *A. B.* is not barred of dower. Z.

## Common Law.

## TRUST.—CREDITOR. P. 143.

The deed made by *A. B.* is good. In *Walker v. Burrows*, 1 Atk. 94, Lord Hardwicke said, "where a man has died indebted, who in his lifetime made a voluntary settlement, upon application to this Court to make it subject to his debts as real assets, the Court has always denied it, unless you shew he was indebted at the time the conveyance was executed." In *Stephens v. Olive*, 2 B. C. C. 92, the Master of the Rolls held, that a settlement after marriage, in favor of a wife and children, by a person not indebted at the time, was good against subsequent creditors. In *Lush v. Wilkinson*, 5 Ves. 387, Lord Alvanley said, "A single debt will not do. Every man must be indebted for the common bills of his house, though he pay them every week. It must depend upon this,—whether he was in insolvent circumstances at the time." And see *Kidney v. Cousmaker*, 12 Ves. 155. In *Holloway v. Millard*, 1 Madd. 421, Sir T. Plumer said, "It is clear, that a voluntary settlement of real or personal property, by a person not indebted at the time, nor meaning a fraud, is good against subsequent creditors." In *Batterbee v. Farrington*, 1 Swans. 113, Sir T. Plumer said, "A voluntary conveyance, by a person not indebted, is clearly good against future creditors. Fraud vitiates the transaction; but a settlement, not fraudulent, by a party not indebted, is valid, though voluntary." The fraud spoken of means, where the settlement is made in contemplation of insolvency. In the case under discussion, there is clearly no fraud; for the party did not become indebted till five years after the execution of the deed. It may here be mentioned, as incidental to this subject, that though the settlement can be affected as fraudulent only as against creditors at the time it was made, the consequence, if it can be so affected is, that the subject is thrown into assets, and all subsequent creditors are let in. *Montague v. Sandwich*, cited in *Kidney v. Cousmaker*. *Walker v. Burrows*, 1 Atk. 94.

SPES.

## QUERIES.

## Common Law.

## PARTNERSHIP.—EXECUTION.

A partnership at Manchester consists of four persons, two of whom also carry on a separate trade together. The firm of the four is perfectly distinct from the firm of the two. Can the sheriff, under a *fi. fa.* against the firm of the four, take in execution the effects of both partnerships?

JUVENIS.



## Law of Property and Contempering.

## CONTINGENT LEGACY.

Gift of a legacy to *A.* for life, and from and after her death, to and amongst *C., D.,* and *E.,* or such of them as shall survive *A.* They all survive the testator: *C., D.,* and *E.* all die in *A.'s* lifetime; what becomes of the legacy?

J.

## MISCELLANEA.

## PUNISHMENT FOR FRIGHTENING TO DEATH.

"In point of law it is not murder to work on the *imagination* so that death ensue, or to call the feelings into so strong an exercise as to produce a fatal malady. But the law, although imperfect in all that respects the protection of the mind, treats the act of assuming the semblance of a ghost, and terrifying persons, especially in a public highway, as an indictable nuisance and *misdeemeanor*, though the unnecessary violence in shooting at and killing a person so guilty has been determined to be murder.<sup>a</sup> And the law at least so far regards the *fears* of mankind, when many individuals might reasonably be alarmed, that it is indictable as a nuisance at common law to keep large quantities of gunpowder near to the habitations of several individuals, or to a highway, although no actual injury has as yet arisen.<sup>b</sup> And it is clear that it is an indictable and punishable *misdeemeanor* to allow the indulgence of passion or emotion to such a degree as to attempt self-destruction, however stimulating the undergone misery may have been; and we know that if the act be perfected it will be punished by the forfeiture of the goods and chattels of the *felo de se*.

"With respect to occasioning death by *terror*, it has been observed, that although the proof of the crime may be difficult, yet its perpetration is far from impossible, and it has been suggested that to act upon the mind of a pregnant woman by extreme terror, and so produce abortion and death of malice prepense, would certainly, in a moral view, be murder in its most atrocious form, and that although it might require some ingenuity in framing the indictment, yet as our law is fertile in fictions on less worthy occasions, it ought not to allow its just vengeance to be avoided.<sup>c</sup> But it is apprehended, that according to the existing law in such a case no indictment for murder could be supported. At least, admitting that there may be no adequate scale in which *mere mental* injuries can be justly weighed, or compensation or punishment duly ascertained, yet

in all the instances, when through the agency of the nerves a *bodily injury* has also been occasioned, and clearly proved, there seems no reason why the culprit, who has malevolently occasioned it, should go unpunished; and injuries of this nature might be safely left to a jury. The enactment to prevent the moral delinquency in *cruelty* to an animal by its owner, was at first ridiculed as an absurd regulation, because it attempted to take into consideration the sufferings of an animal; but it was soon universally agreed that the enactment had a most salutary operation, not only in restraining cruelty towards an animal, but in repressing that disposition which might extend its operation to mankind. Surely the same principle ought to be extended to repress all malevolent injuries to the *mind of man*, especially as it has been demonstrated that such injuries may, and constantly do, occasion most serious injury to the body itself, and frequently even death. Suppose a woman be pregnant, it is notorious that all anxieties of mind increase the danger of miscarriage; and ought not a person, maliciously guilty of causing her mental anxiety with intent to occasion her miscarriage, and succeeding in such attempt, to be equally punished as if he administered a noxious ingredient? and if a person, as unquestionably he may, purposely kill a consumptive person by mental emotion, ought he not to be punishable as if he destroyed the individual by *violence or poison*?"—*Chitty's Medical Jurisprudence*.

## THE EDITOR'S LETTER BOX.

The *Commentaries on the New Statutes*, shewing all the Alterations effected in the Law during the present Session of Parliament, with the Acts *verbatim*, will be published in due time, in continuation of the ANNUAL DIGEST of the STATUTE and COMMON LAW.

We are in possession of the Report of the Commissioners appointed to inquire into the Consolidation of the Statute Law, and shall publish a full abstract of it in the course of this month, as an Appendix to the present Volume.

The further Sketch of the History of the Law since 1660, has been received. The first paper is in the printer's hands.

The subject of G.'s letter has already been attended to; but if the information we expect should not be satisfactory, his letter shall be published.

The Queries and Answers of C.; "A Subscriber;" D; and F.F.J., have been received.

We refer "Inquirer" for the character of Mr. Edgar Taylor's "Book of Rights" to a Review thereof, in vol. 6, p. 233.

*Errata*, p. 351.—"Elector—Qualification."—For "six months' possession," read "twelve calendar months' possession next previous to the last day of July in the year in which the suggested lease is granted, and registration must be borne in mind. (Sec. 26.)"

<sup>a</sup> *Res v. Smith*, 4 Bls. Com. 201, n. 25.

<sup>b</sup> *Res v. Taylor*, 2 Stra. 1167, 1169; see also 1 Par. & Femb. 352.

<sup>c</sup> 2 Par. & Fon. 110, n. (\*). The case of murder by starvation is there referred to, but then there must have been a *legal duty* to provide food, or an imprisonment by the delinquent, or he is dispensable; *Res v. Smith*, 2 Car. & P. 449; 1 Chitty's Gen. Pr. 34, 35.

# The Legal Observer.

Vol. X. SATURDAY, SEPTEMBER 12, 1835. No. CCXC.

— "Quod magis ad Nos  
Pertinet, et nescire malum est, agitamus.

HORAT.

## POINTS OF LAW BETWEEN MASTER AND SERVANT.

IN this article we purpose laying before our readers several important points recently decided in cases between masters and servants of different capacities.

In a recent case<sup>a</sup> we have a leading decision, on the effect of a stipulation for the payment of wages monthly, upon the construction of an agreement, which, but for such a stipulation, would be a general hiring, and therefore a hiring of a year's service; and the decision is, that the monthly payment of wages makes no difference. At the trial it appeared, that on the 5th of March, 1832, the plaintiff entered the defendant's service; and on that occasion the defendant signed the following memorandum: "W. Cash engages to pay Thomas Fawcett 12l. 10s. per month for the first year, and advance 10l. per annum, until the salary is 180l. From 3 mo. 5. (i. e. 5th March) 1832." The plaintiff continued in the defendant's service less than a year, until the middle of January 1833, when he was discharged. His wages having been paid only up to that time, he brought an action for two months wages up to the end of the year: the Court held him entitled to them. *Per Patteson, J.* "This is not the case of a domestic servant, where the contract may be put an end to by paying a month's wages, or giving a month's warning. The agreement either relates to the time of service, or it does not; if it does, it clearly proves a hiring for a year; if it does not, then this is a general hiring, falling within the ordinary rule, and is a hiring for a year."

Mr. Justice *Patteson* had adverted, in the course of the argument, to the recent case

of *Beeston v. Collyer*,<sup>b</sup> as decisive, in broad terms, that a general hiring of a clerk was a hiring for a year. That case is as follows: The contract was described in the declaration as a contract for one whole year from the 1st of March of the current year; and the breach was, that the plaintiff had been dismissed before the end of the year. There was no evidence of any express contract, but it was proved, that the 1st of March 1793 was the day on which the service originally began; that it was continued till the 23d of December, 1826, when the plaintiff was dismissed after a quarter's notice. In 1811 there was proved to have been a payment of a quarter's salary, but all the other payments were monthly. The Court, concurring with the jury, thought this a yearly hiring, and the plaintiff had judgment. Lord Chief Justice *Best* said, "No doubt can be entertained as to the justice of this case. The defendant has suggested no reason for putting an end to the service of the plaintiff. It would be absurd and unjust to hold that a person, in the situation of life of this plaintiff, could be thus abruptly dismissed. I was of opinion at the trial, that if a man hires a servant, nothing being said to the contrary, the hiring is for a year; and that if the service continues for five or six years or more, the jury would be warranted in presuming it to be, not a hiring for one year, but for a year in the first instance, and so on, without a new bargain, for so long as the parties respectively might please. There is no need for such a contract to be in writing. I do not conceive it to be necessary now to say, whether the notice to determine such a contract as this should be a three or a six months notice, or whether any notice at all is requisite: it is enough to say, that after the plaintiff's service had continued for so many years, we must imply a contract by

<sup>a</sup> *Fawcett v. Cash*, 3 Nev. & Man. 177; 5 B. & Ad. 904.

<sup>b</sup> 12 J. B. Moore, 552; 4 Bing. 309.

by the demise of either party." Signed *A. M.*, for Lord Mansfield. Dated Caen Wood, 14 May, 1810. A few days previous, a similar memorandum had been made, but less full in the specification of the employment; and there was a difference in it as to the "present of 20*l.*;" it being expressed in the one above—which was the one made last—as a present of 20*l.*, not saying *per annum*; but in the other it was as follows: "And as conscious of his assiduity towards the work, as addition to the above, the Earl of Mansfield is to make him an *allowance* of 20*l.* *per annum*." This was the earlier memorandum. Scott left London in 1810, in pursuance of this agreement; and continued in the same employment down to 1819. For his work he was paid from time to time by Lord Mansfield and the tenants; but Lord Mansfield had not paid him the 20*l.* promised as "a present," in the one memorandum, in the other, as an "allowance per annum;" and he brought his action in the Sheriff's Court of Perthshire for that sum per year for nineteen years, making 380*l.*, and interest on each year's allowance.

We will endeavour to give our readers an idea of the questions raised, without perplexing them with the pleadings. One ground of defence was, that the agent had no authority to make such an agreement: this ground was overruled, as incompatible with an admission contained in a subsequent part of the pleadings. This part of the case presents a curious specimen of judicial reasoning: Lord Mansfield, by his pleader, said, '*A. B.* had no authority to engage me to give a *yearly* present;' but, he added, 'if the two instruments signed by him should be considered as authorized, then the last, in which the present is not expressed to be *yearly*, supersedes the former, and I am bound only to one year's present.' To which the Lord Chancellor (*Brougham*), delivering the judgment of the House of Lords, replied,—'the concluding hypothetical proposition admits the agency, and therefore both instruments are binding; and then the question becomes reduced to this, what is the construction of the agreement?'

One consideration on this point, which it seems neither occurred to the Lords, nor was suggested by the respondent's counsel, would have supported the same conclusion more consistently with legal and indisputable principles. Our readers perceive the first defence was, not that the agent had no authority to hire; nor that his authority

was specific and certain as to the terms of the hiring; but only that he had no authority "in so far at least as respects the alleged agreement to pay 20*l.* a year in addition to the ordinary wages." He had, then authority to hire; the service, was under the hiring; the hiring therefore was good;—good for the term of service; good for the nature of the service; and therefore good for the *consideration*, although as to this the agent may have exceeded his authority: but that is a point which rests wholly between him and his principal; and if the principal is damnified, he may maintain an action against the agent.

The defence on the point of agency being disposed of,—and satisfactorily, as it seems to us, on the ground last suggested, if not on the Lord Chancellor's reasoning—we come to the principal question:—what is the legal effect of the agreement made by the agent? The Court of Session decided that the latest instrument, that in which the 20*l.* was stipulated as a present, without saying *per annum*, was the operative agreement: the *Lord Ordinary*, speaking in the third person, said, "He was of opinion that the question must be regulated by the minute of the 14th of May; and that its terms, where clear, cannot be controlled by any thing in the previous minute; but it does not appear certain from this alone that the 20*l.*, though denominated a present, was not meant as a part of the *wages*, or *allowance*, for services during the year for which the person was engaged by the minute. It is stated to be in addition to the wages which the person's predecessor had been used to receive; and considering the circumstances of the parties, it does not seem unreasonable that an addition to this extent should have been made. Besides, the cause assigned for giving it is one no less applicable to the services for subsequent years than to those of the first: it is not to be given because the pursuer might be put to expense in removing to Scotland, or for any reason exclusively connected with the year to which the mission relates, but as an encouragement for his greater assiduity,—as a remuneration for his expected services during the year for which he was engaged;—and of consequence, it may not unreasonably be inferred, that if the pursuer, without any further bargain, continued his services, which the defender, by suffering him to do, must be presumed to have approved of, he was entitled under tacit relocation to the continuance of the same emoluments." The House of Lords affirmed this judg-

ment. "The respondent," said the *Lord Chancellor*, "had an undeniable right to 20*l.*; and it being admitted that he has a right to that sum for one year, he has an equal right to the like sum for all the years of his service."

The rule established by this case may be expressed as follows: If there be a contract for a year's service, and the service runs on beyond the year, the original contract is impliedly renewed in all its particulars, unless a new contract is made, or unless it would be repugnant to the intention of the original contract to give it such an operation; and this rule applies even as to the continuance of an extraordinary remuneration, if such remuneration was an obligatory part of the original consideration, and not merely honorary or gratuitous, but recoverable by action.

## LAW OF ATTORNEYS.

### ILLEGAL PARTNERSHIP.

THE following case, on an appeal from the Court of Session in Scotland to the House of Lords, bears importantly on the Law relating to Attorneys.

An agreement of partnership was made between two solicitors, one of whom could only practise in a superior, the other only in an inferior Court. Both undertook to divide the profits of their general business, and each stipulated to recommend the other to his clients, and to keep the partnership a secret from all the world. It was held that such an agreement is void; for a Court cannot suffer statements to be made and papers presented to it by parties who are neither parties to the cause, nor their lawfully authorized agents, and who are consequently not properly responsible to the Court for their conduct.

The following is the judgment:

"The *Lord Chancellor* moved the judgment.—He entertained no doubt whatever of the propriety and soundness of the decision of their Lordships in the Court below, and therefore he should not delay further the time of their Lordships in recommending them to affirm those judgments. As to the conduct of the party, Mr. Henderson, at whose instigation the arrangement was made, and who was undoubtedly as much a party to the illegal arrangement as the appellant, in availing himself of that objection, that was a question with which their Lordships had nothing to do; he might have reasons for so doing, into which it was not their province to inquire. This was an observation applicable to all cases in which two parties were similarly circumstanced, and one of them set up the illegality of the trans-

action as a bar to a claim founded upon it. Their Lordships had nothing to do with that, nor was there any reason why they should express an opinion on the conduct of a party for availing himself of that illegality. The next point of importance for their consideration was, what was the law with respect to the conduct of a partnership between two persons of the same profession, both of whom were qualified to carry on business in either of the Courts, and who conducted the business of that partnership openly before all the world, each following his professional duties at his own place of residence. That also was a question with which their Lordships had nothing to do. That was not the case here, where, first, one of the parties was disqualified from practising in the Court of Session, and the other in the lower Court; had they both been qualified to practise in both the Courts there might have been no objection to the contract, at least upon the nature of the contract itself. But here there was an objection arising out of the mode in which the parties proposed to conduct their business. It was one of the essential articles of this partnership that its existence should be kept a secret from the world. These were circumstances, in his opinion, sufficient to set the contract aside, and to warrant him in saying, that the Court below had most justly decided the question. It was impossible to say that the case was new. At all events there was the case of *Brashe v. Mackinnon*, (Fuc. Coll. 1820,) in which it appeared from the books that that Court was unanimous, and where it was 'found to be illegal for an agent before the Court of Session to draw papers for a solicitor before an inferior Court, and to receive a proportion of the fees,' upon the ground stated by the Lord Ordinary, that it was of the nature of a *pactum illicitum*; and the Court, upon advising a reclaiming petition for the defender, were of opinion that such a practice was improper in both parties; that it was improper for an agent in that Court to make profit of the proceedings before an inferior Court, and that it was improper in a solicitor before an inferior Court to enter into an arrangement by which papers to be given into Court by him were to be drawn by others, though he was bound to certify that they were drawn by himself. Both these improprieties did not exist in the present case, but one of them did, and either of them was sufficient to avoid the agreement. If it was improper for an agent of a superior Court to make a profit of business done in an inferior Court where he could not practise, so it must be improper, under similar circumstances, for the agent of the inferior Court to make a profit of business in the superior Court; the objection in both cases being, that the Courts were called upon to exercise their functions upon statements made and papers presented by persons who were neither the parties in the cases nor their lawfully authorized agents, and who were consequently not properly responsible to the Court for their conduct. On every finding, therefore, in the case of *Brashe v. Mackinnon*, he could

see no difference between it and the present. This was a matter of Scotch practice, as had been most justly stated by the learned Solicitor General; and their Lordships would be very slow to go against the decision of the Court below on a point of practice, when coming here by way of appeal. The case of *Brashe v. Mackinnon* was not decided till 1820, but if it had not preceded this he should have been very reluctant to entertain a different opinion on the subject. He should have proceeded on the ground that the parties could not enter legally into this contract, one of the parties not being qualified to practise in the Court from whence the emoluments arose. He was of opinion, therefore, that the contract was illegal between the two parties, standing in the relation they did towards each other. Part of the contract bound the parties to secrecy as against all the world, including their clients, each undertaking to advise his clients, who were in ignorance of the contract, to employ the other in causes in which the country solicitor had such an interest, as in this case he would have had, in the profits of the town solicitor's practice. These things, taken together, were sufficient grounds in themselves to warrant him in humbly moving their Lordships to affirm the judgment of the Court below, with full costs."

Judgment affirmed, with costs.—*Giffillan v. Henderson*, 2 Clark & Finnelly, 1.

## INTERNATIONAL LAW.

[Concluded from p. 345.]

### CONTRACTS.—MARRIAGES.—CRIMINAL MATTERS.—CONVENTIONS.

We are next to consider as to the contracts entered into between subjects of this country and foreigners. Most, if not all of the above cases, admit that the country in which the contract is made, is the one to give the law which is to rule as to whether a contract does or does not exist. This may be taken to be so in the absence of any stipulation to the contrary, as we have seen from the last case that the parties may act by the foreign law, if they choose.

The most recent case on this subject is that of *Trimbey v. Vignier*, Bing. N. C. 151. There a promissory note was made by a Frenchman, then residing in Paris, and there indorsed to another Frenchman, who indorsed it to an Englishman in blank, who sued the drawer in England. By the law of France, the property in a bill of exchange passes by means of the indorsement. The indorsement is dated, and expresses the value given, and gives the name of the party to whose order payable; and if not so conformable, it does not operate as a transfer, but only as a power. The question in this case was, whether the plaintiff was entitled to sue the defendant in an English Court, in his own name. *Tindal, C. J.*, in delivering the judgment, remarked, "The promissory note was made by the defendant in France, and was indorsed by the payee in blank

in that country,—each of the parties, the maker and the payee, being at the respective times of making and indorsing the note, domiciled in that country. The first question therefore is, whether this action could have been maintained by the plaintiff against the defendant in the Courts of Law in France. On reference to the Code de Commerce, we think the language of the code is clear and express, that an indorsement in blank, that is, without containing the date, the consideration paid, or the name of the party to whose order it is passed, does not operate as a transfer of the note: it is but a procuration; and the language of the code being general, and unrestricted by any expressions which confine its operation to questions between the indorsee and indorser of the note, we think that if an action had been brought in any of the Courts of Law in France against the maker of the note, it would have been held not to be maintainable in the name of the plaintiff, but that he should have sued in the name of the last indorser by procuration. The question, therefore, becomes this: Supposing such rule to prevail in the French Courts by the law of that country, is the same rule to be adopted by the English Courts of Law, when the action is brought here,—the law of England allowing the action to be brought in the name of the holder?

"The rule which applies to the case of contracts made in one country, and put in suit in the courts of law of another country, appears to be this: that the interpretation of the contract must be governed by the law of the country where the contract was made (*lex loci contractus*); the mode of suing, and the time within which the action must be brought, must be governed by the law of the country where the action is brought—in *ordinandis judiciis loci consuetudo, ubi agitur*. See Huberi *Praelectiones Civilis Juris*, tit. 3. "De Conflictu Legum," sec. 7. This distinction has been clearly laid down and adopted in the case of *De la Vega v. Vianna* (1 B. & Adol. 284). See also the case of the *British Linen Company v. Drummond*, 10 B. & C. 903, where the different authorities are brought together.

"The question therefore is, whether the law of France, by which the indorsement in blank does not operate as a transfer of the note, is a rule which governs and regulates the interpretation of the contract, or only relates to the mode of instituting and conducting the suit; for, in the former case it may be adopted by our Courts, in the latter it may be altogether disregarded, and the suit commenced in the name of the present plaintiff.

"And we think the French law on the point above mentioned is the law by which the contract is governed, and not the law which regulates the mode of suing. If the indorsement has not operated as a transfer, that goes directly to the point that there is no contract upon which the plaintiff can sue. Indeed, the difference in the consequences that would follow, if the plaintiff sues in his own name, or is compelled to use the name of the former indorser as the plaintiff by procuration, would be very great in many respects, particularly in

its bearing on the law of set-off; and with reference to those consequences, we think the law of France falls in with the distinction above laid down, that it is a law which governs the contract itself, not merely the mode of suing.

"We therefore think that our Courts of Law must take notice that the plaintiff could have no right to sue in his own name upon the contract in the courts of the country where such contract was made; and that such being the case there, we must hold in our Courts that he can have no right of suing here."

The above-noticed case of *British Linen Co. v. Drummond* shows, that at the same time that the place of contract is to be regarded in respect to whether there be a contract or not, still the party following his remedy is bound by the law of the country where he seeks to enforce his remedy; and therefore, where the contract was made in Scotland, but the remedy sought in England, the party could not allege that by the Scotch law he had a remedy still existing which was barred in England.

Another branch of international law, is that of the Rules of Court as to contracts relating to real property,—those being governed by the law of the place where the property is situated. On this head I shall only refer to one case, where all the law upon the subject may be found collected. There, an Englishman, who had gone to Scotland, and there become domiciled, had a natural child by a woman whom he subsequently married. He died, leaving property both in Scotland and in England. By the law of Scotland, a child born before wedlock becomes legitimate by the subsequent marriage of the parents; and on the strength of this law the child claimed both properties; but on ejectment brought, the Court of King's Bench rejected his claim, and their decision was affirmed in the House of Lords. See *Doe d. Birtucle v. Vardell*, 5 B. & C. 438. Dom. Proc. sess. 1830.

I mention this branch of international law for the purpose of introducing a case of great public importance, founded on the doctrine of the above case, and in which the claimants are considered as coming within the Royal Marriage Act. I quote at present from memory, and may possibly mistake some minor facts. The case, however, was laid before the public some few years back, I conceive, as a feeder to the opinion of the people in favour of the parties, and copies may no doubt still be obtained. The case was this. One of the Royal Dukes, during his residence abroad, married an English lady privately, and there were two children by such marriage. The marriage, however, in this country, was declared null and void, he coming within the Royal Marriage Act. The way in which this matter is now before the Courts is this: the children have filed a bill for perpetuating the testimony of a priest who married the parties in Rome; and the grounds of their ultimate claim, on this evidence, is this: first, that no act of parliament can have any influence beyond the British dominions; and, se-

condly, supposing that such assertion covers too much, still, it is impossible for such act so far to interfere with the law of intermarriage in a foreign country, as to declare the issue of such marriage to be to all intents and purposes illegitimate.

That these children came within the Royal Marriage Act, and could not therefore safely marry at the present day without the requisite consent, was the opinion of Dr. Lushington; but without disparaging the opinion of so learned a civilian, it is impossible in such a question that any individual opinion could have any controul, when we consider that the case is of that moment as to be sufficient to raise a question concerning it before all the branches of the legislature.

I think it is more than probable that Dr. Lushington felt himself very strong on the second question, on the authority of the doctrine laid down in the above decision in *Vardell's* case, that a marriage may to a certain extent be valid, and at the same time invalid for some purposes.—As, for instance, the Marriage Act imposes a certain condition on those, who, by reason of their royal blood, may come to the throne; and this is, perhaps, fair enough, that the people, who are to yield means for the support of such persons, should have some slight controul in return, as to the persons whom it is fitting such blood royal should marry. The Law of England says, by whatever country or religion you be married, still our law is, that only such children as are born in wedlock shall inherit. Why not, then, equally say, that as regards royalty, there shall be a new canon? It does not, however, at all follow, that because we exclude the issue of an ordinary marriage from the Crown, that thereby the party may not be competent to inherit land in the country where that marriage took place, and was there valid. And this I conceive to be the full extent to which the parties wish to carry their claim. To say that we can pass a law which shall bind parties marrying in a foreign country, beyond the excluding them from particular individual rights, would be going rather further than the laws or feelings of that other country would admit of. As this case is likely to be heard more of, we may here leave it for the present.

As space will not allow of this matter being gone into fully, it may be as well to notice shortly some other few points. As regards public or criminal matters, foreign nations at the utmost stand neutral:—as, if a party commit murder here, and fly to France, if application be made to the French authorities to arrest such party, their answer is, We cannot do it. If, however, an officer be sent from this country, the matter is in some slight degree altered.—The officer can have no power to arrest there, and of course commits a trespass by so doing. If the party arrested applies to the authorities, they either liberate him, or wink at the matter, if they think there is a fair ground of arrest; and on this it of course rests on the natural powers of the officer to drag him into

the country where the crime is committed. This proceeding is not much countenanced, even in France, except in very flagrant cases: and in America, I believe, they have declared that they will not countenance it in any case. The consequences are these: When the prisoner arrives in this country, he is then within reach of the officer's warrant, and if he bring an action of trespass against the officer, he of course may reply that it was committed beyond the jurisdiction of the Courts in this country.

One word on Conventions. — When two countries are living in amity, it is open to them, and it often occurs, that conventions are entered into between them, for the purpose of settling claims which each respective country may have against the other, or for the purpose of establishing particular branches of trade, &c.; and under these, arrangements may be made for the subjects of each country enjoying certain privileges in the opposite country, which they could not before.

I am not quite certain whether application

was not made sometime back to France, to allow of mutual arrest of criminals in the two countries. The result, however, I am not at present aware of. Some information regarding the convention entered into between this country and France in 1814, regarding the claims of British subjects for property confiscated by the national convention in 1792, may be obtained by consulting the case of *Hill v. Reardon*, Jacob's Rep. 84; 2 S. & S. 431; and 2 Russ. 608; and also the case of *Lloyd v. Tumbleston*, 4 Sim. 290.

After perusal of the above remarks, it will be seen that Mr. Wellesley's case only varies itself from many already noticed, in the circumstances being rather more special. It is, however, worthy of notice, that France has altered her code so far as to allow of (what in our country we call) bail, and also that even upon a judgment under a particular amount, a foreigner cannot be arrested. This is going a little beyond our proposed liberality of abolishing arrest for debt in the first instance.

M.

## ATTORNEYS TO BE ADMITTED

*In Michaelmas Term, 1835.*

### KING'S BENCH.

#### *Clerks' Names.*

Adams, Perceval, Leeds.  
Adey, Anthony, Bridgwater, Somerset.  
Agar, Thomas Stodhart, 1, Great Bland Street, Great Dover Road.  
Allsup, James, Waltham, Holy Cross, Essex.  
Aspinal, John Bridge, Liverpool.  
Atkinson, John Glenton, Peterborough.  
Barber, Vaughan, Serle Street, Lincoln's Inn Fields.  
Bath, Samuel Jeffries, 19, Blackfriar's Road.  
Beeching, Alfred John, Tunbridge Wells.  
Beckington, Charles, 9, Bow Church Yard.  
Bell, William Errington, Barnard Castle.  
Billing, Charles Wilcocks, Plymouth.  
Birch, George, the younger, Long Buckby, near Daventry.  
Blathwayt, George Wynter, Louth, Lincoln.  
Bramah, Edward Henry, Pimlico.  
Bridgman, George, Southampton Buildings.  
Brooke Henry, Doncaster, York.  
Bromehead, Edmund Arthur, Close of Lincoln, co. Lincoln.  
Brown, Charles Joshua, Leamington Priors, Warwick.  
Brown, Alfred Hall, of Rochdale, Lancaster.  
Brown, John, 15, Tavistock Place, Tavistock Square.

#### *To whom articulated.*

Thomas Townend Debb, same place.  
Richard Antice, same place.  
John Fitch, 6, Union Street, Southwark.  
Joseph Jessopp, same place.  
Henry Byrom, Liverpool; assigned to James Otley Watson, Liverpool.  
Thomas Atkinson, same place.  
John Barber, Derby.  
Christopher Sayers, Great Yarmouth.  
John Stone, the elder, same place.  
Henry Ingledew, Town and County of Newcastle-upon-Tyne; assigned to Francis Seymour, same place.  
William Watson, same place.  
Edward Jago, same place.  
Sommersby Edwards, same place; assigned to John Freeman, Leamington Priors, Warwick.  
William Wilson, late of Louth, deceased; assigned to Field Flowers Goe, of Louth aforesaid.  
George Faulkner, Bedford Row.  
William Lamb Hockin, Dartmouth; assigned to Edward Dunsterville Puddicombe, Funnival's Inn.  
Edward Richardson, Wetherby, deceased; assigned to George Upton, Boroughbridge, and by him assigned to Edward Sheardown, Doncaster.  
John May Bromehead, same place, deceased; assigned to John Nowill, Bromehead, same place.  
William Francis Patterson, same place.  
John Goate Fisher, Great Yarmouth.  
Edward Hilliar, 6, Raymond Buildings.

*Clerks' Names.*

Cadman, Henry, Sheffield, York.  
 Carr, William Thomas, Blackburn, Lancaster.  
 Carter, William Edward, 2, Millman Street.  
 Castle, Charles, 38, Sidmouth Street, Regent Square.  
 Chapman, George Morrison, Lower Tooting.  
 Chester, Henry, the younger, 3, Parsonage Row, Newington Butts.  
 Chubb, John, Bridgewater, Somerset.  
 Clarke, Thomas Judkins, 163, Bishopsgate Street without.  
 Clark, William Henry Andrew, 3, King's Bench Walk.  
 Cockey, William Aldridge, 1, Serle Street, Lincoln's Inn.  
 Cook, John, Scarborough.  
 Collett, Charles Minors, 62, Chancery Lane.  
 Compigné, Horatio, 1, New Square, Lincoln's Inn.  
 Cooper, Charles, Manchester.  
 Cooper, William S., Kingston-upon-Hull.  
 Crafter, George, 247, Blackfriar's Road.  
 Creasey, Albert Thomas, 27, South Audley Street.  
 Cufaude, John Lomas, Halesworth, Suffolk.  
 Dawson, Richard, Wrexham, Denbigh.  
 Dearden, George Kenyon, Burnley, Lancaster.  
 Dent, William, 1, Wiffin Place, Harleyford Road, Vauxhall.  
 Dunn, William, 55, Bernard Street.  
 Edmonds, George, 15, St. Mary's Square, Birmingham.  
 Every, Richard, the younger, 10, Ampton Street, Gray's Inn Road.  
 Fenwick, Henry William, Newcastle-upon-Tyne.  
 Filliter, Freeland, Wareham.  
 Filliter, Clavell, Wareham, Dorset.  
 Foster, Edmund, 44, Queen Square, Bloomsbury.  
 Gibson, Charles, 64, Lincoln's Inn Fields.  
 Gibson, William Renshaw, 24, Providence Row, Finsbury.  
 Gilbertson, Issac, Machynlleth, Montgomery.  
 Glanvill, Geo., Ottery St. Mary, Devon.  
 Goodman, Richard Alfred, Well Street, Hackney.  
 Godwin Benjamin Charles, 9, Buckingham Street, Strand.  
 Grange, Richard, Charles Street, Portland Terrace, Regent's Park.  
 Greaves, Joseph, 7, Melton Street, Euston Square.

*To whom articulated.*

James Wilson, same place.  
 Thomas Carr, same place.  
 William Shearburn, Snaith, York.  
 Edward Daniel, Bristol.  
 John Roger Rush, 18, Austin Friars.  
 Henry Chester, the elder, same place.  
 Richard Anstice, same place.  
 Arthur Clarke, Bishopsgate Church Yard, deceased; assigned to Thomas Butts Tanqueray, same place.  
 Robert Thorp, Alnwick.  
 Robert Abraham, Ashburton, Devon.  
 Arthur Livett, Kingston-upon-Hull.  
 William Dyson, Chancery Lane; assigned to Henry Parker Collett, Chancery Lane.  
 David Compigné, Gosport, Hants.  
 John Makinson, same place.  
 Samuel Scholfield (now Samuel Lightfoot), same place.  
 John Hick Young, 33, Blackman Street, Borough.  
 Frederick Cooper, Brighton, Sussex.  
 John Cufaude, Halesworth.  
 Edwin Wyatt, St. Asaph, Flint.  
 John M'Connochie, same place.  
 Luke Minshall, Bromsgrove, Worcester; assigned to Thomas Holme Bower, 46, Chancery Lane.  
 John Clayton, Newcastle-upon-Tyne.  
 John Palmer, Birmingham and Coleshill; assigned to John Francis Dalby, Birmingham.  
 Richard Every, Exeter.  
 Christopher Fenwick, same place.  
 James Terrell, Exeter.  
 George Filliter, Wareham; assigned to James Terrell, Exeter.  
 Ebenezer Foster, the younger, of Cambridge.  
 Jasper Gibson, Hexham, Co. Northumberland.  
 John W. Ridgway, Manchester.  
 Joseph Jones, same place, assigned to Hugh Owen, same place.  
 Francis George Coleridge, same place.  
 Bartholomew Goodman, Grosvenor Street, Camberwell; assigned to Samuel Goodman, of Warnford Court; and by him assigned to Charles Tomes, Lincoln's Inn Fields.  
 Henry Godwin, Winchester.  
 James Barnaby Mills, Hatton Garden; assigned to James Goren, Orchard Street; and by him assigned to George Metcalfe, Gray's Inn.  
 Joseph Parkes, Great George Street, Westminster; assigned to Edwin Wilkins Field, Old Jewry, and by him assigned to Robert Michael Baxter, 48, Lincoln's Inn Fields.



## Clerks' Names.

## To whom articulated.

Grove, George Wilson, 8, Great Coram Street, Russell Square.

Harry James, Exeter; assigned to Edward D. Puddicombe, Furnival's Inn.

Hall, Thomas, Bath Place Peckham.

Thomas Hanson Peile, Old Broad Street.

Hand, Frederick James, 45, Theobald's Road.

Thomas Magnus Cattlin, 39, Ely Place.

Handley, Charles, 179, Tottenham Court Road.

Thomas Morris, Warwick.

Harding, John Legh, Hough Parish, Wybunbury, Chester.

Thomas Wyndham Jones, same place.

Harrisa, Charles, 72, Broadwall, Blackfriars.

Benjamin Whittington, 2, Dean Street, Finsbury Square.

Harrison, Henry Spencer, Chorlton-upon-Medlock, Lancaster.

John Taylor, Manchester.

Harting, James Vincent, 24, Lincoln's Inn Fields.

Charles Francis Arundell, Waterloo Place; assigned to Meaburn Tatham, 24, Lincoln's Inn Fields.

Harvey, Joseph, St. Mary's Square.

Charles Smallridge, Gloucester.

Hilder, Edward Augustus, 16, Three Crown Square.

James Martin, Battle, Sussex.

Hirst, Edwin, Boroughbridge, York.

William Hirst, same place.

Hodgkinson, Edward, 2, Doughty Street.

John Meriscoe Pearce, 10, St. Swithin's Lane.

Holloway, Stephen, Bath.

Joseph Drewe, Keynsham, Somerset.

Hopps, Edwin Chorley, 19, Wilson Street, Gray's Inn Road.

Matthew Bloome, Leeds.

Janson, Frederick Halsey, Basinghall Street.

Richard Smith, same place.

Jenkins, Henry, the younger, of Liverpool.

James Robinson, same place.

Jones, Frederick Robert, the younger, 11, Upper Charles Street, Northampton Square.

James C. Laycock, Huddersfield.

Jones, John Harpur, Nottingham.

William John Willett, Essex Street; assigned to John Fox, Nottingham.

Kingston, John, Carlton Chambers, Regent Street.

Robert Clarke, Stockton-upon-Tees.

Langdon, William, the younger, Malmesbury, Wilts.

Thomas Chubb, same place.

Landor, Edward Wilson, Rugeley, Stafford.

Walter Landor, same place.

Latimer, John Edward, 43, Southampton Buildings.

Henry Moore Griffiths, 6, Waterloo Street, Birmingham, assigned to Campbell Wright Hobson, Raymond Building.

Leman, George, York.

Robert Henry Anderson, York; assigned to William Smith, the younger, York.

Lewis, John Prothero, 28, Northumberland Street, Strand.

Charles Bishop, of Llandovery; assigned to Nathaniel Hollingsworth, 24, Cateaton Street.

Liddell, William, 6, Frederick's Place, Old Jewry.

Charles Henry Phillips, Kingston-upon-Hull; assigned to Thomas Frederick Maples, Frederick's Place.

Lingwood, Robert S. 13, Middlesex Place, New Road.

Messrs. Isaacson, Mildenhall; now with Robert Walters, Esq. Lincoln's Inn Fields, Barrister-at-law.

Lloyd, Henry, 50, Judd Street, Brunswick Square.

William Preece, Leominster, Hereford.

Lock, Henry, 7, St. Thomas Street, East Southwark.

Thomas Gould Read, late of Dorchester, deceased.

[To be continued].

## SUPERIOR COURTS.

## Vice Chancellor's Court.

## PURCHASE WITH TRUST MONEY.—LIEN.

*The vendor of an estate, knowing that the purchase-money was a trust, acknowledged, by the usual endorsement on the conveyance, the receipt of the whole purchase money; but, by an arrangement with the*

*acting trustee, he allowed him to retain part thereof at interest, and kept possession of the estate at a certain rent, under promise of a lease from the cestui que trust: Held, that the vendor has no lien on the estate for the balance of the purchase money as against the cestui que trust.*

This suit was instituted by the vendor of an estate for 11,000*l.*, for the purpose of obtaining a declaration of the Court of his right of *lien*

on the estate for 2000*l.*, the unpaid balance of the purchase-money. Certain stock stood in the name of Lord Berwick, Mr. Western (now Lord Western), and Mr. Edward Wakefield, upon trust to sell out the same, and vest it in the most beneficial manner in freehold land, and to settle and assure such land to Edward Gibbon Wakefield for life, remainder to the children of his marriage with his then intended wife. Edward Gibbon Wakefield was the son of Edward Wakefield, who was the acting trustee, and who, in negotiating the purchase of the plaintiff's estate with the trust money, retained part of it at interest, according to an arrangement with the vendor; and the question was, whether the vendor has a *lien* on the estate for the sum so retained.

That question was argued for several days by the *Solicitor General* and Mr. Wood, for the plaintiff; Mr. Jacob and Mr. Romilly, for Lord Western; Mr. Tennant, for Lord Berwick; Mr. Wakefield, Mr. Koe, and Mr. Bel-lusis, for Edward Gibbon Wakefield and his children; and by Mr. Knight, Mr. Kindersley, and Mr. K. Parker, for incumbrancers on Mr. Edward Gibbon Wakefield's interest in the estate. Edward Wakefield did not appear to the suit.

His Honor the *Vice Chancellor*.—E. G. Wakefield was virtually entitled to a sum of money, to be laid out in land, which was to be settled on himself for life, with the usual remainders to his children. E. Wakefield, his father, with Lord Western and Lord Berwick, being the trustees of this money, contracted with Mr. White, now deceased, the father of the plaintiff, for the purchase of an estate for 11,050*l.* It was distinctly in evidence from the correspondence, that Mr. White's solicitor was aware the purchase-money was trust-money. It appeared that Edward Wakefield entered into an arrangement on the part of Edward Gibbon Wakefield, that White, the vendor, should have a lease of the estate for twelve years, at four hundred pounds a-year. In the course of managing the completion of the purchase, there had been an application of a pressing nature for an immediate sale of the stock, out of which the purchase-money was to be paid, at a time when the vendor was not actually ready to complete the purchase. This gave rise to a transaction of a peculiar nature. On the 18th August, 1821, an account was settled between White of the one part, and E. Wakefield of the other, which takes notice of monies already paid to White, and of a loss incurred by the sale of the stock already mentioned, and it ends with an item to this effect:—"By amount retained, 2000*l.*, until the remaining signatures are obtained, and until certain attested copies of deeds are delivered, and lease executed, and other legal matters are completed; which balance shall carry interest after the rate of 4*l.* per cent., provided Mr. White gives two months' notice for payment of said 2000*l.*" The deed of conveyance from White to the trustees bore the same date, and had the usual receipt indorsed for payment of the purchase-money in full. Now, if there were any doubt

of the nature of the transaction, upon the face of this account, the correspondence shews that it was a transaction by means of which White agreed that the money should remain in Edward Wakefield's hands at interest, with a special proviso as to its payment. It did, therefore, appear to him that this transaction was one which made this case essentially different from the common cases where, for the convenience of the purchaser, or by reason of his misconduct, it happens that an estate is conveyed, without payment of the purchase-money; because, if White knew that the purchasers were trustees, he ought to have taken care that no arrangement should have been made but one which should leave himself and all persons interested under the trust in the situation they ought to have been in, had the purchase-money not been paid. The money should have been safe, and forthcoming. But the transaction was of a totally different character, and the money was virtually placed under the control of Edward Wakefield. If White did so deal with one of the trustees, without the concurrence of the others, he cannot be heard to say against them and the *cestui que trusts* and their incumbrancers, that he has a right to consider the estate as virtually mortgaged to him for his unpaid purchase-money. The essence of his claim altogether fails. Suppose it were otherwise: suppose that he had this *lien*; then, if the incumbrancers had no actual notice of this *lien*, the question would arise whether they were bound; because, as it was said, their trustees had notice that White was tenant in possession of the estate. But if White had declared in the most solemn manner to all the world, as he actually did by his receipt endorsed, that he had received all the purchase-money, no man could be expected to make any enquiry of him. The case, therefore, totally fails as against them; this was not a case, consequently, in which a Court of Equity could recognize this *lien*, and the bill must be dismissed with costs.

*White v. Wakefield and others*, at Westminster, May 7th, 9th, 11th, and June 1st, 1835.

### Eschequer of Pleas.

TRESPASS.—NONSUIT.—SUGGESTION ON THE RECORD.—TREBLE COSTS.

*In an action of trespass, for an alleged injury done to a wall, the plaintiff was nonsuited, and treble costs were thereupon allowed to the defendant by the master. A rule was obtained to review the master's taxation, on the ground that a suggestion should have been entered on the record for treble costs. Cause having been shown, the Court discharged the rule.*

In an action of trespass, brought for an injury done to a wall, the defendant pleaded that it was a party wall, and justified under the Building Act. The plaintiff declared in trespass, instead of case, and he was in consequence nonsuited, and treble costs were taxed to the defendant by the master.

A rule *nisi* was then obtained to shew cause

why the taxation should not be reviewed, on the ground that no suggestion was entered on the roll to shew that the defendant was entitled to treble costs.

Cause was now shewn, when it was contended, that it was not customary to enter the suggestion, except after verdict given. Besides, as it was admitted the defendant was entitled to treble costs, and it was not shewn that judgment was signed, the suggestion might be put upon the roll any time before it was completed. A case was cited, where the certificate of the Judge before whom the cause was tried, allowing treble costs, was permitted to be entered upon the record, even after error brought. So also in another case, the Court was authorized to make such entry upon the *postea* as would authorize the Court to allow costs, if the jury had omitted to find them. The act gave the defendant power to recover treble costs in the suit, by such remedy as was usual in other cases by law. Some cases might exist where it would be right to make an application to the Court to allow the treble costs; but in the present case, where there was no doubt that the defendant was justly entitled to them, no suggestion was necessary. The words of a former act were nearly the same as those before cited, and gave the defendant authority to recover double costs of suit, on a nonsuit, or verdict for him; and costs had been taxed in the usual way under that act, without any suggestion being entered.

In support of the rule, it was submitted, that there appeared nothing on the record to shew that any more than the common costs in a nonsuit should have been taxed. It had been decided in many cases, that the defendant was too late to enter a suggestion after judgment finally signed. The form of judgment was merely for so much costs sustained; and it could not be said that treble costs had been sustained. In a former case, the Court had directed a suggestion to be entered, under circumstances similar to the present; and no supposition there existed that the defendant could have treble costs without a suggestion.

The Court said, that final judgment had not yet been signed, and if it were finally entered up without a suggestion, the plaintiff might take advantage of it. The defendant appeared to be justly entitled to the treble costs, and the master was therefore right in taxing them. It was at present unnecessary to decide as to the entry of a suggestion; but in some cases such an entry appeared to be required; as, for instance, where the object was to deprive the plaintiff of his costs, when some reason must be shewn why they should be disallowed. In the present case, the defendant was fully entitled to treble costs under the act; and nothing to entitle him to treble costs would appear upon the record, unless he entered his judgment for them.

Rule discharged.—*Wells v. Ody*, E. T. 1835. Excheq.

**NOTICE OF RENDER.—ASSIGNMENT OF BAIL-BOND.—PROCEEDINGS TAKEN.**

*If notice of render shall have been given to the plaintiff's attorney, no notice of bail however being served, and no entry of the render being found, and he shall take an assignment of the bail-bond and commence proceedings, such proceedings will be deemed irregular.*

This was an action on a bail-bond, brought by the plaintiff in his capacity of assignee to a late sheriff; and a rule had been obtained for staying all proceedings on payment of costs of the assignment.

Cause was now shewn, when it was submitted that the affidavit on which the rule was obtained was improperly headed. The proper title of the cause was "*John Short, assignee of J. H. Esquire, and of T. W., Esquire, sheriff,*" &c. while in the affidavit the word "*Esquire*" was omitted in both instances. Besides, the proceedings in the case were irregular, as shewn in the affidavits. The last day for putting in bail was passed over, and on the next day notice of render to the Fleet was given, and the defendant rendered accordingly. Such notice, however, should have been for a render to the sheriff, and on the defendant's rendering, notice of special bail, which was put in, should also have been given. The plaintiff's attorney was, however, ignorant of this last fact; and it was now sworn that the books had been examined, and no entry could be found.

In support of the rule, it was stated, that although the first notice of render to the Fleet was irregular, yet a subsequent notice was served, pointing out the error in the previous instance, and informing the plaintiff of the defendant's intention to surrender to the sheriff. The bail was merely given for the purpose of rendering the defendant; and after notice of render had been given, an assignment of the bail-bond was irregular. It had been held that where bail was put in, merely for the purpose of a render, it was unnecessary to give notice; and it was also irregular, according to a case cited, to sue out process on a bail-bond, although the same shall have been forfeited, and an assignment written for before a justification, after the rule for the allowance of bail has been served.

The Court made the rule absolute.—*Short, assignee, v. Doyle*, T. T. 1835. Excheq.

**ASSAULT AND BATTERY.—MASTER AND APPRENTICE.—EXCESSIVE PUNISHMENT.—PLEA, RIGHT TO CHASTISE.—REPLICATION, DE INJURIA.**

*In an action for assault and battery, where the defendant was the master of the plaintiff, and pleaded just and moderate correction, and the replication was de injuria; the jury found that the correction was excessive, and gave a verdict for the plaintiff. The Court held that the question of excess did not arise on that issue, and granted a new trial.*

This was an action in trespass for assault

and battery. The defendant in his plea pleaded, first, not guilty; and secondly, that at the time the assault was alleged to have been committed, the plaintiff was in his service as an apprentice, and conducted himself saucily, whereupon he moderately corrected him; and this he was ready to verify. The plaintiff replied, as to the first plea, *similiter*, and furthermore alleged that the assault was committed by the defendant of his own wrong, and without the cause by him assigned; and of this he put himself upon the country. At the trial of the cause a verdict was given for the plaintiff with one shilling damages. The jury finding that the assault alleged was given by way of correction, returned a verdict on the ground of disproportionate punishment. On this a rule *nisi* was obtained for entering a verdict for the defendant, or for a new trial, on the ground that excess could not be given in evidence on the issue.

Cause was now shewn, when it was contended, that the plea was not proved, as the jury found that the punishment was disproportionate, and as the plea *de injuria* put in issue all facts stated in the plea, the fact of moderate correction must be put in issue. The replication, at any rate, must be held to be good after verdict given; for in a case cited it was held, in assault and battery, where the defendant pleaded that the plaintiff neglected his duty, in consequence of which he moderately chastised him, and the replication was that the correction was not moderate, although that was an informal traverse and involved the chastisement rather than the manner of doing it, yet after verdict found, it was good, as the jury had found that the correction was excessive. In a latter case it was also held, that the question of excess was put in issue, until the material allegations in the plea were all proved, and evidence of facts consistent with the declaration might be given under *de injuria*. So also it had been held in an action where the defendant pleaded *non assultu demerere*, if it was proved that more than necessary violence had been used he could not justify under that plea. In another case also, where the declaration alleged the imprisonment and assault of the plaintiff, the defendant in his plea stated that the plaintiff was in custody under process, and that whilst so confined he became violent, and would have escaped but for the commission of the assault complained of. The Court there said, that the plea of the defendant was good, if sufficiently proved; and it was necessary to allege the misconduct of the plaintiff to justify the assault: as there was not good proof however of the justification, a verdict was given for the plaintiff. So in the present case, the latter part of the plea was disproved, and the plaintiff was in consequence entitled to a verdict.

The Court immediately made the rule absolute for a new trial, and observed, that the replication *de injuria* only put in issue the cause of correction stated in the plea. The plaintiff therefore, instead of replying *de injuria*, should have admitted the power of the defendant to chastise him, and should have new as-

signed the excess, which would have the effect of raising the real question in dispute.

Rule absolute for a new trial.—*Penn v. Ward*, T. T. 1835. Excheq.

ACTION ON THE CASE.—REASONABLE NOTICE TO DEFENDANT TO ADMIT DOCUMENTS.—COSTS.—ATTORNEY AND AGENT.—ATTORNEY AND CLIENT.

*In an action on the case, proof of certain documents in the plaintiff's cause became necessary. The defendant's agent in London, on being applied to, four days before the commission-day at Newcastle-upon-Tyne, refused to admit the documents, on the ground that the application came too late, as he had no opportunity to communicate with the defendant. Two days subsequently, a similar application was made, which he again refused, and sent off the briefs in the cause on the same night. After the trial of the cause, the master refused to allow the costs of proof of the documents. On a rule nisi, the master's taxation ordered to be reviewed.*

An action on the case was brought for running down a ship. The defendant pleaded on the 26th of January; and issue having been joined, notice of trial was given on the 21st of February. On the 28th of the same month, the plaintiff's attorney served upon the defendant's attorney's agent in London a notice to admit certain documents necessary for the success of the plaintiff's cause, an inspection of which on the same day was offered. No attention was paid to this, but on a second notice being served on the 2nd of March, the defendant's agent refused to admit the documents, giving as his reason that it was too late to make the application. A summons was taken out for the next day, but no attention was paid to it. The commission-day was on the 4th of March, but the trial did not come on until the 7th. It was then tried at Newcastle-upon-Tyne, and the plaintiff obtained a verdict. The master, in taxing costs, refused to grant the expenses of a witness called to prove the document alluded to. A rule *nisi* was then obtained to review the master's taxation, against which cause was now shewn.

It was stated, that the defendant's attorney lived at Harwich, and that his London agent was entrusted to make out the briefs. They were nearly drawn at the time the first notice was served, on the 28th of February, and were transmitted on the 2nd of March by the mail, before the documents were brought to be inspected. It was now contended, that under these circumstances the notice was not given in reasonable time. The agent should have had more opportunity to inspect the documents, and time should have been allowed for him to communicate with the plaintiff's attorney. The master therefore was quite right in refusing to allow the expenses of the witness in question.

In support of the rule it was urged, that there was no suggestion on the part of the defendant, that the admission of the documents would have been a matter of inconvenience. It was quite evident that the London agent must have known whether it was fit to admit the documents or not, as he had to prepare the briefs, and generally to manage the case. The question was, whether the notice given was not sufficient, and whether the fact of the documents having been submitted to the defendant's agent for inspection, did not entitle the plaintiff to his costs for proving the copies of the instruments.

The Court was of opinion, that the master's taxation ought to be reviewed.

Rule absolute.—*Tynn v. Billingsley*, T. T. 1835. Excheq.

WRIT OF FI. FA.—NO EFFECTS.—WRIT OF CA. SA.—SHERIFF'S RETURN TO FI. FA.

*A writ of fi. fa. having been issued, a statement was made to the plaintiff by the sheriff's officers that there were no effects. A ca. sa. was in consequence sent. The officer's statement was afterwards found to be untrue, and the fi. fa. was in consequence ordered to be put in force. Held, that the ca. sa. did not preclude the plaintiff from his right to the return to the fi. fa.*

In this case it appeared that a writ of *fi. fa.* had issued, and was lodged in the hands of a sheriff's officer. A letter was subsequently received from the officer, stating that the defendant had no goods, and was only a lodger; and upon this information, a writ of *ca. sa.* was issued. The facts stated in the officer's letter were afterwards found to be untrue, and a communication to that effect was forwarded to him. Directions at the same time were also given, that unless the writ of *ca. sa.* had been put into execution, the goods should be seized; and a side-bar rule was obtained, for a return to the writ of *fi. fa.* The Court however also subsequently granted to the sheriff a rule *nisi* to set aside the side-bar rule, in answer to which, affidavits were now put in, endeavouring to shew that there was a collusion between the sheriff's officer and the defendant, and that the representations made by the former in his letter to the plaintiff, were wilfully falsified. In support of this it was alleged, that the officer had, on a former occasion, seized some goods belonging to the defendant, which however, on the execution being compromised, he had again delivered up. Independently of the collusion, however, it was also contended, that the issuing the writ of *ca. sa.* did not necessarily affect the former writ; and in support of this, a case was cited where the Court had held, that a plaintiff might sue out both processes at once, either of which he might use; but by putting the *fi. fa.* in execution first, he could not use the other process until a return shall have been made to that writ. A plaintiff might however, omit to use

the *fi. fa.*, and might put in force a *ca. sa.* before the *fi. fa.* was returnable. In another case it was also held, that both writs might be issued together, and either might be put into execution. In the present case, the officer had the *fi. fa.* for a considerable period before the *ca. sa.* issued, and if he was guilty of breach of duty in neglecting to put the writ in force, the sheriff was answerable. No authority could be adduced to shew that one writ supercedes the other, and as there was no express countermand of the first, the sheriff was not relieved from his duty on both, and should have put that in force which would have been most to the plaintiff's advantage.

In support of the rule it was urged, that the cases cited of the concurrent writs, did not meet the present case. The officer had no opportunity of executing the *fi. fa.*, for immediately on the receipt of his letter by the plaintiff, the *ca. sa.* was lodged with the sheriff's deputy. Under such circumstances, the *ca. sa.* had the effect of countermanding the former writ, unless the contrary was distinctly pointed out. Otherwise, the sheriff would be in this predicament, that, supposing the defendant was in the custody of any officer of the sheriff, he would also be in the custody of the sheriff on the action in which the writ was lodged. In a case cited, a writ of *ca. sa.* was issued on the action against a defendant, with directions that it should not be put in force unless he was in custody on any previous writ. The defendant was found to be in custody, but, as it turned out, illegally; and the sheriff considering the *ca. sa.* as a detainer, kept him in custody, although he should have been discharged. On an application by the defendant for his discharge, the Court told him, that he was properly in custody, and refused to discharge him, observing, that the writ of *ca. sa.* attached from the period the defendant was originally in custody, although it was at the suit of another. So, in the present instance, the defendant might be in custody on the *ca. sa.* and his goods ought not therefore to be taken on the other writ.

The Court discharged the rule, with costs,—observing, that it was evidently the duty of the sheriff's officer to have seized the goods wherever he could find them, so long as the *fi. fa.* ran, or he might have put whichever of the writs he thought most advantageous to the plaintiff into execution. It was unnecessary now to determine whether the *ca. sa.* acted as a *superseas* to the *fi. fa.*; but even if it had been so, some time had elapsed, during which it appeared the *fi. fa.* should have been executed, and the plaintiff should have an opportunity of trying the question, which he could not have without a return to the *fi. fa.*

Rule discharged with costs.—*Smith v. Johnson*, T. T. 1835. Excheq.

## NOTES OF THE WEEK.

The session of parliament has at length closed, having been prorogued on the 10th instant. The result of the last week's deliberations is stated in the following lists. The most important measure of the session, both in a general and professional point of view, is the Municipal Corporation Bill. The Houses of Parliament have been engaged in the discussion of its clauses until a later period of the year than has ever occurred on any other occasion, except that of the Reform Bill, when first introduced.

The following Bills, which have received the Royal Assent, are of more or less importance to the profession: viz. Highways, Illegal Securities, Certiorari, Bankruptcy Funds, Letters Patent, Oaths Abolition, Tithes Recovery, and Contempts in Equity (Ireland). These we shall bring to the notice of our readers in due course.

Many most important Bills for altering the Law have been postponed till the next Session,—particularly the following: Imprisonment for Debt, Wills and Executors, Prisoners' Counsel, Copyholds Enfranchisement, Law of Tenure and Escheat, Ecclesiastical Courts, Church Reform, Education and Charities, Dissenters' Marriages, Law of Libel, Poor Laws, Parochial Registration.

The following is the list of the past week.

## ROYAL ASSENTS.

9th September, 1835.

Municipal Corporations.  
Stamps and Taxes.  
Tithes' Recovery.  
Tithe on Turnips.  
Cruelty to Animals.  
Workhouse Property.  
Publication of Lectures.  
Oaths Abolition Amendment.  
Weights and Measures.

10th September, 1835.

Capital Punishments.  
Abolishing useless Offices.  
Letters Patent.

## HOUSE OF LORDS.

*Bills passed.*

Stamps and Taxes.  
Abolishing useless Offices.

*Postponed.*

Residence of Clergy.  
Pluralities Prevention.  
Ecclesiastical Jurisdictions.  
Wills Execution.  
Executors.  
Education & Charities.  
Church of Ireland.  
Marriage Law amending.

## HOUSE OF COMMONS.

*Bills postponed.*

Law of Tenure.  
Law of Escheat.  
Registration of Births, &c.  
Law of Libel.  
Parish Vestries.  
Copyholds Enfranchisement.  
Registration of Voters.  
County Coroners.  
Durham Court of Pleas.  
Dissenters' Marriages.

For the other Bills passed or postponed, see the lists in the previous Numbers.

## ANSWERS TO QUERIES.

*Law of Property and Conveyancing.*

## APPORTIONMENT ACT.—ANNUITY. P. 288.

The act of 4 W. 4, c. 22, is clearly *prospective only*. After setting forth, in the preamble of the act, the evils arising from the then existing law of apportionment, the 2d section provides for the more equitable apportionment of rents-charge, and other rents, annuities, pensions, dividends, &c., made payable or coming due at fixed periods, under any instrument *that shall be executed after the passing of the act*; or, being a will or testamentary appointment, *that shall come into operation after the passing of the act*. It is difficult to conceive by what ingenious process of construction of these words, it can be contended that the representatives of an annuitant under a will, of which probate was granted three years before the passing of the act, are entitled to an apportionment of the annuity under the provisions of that act; as the death of the testator, it is submitted, must be deemed to be the time when a will is considered to come into operation. The special wording of the act, with respect to wills and testamentary apportionments, was no doubt intended by the legislature to provide for the cases of wills executed before, but not coming into operation until after, the passing of the act.

C. H.

*Law of Attorneys.*

## SIGNED BILL. P. 224.

L. M. is referred to the case of *Franklin v. Featherstonaugh*, 1 Adol. & El. 475; 3 Nev. & Man. 779, S. C. J. C. G.

## ADMISSION.—CERTIFICATE. P. 32 &amp; 240.

1. The case quoted by "I. M. C." is, I submit, not conclusive on this point. In opposition to which, I beg to refer him to two recent cases, reported in the 7th vol. of the *Legal Observer*, pp. 332 and 388, namely, *Ex parte Jones*, H. T. 1834, K. B. P. C.; and *Ex parte Joy*, H. T. 1834, K. B. P. C. There is also recorded in the same book an opinion of, I think, Mr. Justice *Littledale*, which he pro-

nounced in favor of the attorney, on a similar application. The 37 G. 3, c. 90, s. 31, is, at this time of day, construed more liberally than "I. M. C." is probably aware of. An affidavit to the effect that the attorney has never, either directly or indirectly, practised since his admission, is, however, I apprehend, essential, before he can obtain his certificate. This duty would, indeed, be more oppressive than it is at present, and operate most injuriously on the exertions of the young practitioner, if the law were otherwise. **ASPIRO.**

2. The answer given by "I. M. C.," in your last number, p. 240, is incorrect. The contrary has been decided in three cases, *all previously mentioned in your work*. See 7 L. O. 332 & 388; 9 L. O. 158. The question is too important to the younger members of the profession, in these times, to be allowed to pass uncontradicted. **X. D.**

### **Law of Landlord and Tenant.**

NOTICE TO QUIT. P. 224.

Attornment from B. to C. is unnecessary. The notice to quit given by C. to B. is good. C. may bring ejectment, or distrain, or sue in *assumpsit* or debt, for use and occupation. For the law on this subject, see Mr. Ram's Law of Tenure and Tenancy, p. 66, sec. 9, and 67, note (1),—a useful little work.

**J. C. G.**

## **QUERIES.**

### **Common Law.**

REPORT OF ARBITRATION.—LIBEL.

Mr. H. L. brought an action against G. and others, as executors of Mr. J., deceased, for the recovery of his bill for medicine and attendance upon the deceased in his lifetime; to which an appearance was entered, and a sum which was thought sufficient paid into Court by the executors. The cause, when at issue, was brought on for trial at the Lancaster assizes, and ultimately ended in a reference, which terminated in favor of the executors. A question arises as to how far they would be justified in giving publicity to the result of the award in the newspapers; and an answer to which will very much oblige **J. T. A.**

### **POLICY OF ASSURANCE.**

Is a policy of assurance of a ship assignable without the consent of the insurance office? see *Lynch v. Dalsell*, 3 Bro. P. C. 341, Tomlin's edition. **J.**

### **Law of Property and Co-partnership.**

AD VALOREM STAMP.

A, in consideration of natural love and affection for his three sons, assigns to them as tenants in common a valuable lease; the three enter into co-partnership, and articles are executed: about one year after, one of the sons sells to the other two, for the sum of 2000*l.* all his undivided *third part or share of and in the said lease*, and also his third of and in the stock in trade, furniture, and effects of the co-partnership; and executes an assignment

of the same by indorsement on the co-partnership deed (no apportionment of consideration). What stamp is necessary? See *Belcher v. Sykes*, 6 Barn. & Cres. 234. **J. B.**

### **DEVISE.**

Devise of real estate to A. and his heirs, and in case he shall happen to die and shall have no son who shall live to attain twenty-one, then over. A. has a son who attains twenty-one; does the son take any, and what estate, under the devise? **A.**

## **THE EDITOR'S LETTER BOX.**

The *Legal Almanack, Remembrancer, and Diary*, for 1836, will be published before Michaelmas Term. The plan adopted last year will be somewhat altered. Particular attention will be paid to the preparation of an *Office Diary*. Several new Professional Lists will be added; and it is expected that with the suggestions we have received, the Work will be rendered particularly useful to the profession at large.

The Commissioners' Report on the Consolidation of the Statute Law, or so much thereof as will be interesting to the Profession, will be published next Saturday, the 19th inst.

The *Commentaries on the New Statutes*, showing all the Alterations in the Law during the late Session of Parliament,—particularly in Municipal Corporations,—in continuation of our ANNUAL DIGEST of the STATUTE and COMMON LAW, will be published at an early period.

We hope "Inquirer" will not hastily bring an action on the faith of any answer he may receive to his query. We shall be glad if he receive any assistance from this Work by reference to proper authorities; but he should consult Counsel, learned in the particular branch of law to which he refers.

We have been obliged, from the arrear of other matter, to defer the Historical Sketch till another week.

The suggested Improvement of the Law by J. B. W. shall be considered.

We are obliged by the further case on Retaining Counsel.

We are sorry for the disappointment which "Chagrin" has received, and thank him for his numerous remarks on other Correspondents. We shall make use of some part of his communication, and hope to profit by the rest.

The statement of J. B., as to the charge at the Subpoena Office, shall be attended to.

"Non Professional" is informed, that he will be entitled to practise in the branch of law to which he refers, after serving articles to a solicitor.

We are obliged by the further statement of the case of *Doe d. Burtley v. Gray*, as to a mortgage stamp, and will insert it, for the information of several correspondents, in the next number.

The Queries and Answers of J. S. C.; J. D.; and "A Constant Subscriber," have been received.

# The Legal Observer.

Vol. X. SATURDAY, SEPTEMBER 19, 1835. No. CCXCI.

— "Quod magis ad nos  
Pertinet, et necire malum est, agitamus.

HORAT.

## THE RIGHTS OF FRENCHMEN IN ENGLAND.

BY A FRENCH ADVOCATE.

No. I.

My dear Friend,

IN my last I gave you a full account of my perils by land and sea, in obtaining access to this enormous smoky city. They tell me, however, that the air is astonishingly clear for London, and that in winter they frequently burn candles in the Courts of Justice. If that would assist in making their laws clear, I should not object to stay till the second of November, when I understand the Michaelmas Term begins. It used to begin on the 6th of that month; but Lord Abinger, the President of the Tribunal of the Exchequer, cut four days off the Long Vacation, as the English Advocates call it, and thus at one blow made the lawyers complain, and the term begin, some days earlier.

You requested me to give you an account of our *rights* in this country. I think the best way of complying with that request is by informing you of our *wrongs*. I mean only a play of words by this: I refer only to the various restrictions under which we labour here. You are aware that before I came to this country, I had made some progress in the study of *English law*; and therefore what I now communicate to you will be the result of former study, and personal observation and inquiry.

In the present letter I shall describe our rights as citizens, with respect to the acquisition of property.

Most of what I can state applies equally to all foreigners, and therefore to Frenchmen among the number. When there is any thing which peculiarly affects us, I will remark it.

The first consideration will be—Who are aliens? I know of no better mode of defining that character than by pointing out who

are *natural-born* subjects. After a very long examination of the common law, as well as the statutes by which it has been modified, it appears that persons born within the allegiance, power, or protection of the Crown of England, are natural-born subjects. This is the general proposition; and the words "allegiance, power, or protection," now embrace, not only persons born within the dominions of the Crown of England, or of its homagers, and the children of subjects in its service, born abroad, and the King's children, wherever born, if their father was king at the time of their birth,—all of whom were natural-born subjects by the common law,—but also by statute, all persons who are born abroad, whose fathers or grandfathers by the father's side were natural-born subjects at common law;—whilst the father or paternal grandfather, through whom the claim is made, was, at the time of the birth of such children, liable, in case of his return into this country, to the penalties of treason or felony, or was in the actual service of any foreign prince then at enmity with the Crown of England;—excepting always from the benefit of the common law, and of the statutes, those artificers and manufacturers, who are declared to be aliens by the 5 G. 2, c. 27.

It must, however, be remarked, that when the Crown of England is here spoken of, it only refers to the Crown of Great Britain; for the dominions of the King of *England*, as ruler of *Hanover*, are not meant; and persons born in Hanover, or in the King's service there, are as much aliens by the common law, as the inhabitants of any other country, over which the King of England has no power. This appears clear from the case of *Craw* and *Ramsey*, Vaughan, 286.

From this definition of natural-born subjects, you will perceive that all other persons, who are neither denizens nor naturalized, are aliens.



I will now inform you what the English lawyers understand by the word "denizen." It should seem by the writings of the older lawyers, that the word *denizen* was employed both in the sense of a natural-born subject, and of a person who only possessed some of the privileges attached to that character. The latter is the meaning now attached to it by English lawyers. The words of the great Lord Bacon, in *Calvin's case*, (7 Coke, p. 1; Bac. Ab. Aliens, A.) are very important. He says, "A denizen is one that is but *subditus insitivus*, or *adoptivus*, a subject engrafted or adopted, and is never by birth, but only the king's charter, and by no other mean, come he never so young into the realm, or stay he never so long. Mansion or habitation will not endenize him; no, nor swearing obedience to the king in a leet, which doth in law the subject; but only, as I said, by the king's grace and gift. To this person the law giveth an ability and capacity, abridged not in matter but in time. And as there was a time when he was not subject, so the law doth not acknowledge him before that time. For if he purchase freehold after his denization, he may take it; but if he has purchased any before, he shall not hold it: so if he have children after, they shall inherit; but if he have any before, they shall not inherit."

Mr. Justice Blackstone is of the same opinion (1 Com. p. 374). The denizen himself cannot inherit lands, because his parents, through whom he must inherit, had no inheritable blood themselves, and therefore could convey none to him. He may take and hold lands by purchase or devise, as neither of those modes of acquiring property have relation to time past, as descent and inheritance necessarily have. The effect of denization is to invest an alien, from the moment of granting letters for that purpose, with all the inheritable rights which can subsist without relation to an antecedent period of time. Com. Dig. tit. Aliens, D. 2; 1 Bla. Com. 374.

By the 12 & 13 W. 3, c. 2, it is provided, that no denizen, unless born of English parents—in which case he would be by statute a natural-born subject—shall be allowed to become a member of the Privy Council or of either House of Parliament; or to enjoy any place or office of trust, civil or military; nor receive any grant of lands from the Crown. This provision of the act appears to have owed its origin to the jealousy which the English had of William III, on account of his predilection for foreigners.

Now let me inform you of the mode in which denizens are made. Lord Coke, who seems a great authority among English lawyers, says, in the case of *Calvin*, to which I have already alluded, that denizens may be made in three different ways: by Parliament; by letters patent; and by conquest; as if the king and his subjects should conquer another kingdom or dominion, as well *antenati* as *postnati*, as well they who fought in the field as they who remained at home for defence of their country, or were employed elsewhere, are all denizens of the kingdom or dominion conquered. The most usual way is the second; but that right cannot be delegated to another. Sir William Blackstone (Com. vol. 1, p. 374) calls this "a high and incommunicable branch of the royal prerogative."

It may be proper to inform you, that not merely does the English law respect the rights of denizenship gained in England, but such rights in those declared denizens in foreign states. The Court of King's Bench, in the case of *Wilson v. Maryat*, 8 T. R. 31, decided that a natural-born subject of England may also be a citizen of America, for the purposes of commerce, and entitled to all the advantages of an American under a treaty; and the circumstance of his coming over to England for a temporary purpose does not deprive him of those advantages. This doctrine was afterwards confirmed on appeal to the Exchequer Chamber, 1 Bos. & Pul. 430.

The next class of subjects to which I shall refer you, are naturalized persons. These are persons who were originally aliens, but have been naturalized. The effect of naturalization is to bestow on the person naturalized all the privileges, with some very fair exceptions, of a natural-born subject. This is done either by a special act of parliament, or by complying with the provisions of a general one. They are, however, by the 12 & 13 W. 3, c. 2, prohibited from being members of the Privy Council, or of either House of Parliament, and from enjoying any office or place, civil or military, or any grant from the King of lands within the kingdom of Great Britain and Ireland. In consequence, therefore, a person naturalized is not eligible even to the office of constable, 5 Burr. 2788. By the 1 G. 1. st. 2, c. 4, it is provided, that no bill of naturalization shall be received without a clause to this effect. The usual practice therefore is, whenever a foreigner distinguished for his rank or services, is naturalized, first, to pass an act for the repeal

of these statutes in his favour, and then to pass an act of naturalization without any exception. There are other provisions to be found, in some degree limiting the privilege of a naturalized person; but I do not think I need trouble you with them, as they are of unfrequent occurrence.

Having now pointed out to you who are absolute aliens, by describing who are natural born subjects, denizens, and naturalized persons, I come now to describe what are the restrictions imposed on aliens. In my present letter, I shall only mention the disabilities under which they labour with respect to the right of holding property in England. Sir Edward Coke (Co. Lit. 2, a. b.), says, "If an alien purchase houses, lands, tenements or hereditaments, to him and his heirs, albeit he can have no heirs; yet he is of a capacity to *take* a fee-simple, but not to *hold*; for upon office found,—that is, upon the inquest of a proper jury—the King shall have it by his prerogative, of whomsoever the land is holden: and so it is if the alien doth purchase land and die, the law doth cast the freehold and inheritance upon the King."

But it is to be observed, that this prohibition only applies to real property. Therefore an alien may acquire a property in goods, money, and other personal estate, or may hire a house for his habitation. The reason given for this is, that if an alien could acquire a permanent property in lands, he must owe an allegiance equally permanent with that property, which would probably be inconsistent with that which he owes to his own natural liege lord, and might be productive of inconvenience, in consequence of foreign influence; while, on the other hand, personal estate is of a transitory and moveable nature,—and, moreover, indulgence to strangers is necessary for the purpose of trade. There were formerly, in the time of Henry VIII, certain statutes which prohibited alien artificers from working for themselves in England. They were, however, considered as virtually repealed by the 5 Eliz. c. 7. (1 Bla. Com. p. 372.) An alien also may bring an action concerning personal property, may make his will, and dispose of his personal estate. (Lutw. 34).

Again, a foreigner may under the Poor Laws gain a settlement by occupying a tenement of 10*l.* a-year value, for forty days. *Rez v. Eastbourne*, 4 East, 103.

In speaking of the rights of an alien, you must observe that I only speak of the rights of aliens belonging to countries which are

at peace with England; for alien enemies have no rights, except by a special favour from the Crown.

I shall here close my letter, and proceed in my next with the consideration of other rights or restrictions, which the English Law grants or imposes.

I remain, yours, &c.

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## PROGRESS OF THE ENGLISH LAW SINCE 1660.

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ACCUSTOMED, as we are, to the progress and changes of this reforming period, when we look back to the revolutions of former ages, we naturally expect to discover the effects of those general principles which actuated the leading characters of the age. We expect to find that the Revolutionists, after reforming, or at least altering their political constitutions, turned their attention in good earnest to the criminal and civil laws, and remodelled the relations of domestic life, and the laws affecting the tenure and dispositions of property; and Englishmen of the present day are apt to imagine that during the Commonwealth—after the King had been brought to the scaffold, when the civil wars were ended, the constitution in church and state entirely subverted, and the republican party in full possession of the government,—vast changes were made in the civil branch of our laws; but in reality less was done during the whole twelve years of the commonwealth than had been effected in equal portions of former periods of our history, and much less than in the last twelve years. This, however, was not owing to the nation not being possessed with the true revolutionary spirit, which, being based upon theories of ideal perfection, and finding all things necessarily more or less imperfect, innovates, with the hope of improving the bad, at the risk of spoiling the good.

The causes which prevented any thing of consequence being effected while the Republican party was in power, were chiefly these.—On gaining possession of the government, their first object was to establish themselves, by the total defeat of the Royalists; and their whole attention was directed to war. After obtaining complete success, the designs of Cromwell, who aimed at seating himself and family on the republican throne, led him to wish rather to check than to encourage the progress of change; and in this he was partly aided by the gentry and legal classes of the country. There were two motives which induced the gentry to be opposed to further changes: one, which actuates them to a certain extent in all countries and at all times, viz. the fear of losing a positive good—the secure enjoyment of their property—in an attempt to obtain a theoretically greater good: the other was, a desire not to do any thing which might obstruct a restoration. But as to this motive, the possessors of property were divided: there were many

who would greedily have received any alteration, in hopes that the making men's properties, estates, and titles rest upon new laws, would engage the community in support of the new order of things—an effect which was actually produced in France by the first revolution. The great majority of the English gentry, however, must have been desirous of resisting great changes in the laws, not only from the character of the class in general, and of Englishmen in particular, but also because, when they saw the real consequences of their rebellion, they longed for the return of the rightful sovereign.

The lawyers of those days were influenced by similar motives: we find many of them nobly refusing to acknowledge the illegal usurping authorities, or to accept office under them; and those who did take office feared the consequences of the crude and ill-advised measures of ignorant and headstrong men. Sir Matthew Hale observed, "Twelve red-coats in Westminster Hall were able to do more mischief than as many thousand in the field."

But although these, and other reasons which we shall not stop to mention, prevented any important results arising from the desire of the public to have the laws amended, yet a Parliamentary Committee was appointed in 1651,—consisting of Major-General Desborough, Hugh Peters, Sir M. Hale, and others,—for considering the reformation of the law; and the next year the Committee presented the draughts of seven bills, most of which, though they miscarried then, have since been separately adopted, though with considerable modifications.

At the period of the restoration, therefore, a vast field gradually disclosed itself for the labours of the jurist and legislator. The feelings of individual personal independence, which had been rapidly gaining ground among the very lowest classes since the close of the wars of York and Lancaster, and which, during the reign of Charles I. and the Commonwealth, had pervaded the whole nation, with perhaps a greater force than at present, was so contrary to the spirit of feudal subordination and feudal exactions, that it had become absolutely necessary for the lawyers of the restoration to accommodate the existing law of real property to the actual state of the nation. Again, a species of wealth, which previously could hardly be said to exist, had been called into being by the exertions of our merchants and manufacturers, and of course the laws affecting that species of wealth had no positive existence. Personal property had hitherto been of so little value, as scarcely to claim the attention of the Legislature or the Judge, and a system of Commercial Law was to be developed by the Courts or enacted by the Senator. Again, Science and Philosophy had already made great alteration in the ways of thinking, and new principles of political expediency had become current, through the instrumentality of popular ethical and politico-economical writers. Bacon, Gentilis, Selden, Grotius, Hobbes, and Puffendorf, had already, and still continued, to exercise an influence over the human mind; and the laws had to be accom-

modated to, or constructed in accordance with, the then mode of thought. All these influences had been in existence during the Commonwealth; but from the causes before mentioned, their action had been obstructed. The restoration having taken place, the causes which had operated to prevent any changes whatever, were removed: the nobility and gentry, and the lawyers, felt that they might without hazard give way to the spirit of improvement which time had engendered.

To accomplish this vast task of amending the laws, a splendid band of powerful and erudite intellects appeared among us, on the Bench and Woolsack. On the return of Charles 2, Sir Edward Hyde, afterwards created Earl of Clarendon, to whom the Great Seal had been committed in 1657, held in his hands the chief administration of affairs. His legal studies and professional success previous to the civil wars, well qualified him for the office of Lord High Chancellor, and his long residence abroad in exile, as well as his having enjoyed the society of men of the greatest genius of his age,—Selden, Vaughan, Ben Johnson, May, Chillingworth, Waller,—formed him into the moderate and enlightened law-reformer. He was assisted by the celebrated Sir Matthew Hale, who was appointed Chief Baron. Sir Robert Foster was Chief Justice of the King's Bench, and Sir Orlando Bridgman Chief Justice of the Common Pleas.

The Convention Parliament met on the 25th of April, and on the 8th of May Charles 2 was proclaimed; and the first measure of the new government was to pass an act (12 Car. 2, c. 1) to remove all questions and disputes concerning the assembling and sitting of the then parliament. There is no doubt that that parliament was not constitutionally assembled, as the last long parliament had not been lawfully dissolved, and this new one had not been called together by the King's authority.

Many important acts were passed by this parliament, which, as they relate to constitutional revenue, &c. or to the confirmation of the then or past judicial proceedings, being of a temporary nature, it is not our purpose to mention.

The policy of leaving the value of the use of money to find its own level, and the debtor and creditor to settle their interest by themselves, is even at this day a question with many, although it is daily seen by what shifts and at how great an expence the debtor is willing to secure a large rate of interest to the creditor in those cases where the risk or other circumstances are such as to prevent him from obtaining better terms from any one else. But in the reign of Charles 2, the feeling that there was something criminal in taking any interest or reward for a loan, which had once induced the legislature to forbid under a heavy penalty all interest whatever, had scarcely worn off notwithstanding the frequency of such transactions; and we find not only the divines, but the lawyers and philosophers of that period, discussing its lawfulness *in foro conscientiae*. We therefore are not surprised to find an act

(12 Car. 2, c. 13) passed, to reduce the maximum rate allowed by the statute in force, viz. 8 per cent, and to limit it to 6 per cent., which had then become the usual rate of interest. This act was superseded by 12 Ann, st. 2, c. 16, which limits the rate to 5 per cent. Another act greatly affecting commerce also passed this session. A spirit of anger against the Dutch, for refusing to form an alliance offensive and defensive with Cromwell's government, is said to have originated our Navigation Law, which has done so much towards our naval supremacy. The carrying trade of nearly the whole of Europe was at that time in the hands of the Dutch, owing to the other countries being without sufficient shipping. The Navigation Act passed in 1651, and re-enacted 12 Car. 2, c. 18. It prohibited all nations from importing into England in their bottoms, any commodity which was not the growth and manufacture of their own country. This act relates more perhaps to the fiscal branch of the law than the civil; but as it gave rise to much litigation, it is as much an object of consideration to the legal historian as to the politician. Its recent modifications are well known.

But of the acts passed by this Parliament, that which was and still is the most important in a legal point of view, was one entitled, "An Act for taking away the Court of Wards and Liveries, and Tenures *in capite*, and by Knight Service and Purveyance, and for settling a Revenue upon His Majesty in lieu thereof." Its object was to abolish in law those feudal burdens and restrictions which had already become obsolete in practice, and which it would have been dangerous to attempt to enforce. Blackstone calls this "a statute which was a greater acquisition to the civil property of this kingdom than even Magna Carta itself: since that only pruned the luxuriances that had grown out of the military tenures, and thereby preserved them in vigour; but the statute of King Charles extirpated the whole, and demolished both root and branch." 2 Bl. C. 77.

The Convention Parliament enacted thirty-five public statutes, and was then, on the 29th Dec. 1660, dissolved by the King. In consequence of the irregular way in which this parliament was assembled it was thought necessary, notwithstanding the act 12 Car. 2, c. 1, before mentioned, to confirm its proceedings by an act of the succeeding parliament. 13 Car. 2, c. 13.

During the Michaelmas Term of the first year of the Restoration, among other questions of importance then decided, was one in the King's Bench, of which the consequence is not at all diminished, and on which the practising lawyer may still be called upon to give an opinion. This was, whether or not the wife's contract for necessities will bind the husband where she had departed from him and lived long absent from him, and he had forbidden the tradesmen, particularly the plaintiff in that action, to trust her, and although he allowed her no maintenance. The Court of

King's Bench were divided on this question; (see *Munby and another v. Scott*, 1 Lev. 4;) and the cause, on account of the great weight thereof, was adjourned into the Exchequer Chamber, where it was argued at the bar before all the Judges. The majority, including the three Chiefs, *Bridgman*, *Hule*, and *Foster*, decided that the husband should not be charged. In the case of *Dyer v. East*, 1 Mod. 9, (where it was decided that the husband is liable for necessities sold to his wife, except she has eloped and he has given notice not to trust her) this first judgment is called a hard one. It seems now clear that the adultery of the wife, or her absenting herself against her husband's will, except in cases of cruelty, &c. on his part, if the tradesmen have proper notice not to trust her, discharges his liability even for her necessities: but the law will not allow her to be left to starve except for her own wilful misdeed, nor will it suffer the tradesman to be injured unless he had sufficient notice of her misconduct: and a notice not to trust the wife while living with her husband, will not discharge his liability, except, it is said, when she has adequate maintenance.

G. B.

## REVIEW.

*The New Orders of the High Court of Chancery, with the Decisions and Practical Notes thereupon; together with the late Statutes for the Regulation of the Practice and Proceedings of the same Court; and an Appendix, containing the Decisions under Sir E. Sugden's Acts.* By John Cooke, Esq., of Gray's Inn, Barrister at Law. London: William Crofts. 1835.

This work contains, in addition to the New Orders of the Court of Chancery, the latest Statutes on the Practice and Proceedings of that Court. It commences with the Orders of the 3d of April, 1828, and proceeds to those of the 23d of November, 1831. The act of 3 & 4 W. 4, c. 94, is then stated, and afterwards the last set of Orders of the 21st December, 1833. To these succeed the statutes for effecting Service of Process abroad, 2 & 3 W. 4, c. 33, and 4 & 5 W. 4, c. 82. Notes and Cases accompany the Acts and Orders; and the Appendix contains Cases and Notes under Sir Edward Sugden's Acts.

Mr. Cooke states the following General Rules as applicable to all the Orders:

"Where the word *months* is used, the construction of the Court is that *lunar months* only are intended.—See *Creswell v. Harris*, 2 Simons and Stuart, 476. See also *Clayton's Case*, 5 Rep. 1; *Norris v. The hundred of Gawtry*, Hob. 139; *Castle v. Burditt*, 3 T. R. 623; *King v. Adderley*, Doug. 446; *Tulbot v. Linfield*, 1 W. Blackst. 450.

"If the *last* of any specified number of days happens on a *Sunday*, the Sunday is not to be reckoned in the computation of the time.—See *Milburn v. Lyster*, 5 Simons, 565. The extension of this Rule to the case of the last day being a *holiday*, is undecided.—See *Bullock v. Edginton*, 1 Simons, 481; *Manners v. Bryan*, 5 Simons, 147.

"It appears that if the *Solicitor* of a party, merely through *ignorance or mistake*, has neglected to comply with the exigency of an order, the Court will not relieve the client upon terms from the penal consequences of the neglect, *without the consent of the other party*.—*Wulmesley v. Froude*, 1 Russ. & My. 334."

The following note, on the 26th Order of the 21st of December, 1833, as to dismissing for want of prosecution, may be useful to extract :

"The intention of this order was merely to prevent a motion to dismiss for want of prosecution being made in the case of a *sole* defendant, where the time for amending under the 13th of the Orders of 1831 had not expired; thus, where *one of several* defendants had answered the bill, and two lunar months had elapsed after the answer had become sufficient, the Court, upon a motion by the defendant, who had so answered, to dismiss the bill for want of prosecution, under the 16th of the Orders of 1831, put the plaintiff upon an undertaking to speed the cause, although it was objected by the plaintiff's counsel that *all the defendants to the bill had not answered*; and that the 13th of the Orders of 1831, which gave the plaintiff a general right to amend within six weeks after the last answer, was to be deemed sufficient, it not appearing that the plaintiff had used due diligence in compelling the other defendants who had not put in their answers to put them in.—*Gully v. Bodicoat*, V. C., 13th December, 1834. *Ed. MSS.*, since reported in 5 Simons, 668."

On the same subject, of dismissing a bill for want of prosecution, we select the following notes and practical remarks on the 16th Order of the 23d of November, 1831, which will shew the manner in which Mr. Cooke has executed his task :

"In computing the time within which a bill may be dismissed for want of prosecution, the intervals mentioned in the 19th amended Order (*vide postea*, 46.) are not to be reckoned. In this case the answer had been filed on the 30th December, and the motion was made on the 3rd May following.—*Attorney General v. Jones*, 5 Simons, 246.

"If the order made on the plaintiff's undertaking to speed the cause, he not afterwards complied with, another motion must be made by the defendant *on notice*, viz. that the bill may be dismissed with costs, before the bill can be finally dismissed for want of prosecution. Per Registrar.—*Ed. MS.*

"A motion to dismiss a bill to *perpetuate testimony*, for want of prosecution, is irregular.

The proper application is, that the plaintiffs may proceed within a given time, or may pay the defendant his costs.—*Wright v. Tatham*, 2 Simons, 459.

"So an application to dismiss a bill of *discovery* for want of prosecution is irregular—the proper course to be pursued by the defendant for obtaining his costs being an *ex parte* application by motion for an order for the taxation and payment of his costs; but this order should not be moved for until the time allowed to the plaintiff for taking exceptions to the answer for insufficiency has expired.—*Ed. MS.*

"Although the V. C., in *Vent v. Pacey*, 3 Sim. 382, where the plaintiff upon a motion to dismiss the bill for want of prosecution, satisfactorily accounted for the delay in prosecuting the suit, refused to make any order on the motion; yet, in a like case, where the delay in prosecuting the suit was not only satisfactorily accounted for by the plaintiff, but the plaintiff's solicitor made an affidavit, whereby it appeared that, before the service of the notice of motion to dismiss, the defendant's solicitor had been informed of the circumstances which so accounted for the delay, the Vice-Chancellor dismissed the motion with costs.—*Barber v. Kavanagh*, 20th March, 1834. *Reg. lib.* 1834, A. p. 704.—*Ed. MS.*

"So where the solicitor for some of the defendants was agent for the rest, and the former were entitled to move to dismiss, and they moved accordingly, but no order could be made, as the time for the other defendants to answer the amendments had not expired, the V. C. dismissed the motion with costs, as the solicitor must have known that it could not succeed.—*Partington v. Baillie*, 5 Simons, 667.

"On a motion to dismiss for want of prosecution by two defendants, it appeared that another defendant had, *before the time at which the defendants could have moved to dismiss for want of prosecution*, been committed to prison for debt—that he had presented a petition to be discharged under the Insolvent Debtors' Act, upon which there had been no final adjudication, and he remained in custody; but that a person had been appointed the assignee of the insolvent, *ad interim*. The plaintiff's counsel, in opposing the motion, insisted that the delay had been satisfactorily accounted for, inasmuch as the assignment which had been executed would, under the Act, become void in the event of the petition being dismissed, and that the plaintiff was, therefore, not bound to proceed in the cause until after there had been a final adjudication upon the petition, or it had been dismissed. The Vice-Chancellor was of that opinion, and directed the motion to stand over until after the adjudication of the Insolvent Debtors' Court.—*Lacey v. Lacey*, V. C., 11th March, 1835. *Ed. MS.*

"It is not the ordinary practice to restore a bill which has been regularly dismissed for want of prosecution, but this may be done under circumstances.—*Hannam v. South London Water Works*, 2 Meriv. 63.

"An order to dismiss a bill for want of prosecution, after an *abatement*, although irregular, is not to be regarded as a nullity; consequently, that order must be discharged before the plaintiff can obtain an order to revive the suit.—*Boddy v. Kent*, 1 Meriv. 361.

"Where a replication had not been filed through mistake, the Court restored the bill, notwithstanding an order to dismiss.—*Attorney-General v. Fellowes*, Mad. & Geld. 111.

"The plaintiff's solicitor, before he instructs counsel to undertake to speed a cause, should well consider the effect of such undertaking with regard to the particular situation of the parties and the state of the record; for where the bill is so framed that it is necessary to add parties, it will in most cases be difficult, and in some impossible, to bring up the new parties to the same level of proceeding, upon which he will be obliged to place the other defendants by the operation of his undertaking to speed. In a case so circumstanced, the plaintiff's solicitor should account for the delay in bringing the new parties before the Court, and show to the Court upon the motion to dismiss the state of the record, and the necessity of adding parties. Upon the Court being satisfied on these points, it will neither dismiss the bill, nor put the plaintiff to an undertaking to speed the cause, but will order the motion to stand over, giving the plaintiff, by the same order, liberty to make the necessary amendment in the bill.—*Hollings v. Kirkby*, V. C., 11th March, 1835. *Ed. MS.* In this case the plaintiff, pursuant to the leave of the Court, afterwards amended the bill, by adding new parties; and the defendants, who had previously moved to dismiss the bill for want of prosecution, a few days after answering the amendments renewed the motion to dismiss for want of prosecution. The Vice-Chancellor, under the circumstances, and to enable the plaintiffs to complete the record, directed this motion to stand over till the first day of the following Michaelmas Term.—*Hollings v. Kirkby*, V. C., 17th July, 1835. *Ed. MS.*

"As a sole plaintiff or defendant, or one of several plaintiffs or defendants, sometimes becomes bankrupt, or insolvent, or dies after filing the bill, the Editor conceives that it may be useful in practice to show at one view the distinctions which exist in these cases, and the proceedings which a defendant desirous to get rid of, or bring to a conclusion, the suit should adopt for that purpose, so far as the cases go: therefore—

"1st. Where a sole plaintiff becomes bankrupt or insolvent after answer,

"The proper proceeding is a motion by the defendant, upon notice served on the assignee of the plaintiff, (and, since the new orders, I should think on the bankrupt,) that the assignee may file a supplemental bill within a given time, (generally a fortnight,) or that the bill may stand dismissed without costs.—*Randall v. Mumford*, 18 Ves. 424; *Porter v. Coz*, 5 Madd. 80.

"Upon the bankruptcy of a sole plaintiff, in an injunction bill—

"Lord Eldon stated the practice to be not to dissolve the injunction, but that the defendant might move that the assignees should come in, or the injunction be dissolved. See 18 Ves. 427.

"2dly. Where one of several plaintiffs becomes bankrupt or insolvent,

"The practice was settled by the Vice-Chancellor, that the defendant may make the common motion to dismiss for want of prosecution with costs.—*Craddick v. Musson*, 1 Sim. 501; *vide* also 18 Ves. 426.

"3dly. When a defendant becomes bankrupt,

"It has been held that he may, notwithstanding his bankruptcy, move to dismiss for want of prosecution with costs.—*Monteith v. Taylor*, 9 Ves. 615. See also *Booth v. Smith*, 5 Simons, 639.

"4thly. Where one of several plaintiffs dies even before answer,

"A defendant may move that the surviving plaintiffs may be ordered to revive the suit within a given time, or that the bill may be dismissed with costs. See *Adamson v. Hull*, 1 Turn. 258.—Consequently, if one of the plaintiffs dies after answer, such a motion is the proper proceeding for a defendant to take.—See *Wood v. Bethune*, 2d of June, 1820; B. 1819; *Reg. Lib.* 1183. The Editor conceives that the same course of proceeding must be taken when a suit abates by the death of a co-defendant.

"Where a bill of revivor had been filed by a plaintiff before the service of a subpoena to rejoin, but no order to revive had been obtained, the V. C. (Sir John Leach), on the motion of the defendant, ordered the plaintiff to revive within ten days, and, in default thereof, that both the original bill and bill of revivor should be dismissed with costs. *Bolton v. Bolton*, 2 Sim. & St. 371. *Reg. Lib. A.* 1824, 1593.

"The difference in the course of proceeding on the part of a defendant in the case of the death, on the one hand, and the bankruptcy, on the other, of a party, arises from the distinction that the death of a party ordinarily works an *abatement* of the suit, but that the bankruptcy or insolvency of a party merely renders the suit defective for want of proper parties.—See 18 Ves. 426; *Booth v. Smith*, 5 Simons, 639. And even after bankruptcy, and before a supplemental bill is filed, proceedings may be taken in the cause.—*Ibid.*

"If a suit abates by the death of one of several plaintiffs or defendants, after the service of a subpoena to rejoin (which seems to be the period beyond which a motion to dismiss for want of prosecution cannot be regularly made), and before a decree, it appears to be undecided whether a defendant can compel the payment of his costs, or the revival of the suit; for although a defendant, after the service of a subpoena to rejoin, may so far become an actor in the cause as to take the necessary steps for bringing it to a hearing, yet he cannot revive a suit before a decree. It would seem, therefore, that a defendant is under such circum-

stances without a remedy, unless the Court should consider, as Lord Eldon observed (see 1 Turn. 258), that "*a plaintiff is bound to revive a suit or put the defendant out of Court.*" On the *abatement of a suit by the death of a sole plaintiff*, the defendant seems to be without a remedy in regard to his costs. And on the death of a *sole defendant*, the representatives of such defendant seem also to be without a remedy in regard to the costs of such deceased defendant.

"The above propositions regarding proceedings to be taken on the bankruptcy or insolvency of a party, should be read with caution, in regard to cases in which such bankruptcy or insolvency happens after the service of a subpoena to rejoin.—Ed."

The author has here, it will be observed, as he has in other parts of his work, adduced several MS. authorities and original remarks which will be useful to the practitioner.

## MUNICIPAL CORPORATION ACT.

### BURGESS LISTS.—REVISING BARRISTERS.—ELECTIONS.

WE shall, in an early number, state the substance of the alterations effected in the law by this act, and also separately publish it verbatim, with full commentaries. In the mean time we give the following Order in Council, from the Gazette of the 11th instant, fixing, for the present year, the 7th of November as the day on which the Overseers of Parishes are to deliver to the Town Clerks of Boroughs the *Burgess Lists*, and such Lists are to be placarded on the Town Halls, a week before the 17th of November.

Objections to the names inserted or omitted in such Lists, are to be notified by the 17th of November; and Lists of the objections are to be put up during eight days preceding the 1st of December.

The Revising Barristers are to sit between the 1st and 15th of December, and the Burgess Roll is to be completed by the 22d of December; the Councillors are to be elected on the 26th of December; the Aldermen on the 31st of December; and the Mayor and Sheriffs on the 1st of January next.

At the Court at St. James's, the 11th day of September, 1835. Present, the King's Most Excellent Majesty in Council.

5th and 6th William 4, c. 76, s. 140.

Whereas, by an Act passed in the fifth and sixth year of his Majesty's reign, intituled, "An Act to provide for the Regulation of Municipal Corporations in England and

Wales," it was, among other things, enacted, that it should be lawful for his Majesty, if he should think fit, by the advice of his Privy Council, to order any days and times before the 1st day of February next for doing the several matters required or authorized by the said Act to be done, in lieu of the several days and times for the present year thereinbefore specified, or any of them; and that in such cases, all matters mentioned in such order should be done on and within such days and times as should be mentioned respectively in that behalf, in such order as if the days and times mentioned in such order, had in every instance been mentioned in the said Act, instead of the days and times therein before respectively mentioned in that behalf, and not otherwise; provided always, that nothing therein contained should authorize his Majesty to appoint any days or times other than were therein before specified, for any matters required or authorized by the said Act to be done, after the expiration of this present year:

His Majesty is thereupon pleased, by the advice of his Most Honourable Privy Council, in pursuance of the power vested in his Majesty by the said Act, to order, and it is hereby ordered as follows, that is to say:

Section 15. His Majesty, by the advice aforesaid, does hereby order, that the overseers of the poor of every parish wholly or in part within any borough named in either of the schedules (A) or (B), to the said Act annexed, shall make out, and shall deliver to the town clerk of the borough, the *burgess list*, according to the provisions of the said Act, on the seventh day of November in this year, instead of the fifth day of September, as provided in the said Act; and that the said overseers shall keep a true copy of such lists, to be perused by any person, without payment of any fee, at all reasonable hours, between the said seventh day of November and the seventeenth day of November in this year, instead of the time between the fifth and fifteenth days of September; and that the town clerk shall cause a copy of all such lists to be fixed on or near the outer door of the town-hall, or in some public and conspicuous situation within the borough, on every day during the week next preceding the seventeenth day of November in this year, instead of the week next preceding the fifteenth day of September.

17. And his Majesty, by the advice aforesaid, does hereby order, that every person whose name shall have been omitted in any such *burgess list*, and who shall claim to have his name inserted therein, and every person authorized by the said Act to object to any other person as not being entitled to have his name retained in any *burgess list*, shall give notice thereof respectively, as by the said Act is required, on or before the seventeenth day of November in this year, instead of the fifteenth day of September; and that the town clerk of every such borough shall cause copies of the lists to be made out by him of all such per-

sons so claiming and so objected to, according to the provisions of the said Act, to be fixed on or near the outer door of the town hall, or in some public and conspicuous situation within such borough, during the eight days next preceding the first day of December in this year, instead of the eight days next preceding the first day of October, and that the town clerk shall likewise keep a copy of the names of all persons so claiming as aforesaid, as also a copy of the names of all persons so objected to as aforesaid, to be perused by any person, without payment of any fee, at all reasonable hours during the eight days (Sunday excepted) next preceding the first day of December in this year, instead of the eight days (Sunday excepted) next preceding the first day of October.

18 and 20. And his Majesty, by the advice aforesaid, does hereby order that the Barristers to be appointed to revise the lists of burgesses of the said boroughs, according to the provisions of the said Act, shall hold their courts as directed by the said Act, for the purpose of revising the said burgess lists, at some time between the first day of December inclusive and the fifteenth day of December inclusive in this year, instead of the time between the first day of October inclusive, and the fifteenth day of October inclusive.

22. And his Majesty, by the advice aforesaid, does hereby order that the town clerk of every such borough shall cause the Burgess Roll of the burgesses of such borough to be completed on or before the twenty-second day of December in this year, instead of causing it to be completed on or before the twenty-second day of October.

30. And his Majesty, by the advice aforesaid, does hereby order, that the Councillors of every such borough shall be elected according to the provisions of the said Act, on the twenty-sixth day of December, in this year, instead of the first day of November.

25. And his Majesty, by the advice aforesaid, does hereby order, that the Aldermen of every such borough shall be elected according to the provisions of the said Act, on the thirty-first day of December in this year, instead of the ninth day of November.

49, 61, and 69. And his Majesty, by the advice aforesaid, does hereby order, that the first quarterly meeting of the Council of every such borough shall be holden at noon, on the first day of January in the year one thousand eight hundred and thirty-six, instead of the ninth day of November in this year; and that the mayor of every such borough shall be elected, according to the provisions of the said Act, on the said first day of January, instead of the said ninth day of November; and that the sheriff to be appointed to any such borough, according to the provisions of the said Act, shall be appointed accordingly on the said first day of January, instead of the first day of November in this year.

C. C. GREVILLE.

## SCOTCH MARRIAGE REFORM.

Lord Brougham has just introduced a bill intituled "An Act for amending and declaring the Law of Marriage," which has been printed, as we understand, for the purpose of consideration by the next Session of Parliament.

The preamble recites that "it is expedient that the law should be certain and known, especially touching marriage and legitimacy, and that its provisions should be rendered as difficult to evade as may be."

The following is the substance of the proposed enactments:

That no marriage contracted, had, made, or solemnized in Scotland shall be valid, either in Scotland, or in any part of the United Kingdom, or of the dominions thereunto belonging, unless both the parties were born in Scotland, or had had their most usual place of residence there, or had lived in Scotland for three weeks next preceding such marriage; any law, custom, or usage to the contrary notwithstanding.

2. That no divorce shall be pronounced by the Court of Session in Scotland to dissolve any marriage not had in Scotland unless the husband be a Scotchman, or unless his usual place of residence be in Scotland, or unless both the husband and the wife shall have lived in Scotland for twelve calendar months next preceding the commencement of the suit to be instituted in the Court of Session for such divorce; any law, custom, or usage to the contrary notwithstanding.

3. Children legitimate by the law of Scotland, to be deemed so in all parts of the United Kingdom.

4. Marriages and divorces valid by the law of Scotland, to be deemed so in all parts of the United Kingdom.

5. Certificated copy of entry by sheriff depute that parties were married, and that they lived in Scotland three weeks preceding such marriage, conclusive as to its validity.

6. Persons forging such entry, &c. liable to transportation for seven years.

## MORTGAGE STAMP.

We have been favored with the following additional statement respecting the case of *Dee d. Bartley v. Gray*, of which a short report was given at p. 309.

3d October, 1821.—Francis Carter, in consideration of 150*l.* lent to him by William Rowlands, granted and demised certain hereditaments unto Rowlands, his executors, administrators, and assigns, from the date thereof for the term of 1000 years, upon trust that if Carter should not at the end of six calendar months from the date thereof pay unto Row-



lands, his executors, &c. the said sum of 150*l.* and interest, then and in such case Rowlands should sell and dispose of the premises. No sale was made by Rowlands; but Carter (being in want of a further sum, which it was not convenient for Rowlands to lend,) applied to William Worsley to pay off Rowlands, and to lend a further sum of 200*l.*, which Worsley agreed to do.

23d & 24th January, 1823.—Lease and release of these dates, the latter made between Rowlands, of the first part; Carter, of the second part; Worsley, of the third part; and Bartley (the lessor of the plaintiff), of the fourth part; in consideration of 150*l.* paid to Rowlands by Worsley, at the request of Carter, in discharge of the money due on the mortgage, Rowlands bargained, sold, assigned, transferred, and set over, and by way of conveyance only, granted and confirmed unto Bartley, his executors, &c. for the residue of the said term of 1000 years, in trust for Worsley, his heirs, &c. and to attend the inheritance.

Rowlands covenanted that he had done no act to incumber the premises. The release then further witnessed, that in consideration of the further sum of 200*l.* paid by Worsley to Carter, he, the said Carter, granted, bargained, sold, aliened, released, and confirmed unto Worsley, his heirs and assigns, all the premises thereinbefore described, with the appurtenances, and the reversion, &c. and all the estate, &c. and all deeds, &c. to hold unto Worsley, his heirs and assigns, upon the trusts, &c. thereafter declared; that is to say, upon trust that Worsley should enter into possession of the premises and sell the same by auction or private contract, and convey the same to the purchasers, &c. and out of the proceeds to pay himself his principal, interest, and costs. Then followed the usual indemnity to purchasers; covenant by Carter to pay the sum of 350*l.* to Worsley; that Carter and Rowlands had good right to convey; for quiet enjoyment and further assurance, and to produce deeds.

This release was comprised in four skins, and was stamped as follows: 1st skin, 1*l.* 15*s.*; 2d skin, 2*l.*; 3d skin, 2*l.*; and 4th skin, 1*l.*: the number of folios was 66.

The case was tried at Lancaster in March 1834, and verdict for the lessor of the plaintiff, with leave for the defendant to move to enter a nonsuit.

Counsel for the plaintiff, at Lancaster, Mr. Cresswell, Mr. Bartley, and Mr. Samuel Martin; and for the defendant, Mr. Charles Crompton.

The case was argued in *Banco Regis* by Sir William Follett, Solicitor General, Cresswell, and Martin, for the plaintiff; and by Crompton for the defendant; and the rule which had been obtained to enter a nonsuit, was discharged.

J. C. G.

Liverpool, 5th Sept. 1835.

## SELECTIONS FROM CORRESPONDENCE. No. CX.

### FEEs AT THE SUBPŒNA OFFICE.

Allow me to draw your attention to a charge made at the Subpœna Office for sealing subpœnas. The sum now charged is 5*s.* 10*d.*; whereas the sum heretofore charged since the passing of the act 3 & 4 Geo. 4, c. 94, has been 5*s.* 6*d.*, which I apprehend is the proper sum. The reason assigned for charging the extra 4*d.* is, that the sum of 2*d.* is to be paid to the Chaff Wax and his deputy, and the sum of 2*d.* to the Sealer attached to the Great Seal and his deputy, for their use; and this, they say, is in addition to the 5*s.* 6*d.* paid for sealing. The words of the act are, however, that "out of each sum so to be received by him," meaning the 5*s.* 6*d.* to be paid for sealing, those sums shall be paid, and thus clearly excluding the overcharge: such, too, has been the view taken at the office until lately.

J. B.

### DOWER.—ADULTERY.

Sir,

Your journal is the only channel through which any suggestion for the alteration and improvement of the law comes before the eye of the professional portion of the public; and as I perceive you have given room for several ideas of your various correspondents, I am induced to hope that the one I am about to suggest, if worthy, will meet with the same notice.

In the present state of the law a woman who is divorced from a man, a *vinculo matrimonii*, shall not be endowed. Now, permit me to ask, upon what just ground a woman who is divorced a *menaa et thoro*, generally a culprit who has committed the most odious of offences, should be entitled to dower? It may be said, that the husband must take to her again voluntarily before she can be endowed. True; but why should the conduct of a weak man bring upon his children an injury by diminishing their rights and expectations? They have been wronged sufficiently, without a further infliction.

It may further be remarked, that the important amendments in the law respecting dower which have been lately made, has curtailed the right to dower; but, unfortunately, the power created by the Dower Act to diminish or destroy that right, is placed in the same hands that have abused the just expectations of a family. I should be glad to see a law pass which annihilated completely the right of such a woman to dower. In the present age, when so many regret that the offence of adultery is punishable merely by an action for damages, (and that is only directed against one of the offenders,) I may hope an alteration will take place, giving to the civil law as much power as is consistent with justice.

J. B. W.

## THE PROPERTY LAWYER.

No. L.

## LICENCES TO SPORT.

A LICENCE to sport must be in writing under seal, as being an interest in an incorporeal hereditament. A right to fish in the ponds and waters of a manor, cannot be demised by parol. This was decided by the case of the *Duke of Somerset v. Fogwell*, 5 B. & C. 875; 8 Dowl. & Ry. 747; and even an easement over the land of another, cannot pass except by deed; *Hewlins v. Shippam*, 5 B. & C. 221; 7 Dowl. & Ry. 783. In the latest case on the point, there was a demise in writing, but not under seal, of a messuage, and full and free and exclusive licence and leave for the lessee, his friends, gamekeeper, &c. to hunt, hawk, course, shoot, and sport in, over, and upon a manor of the lessor, and to fish in the ponds and waters thereof, from August to February following, at an entire rent; and this was held to be *entirely void*. *Bird v. Higginson*, 4 Nev. & Man. 505.

## RIGHT OF DISTRESS.

Rent is in the nature of a specialty debt. *Gage v. Acton*, 1 Salk. 325; 1 Com. Rep. 67; 1 Ld. Raym. 515. A promissory note therefore given by the tenant to his landlord for rent, does not of itself suspend the right of distress until the note is due. A debt due on bond may be set off against rent, because the latter is a debt of equal degree with the former; but as a promissory note is of inferior degree to the rent, the receipt of the note creates no extinguishment of the rent. *Per Lord Denman*, C. J., in *Davis v. Gyde*, 4 Man. & Nev. 464.

## THE NEW STATUTE OF LIMITATIONS.

By the 3 & 4 W. 4, c. 27, s. 2, it is enacted, that no land shall be recovered unless within twenty years after the right of action has accrued; and by s. 3, the right to bring an action to recover any land, shall be deemed to have first accrued when the person claiming the land, or some person through whom he claims, shall in respect of the estate or interest claimed, have been in possession or in receipt of the profits of such land. By s. 16, "persons under the disability of infancy or coverture, &c.,

or the persons claiming through them, shall have ten years to bring their action after the disability is removed." By s. 17, "no action shall be brought by any person who at the time at which his right to bring an action to recover any land shall have first accrued shall be under any of the disabilities before mentioned, or by any person claiming through them, but within forty years next after the time at which such right shall have first accrued, although the person under disability at such time may have remained under one or more of such disabilities during the whole of such forty years, or although the term of ten years from the time at which he shall have ceased to be under any such disability, or have died, shall not have expired." These sections of the new statute of limitations have been lately applied to the following circumstances: An action of ejectment was brought for a house in Northamptonshire, and the plaintiff's case was this: In 1772, one Whitworth died seised, having devised the premises to his wife in fee; and on his death Mrs. W. took possession, and in the same year married John Corby, by whom she had issue the lessor of the plaintiff. Mrs. Corby and her husband continued to occupy the premises for a few years, after which they left that part of the country, and ultimately settled at St. Albans. It did not appear under what circumstances they had parted with the premises. Mrs. Corby died in 1828, and her husband in 1832. It was shewn that no fine had been levied by the Corbys. The defendant's counsel, without disclosing his title, contended that the claim of the lessor of the plaintiff was barred by the 17th section of the 3 & 4 W. 4, c. 27. The learned Judge (*Littledale*) was of this opinion, and nonsuited the plaintiff, with leave to move to set aside the nonsuit, and enter a verdict for the plaintiff. It was contended, first, that the possession of the defendant must be presumed to be rightful, and not adverse; see *Reading v. Rawstone*, 2 Ld. Raym. 829; *Hall v. Doe*, 5 B. & Ald. 687; *Doe v. Hall*, 2 Dowl. & Ry. 38; *Doe v. Pike*, 1 Nev. & Man. 385; *Doe v. Harborough*, 1 Nev. & Man. 422; and secondly, that the lessor of the plaintiff acquired a new title on the death of his father in 1832, and could by the 5th section of the act maintain the action, which enacts, that a right to bring an action to recover any land shall be deemed to have first accrued, in respect of an estate in reversion, at the time at which the same shall have become

an estate in possession by the determination of any estate in respect of which such lands shall be held, notwithstanding the person claiming such land shall, previously to the creation of the estate which shall have determined, have been in possession of the estate. Lord Denman, C. J. delivered the judgment of the Court as follows:—The fact being clear that, within the terms of the 3 & 4 W. 4, c. 27, s. 3, the plaintiff's mother was dispossessed, or discontinued the possession or receipt of the rents above forty years before the action brought, the action is clearly barred by section 17. Some argument was raised on the question, whether *adverse* or not; but the terms of that clause are quite unequivocal; and one of its objects was to avoid the necessity of inquiring into facts of so ancient a date. If the person actually in possession could be shown to have held under the party through whom the plaintiff claims, the possession of the former might be regarded as the possession of the latter; but in this case there was not a single fact from which such an inference could be drawn. On the contrary, the departure of the former possessors to a distance, without appearing to have received any rent or made any demand, is the strongest evidence of their intending to abandon all occupation and claim of ownership; and as the title of the plaintiff's ancestor rested on no documents except the will of the former husband, but was merely evidenced by possession at an earlier period, that ancestor's entire desertion of the premises for so long a time, goes far to shew a consciousness that the anterior occupation was without title. It is true, that if Mrs. Corby was the owner her husband was tenant by the curtesy, and their son's right of possession did not accrue until after his father's death; but this furnishes no answer to the positive enactment of limitation in the 17th clause. It is true, also, that in the cases cited at the bar this Court shewed a strong indisposition to presume a possession adverse, which might be lawful consistently with the facts found. Of these cases no more need be said than that they were not brought within the late statute.—Rule refused. *Doe d. Corby v. Branson*, 4 Nev. & Man. 664.

## SUPERIOR COURTS.

### Equity Eschequer. TITHES.—PLEADING.

*Although an answer making two inconsistent defences to a bill is vicious pleading, still*

*where the answer is so framed as to render it doubtful whether the defences are inconsistent, the Court will allow the cause to proceed to be heard on the merits.*

This was a rehearing of a point, raised upon the pleadings in a suit for tithes. The plaintiffs, the members of Jesus College, Oxford, claimed as lessees, certain tithes from occupiers of land in the parish of Tudington, Worcestershire. It was objected to their claim, first, that it was opposed to the statutes of *mortmain*; secondly, that their suit was of that description of proceedings which came within the chapter of *maintenance* at common law. Both these objections were abandoned, and the defendants relied on the third as a defence, which was, that the payments made by the defendants and their predecessors constitute a *modus*; and if not good as a *modus*, they amounted to a composition real before the statute of Elizabeth. The question argued was, whether the defendants could be allowed to plead in the alternative, by setting up a *modus*, or a composition real; Mr. Boleter and Mr. G. Richards, were for the plaintiffs; Mr. Simpinson, Mr. Sidebottom, and Mr. Eagle, were for the defendants.

Mr. Baron Alderson having taken time to consider the question, said that the case came on upon a rehearing, the parties being dissatisfied with the decree he had pronounced on a former occasion. He stated then that where an answer set up two defences that were inconsistent with each other, the answer could not be allowed; but whether the answer in this case was so specially framed as to set up such inconsistent defences, he owned that upon the rehearing of the case he entertained very considerable doubt; and as the cases cited were strong to shew that great latitude had been previously allowed in cases of this description, it seemed to him that he ought to reverse that part of the decree which prevented the parties from being heard on the merits of the case, and that he ought to allow an issue, confining it however to the *modus* alone. He hoped he should be always able to adopt the language of Lord Hardwicke, who on a similar occasion of altering his opinion, said he thought it a much greater reproach to a Judge to continue in his error than to acknowledge and correct it when made aware of it.

*Jesus College v. Gibbs and others*, at Gray's Inn Hall, June 8th and July 13th, 1835.

### Eschequer at Pleas.

#### COVENANT.—DECLARATION.—VARIANCE WITH DEED.—DENURRER.

*In covenant, the Court will not hold it to be a material variance, that the circumstance of money agreed to be paid at a particular place, shall not be set out in the declaration, provided the covenant appears to be to pay, as well as to pay at a certain spot.*

This was an action in covenant. The defendant, in his covenant, bearing date 3d Dec.

1825, had agreed to pay to the plaintiff, his heirs, executors, administrators, and assigns, and every of them, for and in consideration of the sum of 100*l.* received at or in the porch of the parish church of Gumlingay in the county of Cambridge, the full and first sum of 100*l.*, with interest for the same, at the rate of 5*l.* for every 100*l.* for a year, on the 3d day of June 1826, without any abatement or deduction on the same for any cause whatsoever. And he the said defendant did thereby agree, promise, and covenant, that he, his heirs, executors, administrators, or assigns, should and would truly pay or cause to be paid to the said plaintiff the said sum of 100*l.*, and interest for the same as aforesaid, at the time, place, and manner thereinbefore limited and appointed for the payment thereof.

The plaintiff now in his declaration, after referring to the covenant, stated, that he the said defendant did thereby promise and agree, for certain considerations, to pay to the said plaintiff, since deceased, the sum of 100*l.*, and interest for the same at the rate of 5*l.* for 100*l.* for a year, on the 3d day of June then next ensuing; but that nevertheless the said defendant did not nor would not pay or cause to be paid unto the said plaintiff in his lifetime, since deceased, the said sum of 100*l.*, and interest as aforesaid; and that the said defendant was then indebted to the said plaintiff, since deceased, in the said sum of 100*l.*, and 2*l.* 10*s.* for interest for the same; and that an action then accrued to the said plaintiff to demand and have of and from the defendant the amount aforesaid; and that the said sum of 100*l.*, and 2*l.* 10*s.* for interest, had not since been paid.

The defendant demurred to this declaration, on the ground of variance, that the declaration did not state that the money should have been paid at the place pointed out. In support of this he prayedoyer of the covenant; and when it had been read, he contended that the declaration was not sufficient in law, and that there was a material difference between the words of the covenant set forth in the declaration, and those in the original deed, inasmuch as that it was not mentioned in the declaration that the money should be paid at any particular place, and for anything that appeared, the defendant might have been at the spot pointed out, ready to pay the money. A second objection taken was, that the declaration alleged that the money was due for certain considerations; whereas there appeared to be only one consideration by the deed. Upon this, it was submitted that no cause of action was shewn to have arisen.

Joinder in demurrer.

It was contended by the defendant, that the only question was, whether the variance between the covenant, as shewn in the declaration and the original covenant, was material; and in support of the allegation that it was of importance various authorities were cited, where it had been held, that if there was any certain place limited for payment, the obligor might refuse to pay at any other place. There

was also another authority, where it had been laid down that an acceptor of a bill of exchange payable at a certain place, did not promise or undertake to pay the same at any place, but only at the place specified by the acceptance. A general covenant had likewise been considered to bind the covenantor to pay anywhere; therefore the covenant, as set forth in the declaration, would have that effect. The real covenant, however, binding the defendant to pay only at a particular spot, the declaration must be held to be materially at variance with the original deed. A second point upon which there was also a variance was, that the covenant set forth only one consideration, while the declaration stated there were several considerations. The only remaining point for inquiry was, whether the defendant was right in taking advantage of the variance pointed out by demurrer; and it was contended that it was open to him to select either that course, or the plea *non est factum*.

In support of the declaration it was contended, that the question of variance could not be raised upon demurrer. The defendant having set out the covenant on oyer, made it a part of the declaration; and unless, upon examining the whole declaration, there appeared no just cause of action, the plaintiff must be entitled to judgment. A case was cited, where it had been held by the Court, that if the legal effect of a deed was stated in the declaration, the defendant had a right to see it on oyer, and if it appeared that there was a variance in the meaning, he should plead *non est factum*, without setting out the deed, and might so take advantage of the variance. If, however, the deed was set out on oyer, and the defendant then pleaded *non est factum*, the only question on issue would be, whether the deed was executed or not by the defendant. Another case was also alluded to, where it was held that a defendant, after having set out a deed on oyer, cannot take advantage of any variance between it and the declaration, on demurrer. In the present case, the plaintiff had alleged that the defendant had covenanted to pay a sum of money, and the defendant, by setting forth the deed on oyer, had shewn how it should be paid.

The Court thought that the declaration, under the circumstances, was good. The covenant must be looked upon as general; but if it could be considered as an agreement to pay at a particular place only, then a material variance might be considered to exist. If, however, it included an agreement to pay, as well as to pay at a particular spot, then looking at the deed and the declaration together, there did not appear to be any variance.

Judgment for the plaintiff.—*Peine v. Emery*, T. T. 1835. Excheq.

## COGNOVIT.—SIGNING JUDGMENT.—TAXATION OF COSTS.

*If, according to the terms of a cognovit given by a defendant, the costs may be taxed and judgment signed on a certain day, the signing judgment first will be deemed irregular.*

This was a motion to set aside an order which had been made under the following circumstances. It appeared that the defendant had given the plaintiff a *cognovit*, payable on a certain day, for the amount of the debt alleged to be due; and if the amount was not then paid, the costs were to be taxed and judgment signed. Judgment was signed by the plaintiff on the day appointed, and notice of taxation having been given, the costs were taxed. A summons was afterwards taken out by the defendant, to set aside the judgment, on the ground of irregularity; and it was contended that the judgment ought not to have been signed until after the costs were taxed. The judgment was on this ordered to be set aside: but it was now contended that the costs could only be taxed upon the judgment, and that as no tender had been made by the defendant of the amount of debt and costs, the plaintiff should not be called upon to pay the costs of the judgment.

The Court, however, thought that it was irregular to sign judgment before the costs were taxed, according to the terms of the agreement. The right course to pursue would have been to tax the costs, and if not paid with the debt, to take judgment for the whole amount.

Rule refused.—*Wilson v. Northern*, T. T. 1835. Excheq.

## IMPROPER INDORSEMENT ON WRIT.—DEFENDANT'S DISCHARGE.—DEFENDANT CHARGED IN EXECUTION DURING VACATION.

*If the indorsement on a writ on which a defendant has been charged in execution, be irregular only as to the interest sought to be recovered, the Court will not discharge the defendant out of custody, but will order the indorsement to be altered. The defendant being charged in execution in vacation, the same does not refer back to the preceding term.*

A rule had been obtained for discharging the defendant out of custody of the sheriff, on two grounds: first, that he had not been charged in execution until two terms after judgment signed; and secondly, that he was improperly charged in execution for an uncertain amount of interest. The defendant, it appeared, had been charged in execution in Michaelmas vacation, which he submitted counted as one term. The writ was indorsed to satisfy the sum of 188*l.* 9*s.*, and interest on 156*l.*, until it should be paid.

In opposition to the rule, it was now contended that there was nothing irregular in the

proceedings hitherto, and that there was nothing to shew the defendant was charged in execution for too large a sum.

On the other hand it was urged, that the taking of the body of the defendant was a satisfaction, and that interest should not be claimed after that. It was probable that the mis-indorsement might have the effect of detaining the defendant in custody for a longer period than was proper.

The Court observed, that if the defendant had shewn his willingness to pay the sum due, his application might have been entertained; but as it was, he was not entitled to his discharge. The proper application to be made would be, to alter the indorsement on the writ to the amount which the defendant admitted to be due. As the writ was not delivered to the sheriff's agent until after Michaelmas term, the defendant could not be said to have been in custody two terms.

Rule discharged.—*Williams v. Warry*, T. T. 1835. Excheq.

## WRIT OF SUMMONS.—PERIOD OF FILING DECLARATION.

*If a defendant shall enter an appearance to a writ of summons before the expiration of the eight days allowed, the plaintiff may immediately declare against him.*

A rule had been obtained to set aside the declaration, on the ground of irregularity. It appeared that the defendant had appeared to the writ of summons on the seventh day, and the plaintiff immediately, on the same day, filed his declaration.

It was now contended, that as according to the old practice the plaintiff was entitled to declare immediately the defendant was in Court, and as no alteration had been made with regard to this regulation, the declaration was perfectly regular.

For the defendant it was submitted, that whatever might have been the regulation formerly, under the Uniformity of Process Act, the declaration was irregular. According to the old practice, a plaintiff might have declared *de bene esse*; but it had since been decided that a plaintiff could not now do so until after the expiration of the eight days. The Uniformity of Process Act directed that all proper proceedings to judgment and execution should be had at the expiration of eight days after the service of the writ; and it had been argued upon this, that the plaintiff could not proceed before that time, for that the defendant would be thereby deprived of a portion of the eight days which were allowed, in order that he might settle the action and pay costs. It made no difference whether the defendant had appeared or not.

The Court thought the application was premature. If the plaintiff had caused judgment to be signed against the defendant in consequence of his not pleading within the proper time, and a motion had then been made to set aside the declaration, the question would have

arisen, whether the plaintiff could reckon the time so as to take in any part of the eight days. The act allowed eight days for the defendant to enter an appearance, and if he chose to appear before the expiration of that period he waived the remainder of the time.

Rule discharged, with costs.—*Morris v. Smith*, T. T. 1835. Excheq.

**COGNOVIT.—DEFENDANT'S ATTORNEY.—DECLARATION AS SUBSCRIBING WITNESS.—SATISFACTION OF COGNOVIT.—INQUIRY BY THE MASTER.**

*It will be sufficient that the attorney appointed by the defendant under the rule of Court, in giving a cognovit, shall make a vivd voce declaration of his being a witness to the same.*

*A cognovit, on which a defendant is in custody, and which it is contended has been satisfied will be referred to the master for the purpose of inquiry; but the defendant will not be discharged by the Court.*

In this case the defendant had been taken into custody on a charge of obtaining money under false pretences, and was conveyed into the country for the purpose of being examined on that charge. He was, however, set at liberty; but on his way back to town he was arrested at the suit of the plaintiff, by whom the original charge had been preferred. He remained in custody for a considerable time, and then gave a *cognovit*, as well as some money and goods, in satisfaction of the debt. A motion was now made on the part of the defendant, that he might be discharged out of custody on his entering a common appearance; and an objection was taken to the *cognovit*, under a Rule of Court, whereby it was required that there should be always an attorney present on the part of the person giving the *cognovit*, expressly appointed and employed by him; and that he should subscribe his name as a witness, and should declare himself to be a witness as the attorney for the defendant in the case. In the present *cognovit* the attorney had only described himself as follows: "Witness to the signing of the defendant, *A. B.*, attorney for the said defendant." A case was cited in support of this objection, where an opinion had been expressed by the Court, that the declaration of the attorney required by the rule should be written on the *cognovit*. It was also contended, that as it appeared from the affidavits put in, that the plaintiff had received sufficient payment by the money and goods given at the time, the *cognovit* had been improperly obtained, and the defendant ought therefore to be set at liberty on entering a common appearance.

The Court thought that it was sufficient if the attorney made the declaration required by the rule *vivd voce*. As the defendant was therefore properly in custody on the *cognovit*, the Court could not order him to be discharged on his entering a common appearance; but would direct, as the only course

that could be pointed out, that the master should inquire into the *cognovit*, whether there still remained anything due upon it.

Rule accordingly.—*Wilson v. Price*. T. T. 1835. Excheq.

## ANSWERS TO QUERIES.

### Practice.

ARREST.—WIFE'S DEBT. P. 394.

There is no doubt as to *C.*'s liability to pay *A.*'s debts, for his having married her makes him liable for all her contracts made *dum sola*, how improvident soever they may be, and although he may have received no fortune with her; yet he cannot be sued alone, even upon an express subsequent promise by himself, unless there be some new consideration for the same accruing to him, or causing an inconvenience or delay to the creditor. See *Bac. Ab.*, Baron and Feme; *S. P. Wms.* 409; *S. C.* 1 Chitty, Pl. 5th ed. 33. In *Richardson v. Hall*, 1 B. & B. 50, it was held, that a husband could not be sued in *assumpsit* for use and occupation, to recover half a year's rent, due upon a demise to his wife *dum sola*, the marriage having occurred in the middle of the current half year for which the arrears were claimed.

F. F. J.

PRACTICE.—WARRANT OF ATTORNEY.—NEW RULES. P. 320.

In signing judgments on warrants of attorney, the old practice is abolished; and under the rule of Hilary T. 1834, the practice is merely to put the day of the month and year, (being the day of signing judgment,) "without reference to any other time," and then proceed "(venue) to wit—*A. B.* by *P. A.* his attorney complains, &c.," *vide* Chitty's Forms, p. 386, 2nd edit. Instead of the usual words, as of the last, present, or subsequent term, Chitty adopts the simple words "at any time." 1b. 385.

T. B.

ORDER FOR TIME. P. 336.

1. Where a defendant takes out a summons for time to plead, and the plaintiff gives a consent for time "upon the usual terms," the defendant is bound to draw up the order immediately, and serve a copy; for unless it be served, the plaintiff is not bound to notice it, but may sign judgment for want of a plea. See *Sedgwick v. Allerton*, 7 East, 542; *Jane v. Hinton*, 1 W. Bl. 290. W. S.

2. The plaintiff may sign judgment; for in all cases an order must be drawn up, and served, or else it will not be binding on either party, even though the plaintiff had indorsed his consent on the summons. *Vide* Chit. R., 647; *Edenson v. Hoffman*, 2 C. & J. 140; 4 Taunt. 253; and 1 Dowl. P. C. 304, S. C.

T. B.

## QUERIES.

### Rate of Attorneys.

#### SERVICE UNDER ARTICLES.

*A.*, under articles to *B.*, serves eighteen months. He then travels on the continent, having received permission from *B.* to be absent for "a few months," which are extended by *A.* to upwards of a year. Upon his return, he proceeds to his service, and continues with his master until the expiration of his original term of five years. Being absent on pleasure, and not on account of "bad health," will he be required to serve an extra length of time, corresponding with his absence? and if so, is any application to the Court necessary on the expiration of his original term? W. B. W.

#### MASTER EXTRA.—ADMINISTERING OATHS.

Ought a master extraordinary to administer an oath to a person whom he does not know? and can a party insist on an oath being administered to him, if he is unknown to the master extraordinary? H. F. J.

### Rate of Property and Conveyancing.

#### ESTATE TAIL GENERAL.

By marriage settlement, lands are conveyed to trustees, to the use of husband for life; remainder to wife for life; remainder to the use of the children of the body of the husband on the body of the wife, and ultimate remainder to the grantor, his heirs and assigns. An only daughter becomes tenant in tail, marries and dies, leaving a husband who becomes tenant by the curtesy, and an eldest son, who is tenant in tail in remainder, and also heir to the grantor. Can this tenant in tail cut off the entail under the late statute, without the concurrence of the protector? If not, who is the protector, the heir of the surviving trustee, or the tenant by the curtesy? And lastly, how far can he, without the concurrence of the protector, bar the estate tail, or mortgage the lands? G. W.

#### REQUEST.—LEASEHOLD.

"I give and bequeath to *A. B.* my dwelling-house and furniture, likewise all monies that may be due to me from Clubb or otherwise, at the time of my decease, in case my wife should die, after her funeral expenses are paid, with every debt that may be due at the time of her decease are paid, the remainder sum or sums of money, goods or chattels whatever, I give and bequeath to *A.*, *B.*, *C.*, and *D.*, to be equally divided: and I do ordain, constitute and appoint my said wife *A. B.* my whole and sole executrix to all my lands, goods and chattels whatsoever." The dwelling-house is leasehold. What estate has *A. B.* in the dwelling-house, and to whom do the premises go on her decease? J.

#### DEMAND OF RENT.—FORFEITURE.

In a lease, containing a covenant for its forfeiture where the rent shall be in arrear 21

days, "it being first lawfully demanded," will you favour me by explaining the nature of this demand. Will a written demand left upon the premises do, or must it not be a personal demand upon the lessee? The word lawfully, I am told, makes the latter necessary. Z. A.

#### REQUEST—"PROPERTY."

Mrs. *B.*, by her will, (*inter alia*) gave, devised, and bequeathed as follows: "All my property of every sort and kind, in and about my dwelling-house, unto my niece *K. D.*, and not to be subject to any diminution, without her own personal act and authority." The testatrix, in the after part of her will, gives *K. D.* 500*l.* and again in a codicil 500*l.* more. The question proposed is, whether "cash," "bank notes," "country notes," "bonds," "bills of exchange," "promissory notes," and "accountable receipts of money lodged in the bank at *B.* till called for," found in the testatrix's dwelling-house at her decease, pass by the above bequest to *K. D.*, as falling within the description of "all my property." A reference to cases bearing upon the above question, will be esteemed a favour.

T. W. H.

## THE EDITOR'S LETTER BOX.

The *Legal Almanack, Remembrancer, and Diary*, for 1836, will be published before Michaelmas Term. The plan adopted last year will be somewhat altered. Particular attention will be paid to the preparation of an *Office Diary*. Several new Professional Lists will be added; and it is expected that with the suggestions we have received, the Work will be rendered particularly useful to the profession at large.

The Commissioners' Report on the Consolidation of the Statute Law is now published, price 2*s.*

The *Commentaries on the New Statutes*, shewing all the Alterations in the Law during the late Session of Parliament,—in continuation of our ANNUAL DIGEST OF THE STATUTE and COMMON LAW, will be published at an early period. The First Part, comprising the Municipal Corporation Act, will be ready early in October.

The Queries and Answers of T. L. J.; "Aspiro," B.; J. B. W.; W. B. J.; J. S. H., and "Mentor," have been received.

We are obliged by another Retainer-Case and Opinion.

We appear to have two Correspondents under the signature of "Inquirer," and have answered only one of them. To the other, we can only say that his Query will appear in due rotation. The same answer applies to "A Subscriber."

We thank F. W. G. for the reference to Mr. Ensor's Book, on the Defects of the English Law.

The Communications of Zeta and Aspiro are acceptable.

# The Legal Observer.

Vol. X. SATURDAY, SEPTEMBER 26, 1835. No. CCXCII.

— "Quod magis ad nos  
Pertinet, et necesse malum est, agitamus.

HORAT.

## CHANGES MADE IN THE LAW IN THE LAST SESSION OF PARLIA- MENT.

No. II.

### THE MUNICIPAL CORPORATION ACT.

3 & 6 W. 4, c. 76.

WE now propose to advert to the great measure of the last Session of Parliament, which, however important as it is, we cannot permit wholly to exclude from our columns the many other articles of professional information and intelligence continually pressing upon them, the knowledge of which is quite as useful to our readers. We can therefore only present it in portions in this part of our work, and must direct the practitioner, for full information, to the act itself, if he choose to wade through it for himself, or to our own Commentaries on it, in which we have endeavoured to condense its provisions into a manageable compass. With our limited space, it is only in this way that we are able to keep pace with the progress of reform, and to put our readers in possession, immediately, of all that is valuable or interesting to them.

In the Report of the Corporation Commissioners, although it was to a certain extent repudiated by some of the authors of the bill, will be found the chief reasons for the extensive alterations effected by the act; one of the principal of which is the new mode of electing the future corporate bodies, which, with their constitution, we shall now proceed to mention. By the act all peculiar modes of election are abolished (s. 1), and one uniform mode established. This we consider a very great benefit bestowed on the country; and, first, as to—

### THE CONSTITUTION OF THE NEW CORPORATE BODIES.

The corporations to be elected under the act are to bear the name of "mayor, aldermen,  
No. CCXCII.

and burgesses," and are, as such, to have all corporate rights not altered or annulled by the act (s. 6).

And first, as to who are to be the electors. The burgesses are to be all male persons, of full age, who, on the last day of August, in any year, have occupied houses or shops rated for three years to the relief of the poor, if they be resident householders, within seven miles of the borough; but aliens, and persons who have received parochial assistance, or charitable allowance twelve calendar months before such last day of August, are not to be enrolled (s. 9). But gratuitous medical assistance shall not disqualify any person from being enrolled (s. 10). Any person occupying any house or shop may claim to be rated to the relief of the poor, in respect of such premises, whether his landlord be rated or not, and the overseers are required to put him on the rate (s. 11). Where any house or shop shall come to any person by descent, marriage, &c. he shall be entitled to reckon the occupancy of the person, from whom such house or shop came to him, as his own occupancy, and to be rated accordingly (s. 12). No person is to be enrolled a burgess in respect of any title, other than occupancy and payment of rates (s. 13).

By the act (s. 15) on the 5th of September in every year, but in this year, as altered by the Order in Council, given in our last Number, on the 7th day of November, the overseers are to make out an alphabetical list, called "The Burgess List," of all persons entitled to be burgesses, and deliver the same to the town clerk, who shall allow them to be inspected until the 17th of November next, or 15th of September, in every succeeding year (s. 15 of Order in Council); and if there be no town clerk, the mayor is to appoint some fit person to discharge his duties (s. 16). Persons omitted from the overseers' list are to give notice to the town clerk, on or before the 17th of November in



this year, but in every other year before the 15th of September; and all objections to any person on such lists are to be made on or before the same periods; and the lists of claimants, and of persons objected to, are to be published by the town clerk between the 1st and 8th days of December in this year, but between the 1st and 8th days of October in every succeeding year (s. 17, and Order in Council). The mayor and assessors are then to revise the lists, and upon due proof to insert and expunge the names (s. 18); and they have power to adjourn the courts, examine books, and administer oaths. But the first lists are not to be revised by the mayor, but by the barristers, to be appointed by the Judges of Assize, who were, by the act, to have held their courts from the 1st to the 15th days of October (s. 20); but this has been altered by the Order in Council to the 1st and 15th of December next. The revised borough lists are to be kept by the town clerk, and are to be copied into a book, with the names numbered, and such book is to be the roll of burgesses entitled to vote (s. 22). Copies of this burgess roll are to be printed for sale (s. 23).

The electors being provided, we shall next enquire as to the governing body of the new corporations. This is to consist of a mayor, aldermen, and councillors, who are to constitute "the Council." The aldermen are to be one-third of the councillors, and one half of them are to go out of office every three years, but may be re-elected immediately (s. 25). Extraordinary vacancies in the office of aldermen are provided for by s. 27. The qualification for the council is 1000*l.*, or being rated to the poor at 30*l.* a year in boroughs having four wards 500*l.*; or being rated at 15*l.* a year in boroughs with less than four wards; but no clergyman of the established church or minister of a dissenting congregation, can be in the council (s. 28). All persons on the burgess roll, and no others, shall be entitled to vote at any election (s. 29).

Next as to

#### THE ELECTION OF OFFICERS.

In the present year the councillors are to be elected on the 26th of December (Order in Council); but in every succeeding year on the 1st of November (s. 30). One-third part of the council is to go out of office annually (s. 31). The elections are to be held before the mayor and assessors, and the mode of voting is by written papers with the names of the desired persons

thereon, and signed by the voter (s. 32). Polling booths are to be provided (s. 33); and no inquiry is to be made of the voter except as to his identity, and whether he has voted before at the same election (s. 34). The mayor and assessors are to declare the result of the election not later than two o'clock p. m. on the day next but one after the day of the election (s. 35). If the mayor be dead, or unable to preside at the election, an alderman is to be chosen to preside (s. 36). On the 1st of March, 1836, and every succeeding year, two auditors and two assessors are to be elected in every borough (s. 37). The existing mayors and councillors are to go out of office on the election of councillors under this act (s. 38). When boroughs are divided into wards, the bounds of the wards are to be determined by the barristers appointed to revise the lists (ss. 39 & 41); who are also to appoint the number of councillors for each ward, according to the rules laid down in s. 40. The barristers are to have power to examine rate books and witnesses (s. 42). The councillors and assessors are to be elected in wards by the burgesses of such wards (s. 43). Burgesses are to vote in the wards in which their property is situated (s. 44); and lists of burgesses in each ward is to be made out yearly (s. 45). If a person shall be elected a councillor in more than one ward, he shall choose the one for which he will serve (s. 46). If occasional vacancies of councillors, auditors, or assessors occur, they are to be filled up by fresh elections (s. 47). If any mayor, alderman, assessor, or overseer shall neglect or refuse to comply with the provisions of the act, they shall forfeit the penalties mentioned in s. 48. On the 1st day of January, 1836, but in that and every succeeding year on the 9th of November, the council is to elect the mayor from the councillors (s. 49). The mayor, aldermen, councillors, auditors, and assessors are to make a declaration of acceptance of office and qualification before they act; and aldermen are, if required, to make the declaration once in three years (s. 50). Every burgess elected to the office of alderman, councillor, auditor, or assessor, and every councillor elected to the office of mayor (unless exempted as provided by the act, s. 51), shall accept the office, or pay a fine to the borough fund (s. 51). Any mayor, alderman, or councillor, if he shall be declared bankrupt or insolvent, or absent himself from the borough, shall lose his office (s. 52). If any person shall act as

mayor, alderman, or councillor, and shall not be qualified, he shall incur the penalties mentioned in s. 53. Persons convicted of bribery are disqualified from voting at any elections in the borough (s. 54); and persons offending in any of the cases aforesaid, on discovering others are discharged from all penalties (s. 55); and no person is liable to any incapacity or penalty under this act unless prosecuted within two years after such incapacity, &c. (s. 56).

We shall shortly return to the other heads of the act.

### ON THE POWERS OF TAX-COLLECTORS.

Two cases have been recently decided respecting the powers of collectors of taxes, the purport of which it may be useful to state.

The first turned on the 33d section of the 43 G. 3, c. 99, which gives to the collector power to levy where payment of the assessed taxes is refused by any person "upon demand made by the collector or collectors of the division or place;" and the question was, whether a personal or written demand was necessary under the statute before a levy could be made. In *Cullen v. Morris*,<sup>a</sup> which was an action against the high bailiff of Westminster, for refusing to receive the vote of the plaintiff at an election on the ground that he had not paid his rates, *Abbott, C. J.*, said, "There has been no personal demand of the rates which are due from him, and no written paper containing a demand of these rates has been left at his house, although an application has been made at the house. It appears to me, therefore, that he has a right to vote." The case to which we would advert,<sup>b</sup> was an indictment for an assault; and it appeared that arrears of assessed taxes being due from Ford, Denham, the collector for the parish, in company with Pollard, whom he had duly authorized to collect taxes, called at the house of Ford for the purpose of demanding payment. Ford was from home, but Denham and Pollard saw at his house a woman, to whom they stated that they had come to demand payment of the arrears of the taxes, and that if they were not shortly paid a distress would be put in. The woman said that Ford was unable to pay, and Ford

himself afterwards called on Pollard and stated that he was unable to pay. Pollard, under the authority of Denham, made a levy upon the goods, &c. in Ford's possession, and put Scattergood in possession. Whilst he was so in possession a violent assault was made on him by the defendant, with a view to compel him to abandon the seizure. The jury found that there had been a refusal to pay, and returned a verdict of guilty. On a motion for a new trial, Lord Denman, C. J. said, "After considering the act of parliament and the case cited, we are of opinion that this application ought to be refused. It is not necessary that a demand should be made on the householder himself, or that the precise sum should be specified. A distress may be put in if a demand of the taxes has been made and there has been a refusal to pay on the ground of inability, or for any other reason. *Cullen v. Morris* relates to a matter totally different from that of the present case, and the principle of it is not, we think, applicable here."

In the other case,—the circumstances were shortly these:—Tipper, a tax-collector, had called repeatedly on Clarke for taxes due, and payment not having been made, he went to Clarke's house on the 28th of October, when he was asked whether he did not mean to distrain, and he replied, he might find it his duty to do so. He was then told that if he touched any thing a violent injury would be inflicted on him. Clarke promised to send the taxes to him within a short time. Tipper, on the 29th of November, went again to Clarke's house, accompanied, as before, by Collins. On neither of these occasions did it appear that any objection had been taken to his being so accompanied. He also took with him two other constables, named Grinder and Holder, but did not introduce them into the house at first. When Tipper had entered Clarke's house and had said that he had come for taxes, Clarke fastened the door on him, kept him within the house, and left it himself. Then Collins opened the door and introduced Grinder and Holder. Clarke afterwards having repaired to an adjoining public-house, returned with ten other men. Clarke then said that he would pay no taxes while the constables remained, and he ordered Austin to turn Grinder out of the house, and said that he would stand by him and see that he did not suffer by it. Austin seized Grinder by the collar and dragged him to the door. A scuffle took

<sup>a</sup> 2 Stark. N. P. C. 577.

<sup>b</sup> *Rea v. Ford*, 4 Nev. & M. 451.

<sup>c</sup> *Rea v. Clarke and another*, 4 Nev. & M. 671.  
2 D 2

place, and ultimately Clarke paid the money, and the parties separated. Clarke and Austin were indicted for the assault, and found guilty. A rule nisi having been obtained to set aside this verdict, Lord Denman, C. J. said, "The question is, whether Grinder was at the time in the execution of his duty as constable. I must own that I cannot entertain any doubt whatever but that he was. On the ground of the general duty of the constable, and the general right of every person in the execution of his duty to have the protection of the law, I think that Tipper was perfectly justified in taking Grinder there by way of precaution; that Grinder did not come into the house until it was proper he should do so, and that he would not have been justified in voluntarily leaving the house at the time when the defendant thought proper with the strong hand to eject him." Mr. Justice Littledale, Mr. Justice Patteson, and Mr. Justice Coleridge were of the same opinion. *Patteson*, J. observing, "A tax-collector has no right to introduce a stranger into the house of a person from whom taxes are due unless there be some resistance. He has no right to take any person he thinks fit along with him into the house;" but considered that under the circumstances above stated Collins was fully justified, without reference to the stat. 38 G. 3, c. 5. The rule was therefore discharged.

## PRACTICAL POINTS OF GENERAL INTEREST. No. LXXXIII.

### BRIBING A VOTER.

In the case of *Sulton v. Norton*, 3 Burr. 1235, the defendant had given one Moore five guineas to vote for Lord Villiers and Sir Robert Burdett. Moore, however, voted for their opponent. The action, which was upon the Bribery Act (2 G. 2, c. 24, s. 7), charged the defendant with having corrupted Moore to vote for Lord V. and Sir R. B., and the plaintiff had a verdict. On a motion to set aside this verdict, it was argued, that corrupting Moore to give his vote, must mean "actually procuring him to give his vote," and that as Moore in fact did not vote for the persons for whom he promised to vote, but for their opponents, the defendant could not be said to have procured him by a corrupt agreement to give his vote. A case of *Bush and Rawlins* was cited *contra*; and Lord Mansfield said, "The case of *Bush v. Rawlins* is in point, and I wonder how it could ever be a doubt, for the offence was completely committed by the cor-

rupter, whether the other party shall afterwards perform his promise or break it." In a very late case under the same statute, it appeared that at half-past seven A. M. on the first day of the late election for the borough of Cambridge, the defendant came to a voter and asked him to give his vote for Mr. K.; and having asked him first whether he had any bills to pay, and being answered in the negative, agreed to give him 10*l.*; 5*l.* now and 5*l.* after polling. The witness took the 5*l.*, and immediately after the defendant had left his shop shewed the money to a friend who came in, and almost immediately afterwards to another friend, and in about half an hour afterwards he went to the committee of Mr. S. R., one of the other candidates, and shewed the money there. He then polled for Mr. S. R. and Mr. P. The defendant, on this evidence, was found guilty. A new trial was refused; and Mr. J. Littledale said, "The words 'procure' and 'corrupt,' used in the act of parliament, have very distinct meanings. To 'procure' is to get the thing actually done; but to satisfy the meaning of the word 'corrupt,' it is sufficient if a corrupt agreement be made in consequence of the offer of the bribe. There is this distinction between *Sulton v. Norton* and this case, that there the corruption of the voter was really completed, whereas here the voter did not perhaps, at the time of agreeing, actually intend to give a corrupt vote." And Mr. Justice *Patteson* said, "In the case of the voter, it is clear from the express words of the act, that any agreement or contract for any reward to give his vote, whether intended to be performed or not, would make him liable to the penalties of the act. I quite agree in the distinction between 'corrupt' and 'procure.'"—*Henslow v. Fawcett*, 4 Nev. & M. 585.

## DECISIONS ON THE NEW PLEADING RULES.

WITHIN the last few terms, various decisions have been pronounced by the different Courts, as to the construction to be put on the New Rules of Pleading. We shall, in the present article, point out what those decisions have been, according to the order of the different pleadings in a cause.

It has been decided in *Miller v. Miller*, 3 Dowl. Prac. Cas. 408, that the New Rules of Pleading are confined in their operation to such actions as all the Courts have jurisdiction over, and therefore that they do not extend to real actions.

First, as to declarations. If a plaintiff proceeds by a writ of summons, he cannot declare against the defendant until eight days after the service, inclusive of the day of serving the writ, has expired; and if he does, he will not be entitled to the costs of his declaration. *Fish v. Palmer*, 2 Dowl.

Prac. Cas. 460. The year within which a plaintiff must, according to the rule of law, deliver his declaration, is, in real as well as personal actions, to be reckoned from the return day of the writ, and not from the date of the defendant's appearance. *Barnes v. Jackson*, 3 Dowl. Prac. Cas. 404.

Upon a writ against several, a plaintiff may declare against one only; but if he declares against any one afterwards, he will be irregular. *Coldwell v. Blake*, 3 Dowl. Prac. Cas. 656. Where a defendant puts in bail, but does not justify, a declaration *de bene esse* is properly filed, and not delivered. *Res v. The Sheriff of Middlesex*, 3 Dowl. Prac. Cas. 186.

In *Reynolds v. Welsh*, 3 Dowl. Prac. Cas. 441, where a declaration in the commencement stated that the defendant was summoned to answer the plaintiff, assignee of certain sheriffs, but the bond declared on appeared to be made to the plaintiff personally, the Court held the declaration to be sufficient, on special demurrer.

The date of the writ need not be stated in the declaration, notwithstanding the new Pleading Rules. *Du Pre v. Langridge*, 2 Dowl. Prac. Cas. 845.

It has now been decided, that if a venue is improperly introduced into the declaration, contrary to the New Rules of Pleading, the proper mode of taking advantage of the irregularity is, by applying to a Judge at chambers to strike it out, and not by demurrer. *Harper v. Chumneys*, 2 Dowl. Prac. Cas. 680; *Fisher v. Snow*, 3 Dowl. Prac. Cas. 27; *Townsend v. Gurney*, *ib.* 168.

Next, as to the plea. If a defendant obtains an enlarged time for pleading previous to the 10th of August, but which does not expire on that day, he is entitled to the remainder of the enlarged time after the 24th of October, for the purpose of pleading. *Wilson v. Bradslocke*, 2 Dowl. Prac. Cas. 416; *Trinder v. Smedley*, 3 Dowl. Prac. Cas. 87.

A special plea of justification, besides the general issue, will not now be allowed, when the special matter may by statute be given in evidence under the latter plea. *Neale v. Mackenzie*, 2 Dowl. Prac. Cas. 702.

In *Gardner v. Alexander*, 3 Dowl. Prac. Cas. 146, it was decided that evidence of a special contract may be given under the general issue to the declaration, in the common form, for goods bargained and sold. A plea of payment into Court must follow the form given by the New Rules; and if

other pleas are pleaded to part of the plaintiff's demand, the plea of payment into Court should be put last, and pleaded to the residue. *Sharman v. Stevenson*, 3 Dowl. Prac. Cas. 709. A special demurrer to a plea of payment of money into Court, that "it varies from the form given by the Rule," is sufficient to raise an objection that the plea is bad, for the want of a proper conclusion with a prayer of judgment. *Ib.*

If a good cause of action at common law appear in the declaration, the defendant must now plead any statutable illegality in the contract on which it is founded, in answer. *Barnett v. Glossop*, 3 Dowl. Prac. Cas. 625. It should seem that the general issue with power to give the special matter in evidence, is abolished in all cases whatever, except where specially allowed by statute. *Ib.* and *Frankum v. Lord Fal-mouth*, 4 Dowl. Prac. Cas. 65. The illegality of work and labour done, cannot be given in evidence under the plea of *non assumpsit*, but must be pleaded, although the illegality be not inferential, but essential. *Potts v. Sparrow*, 3 Dowl. Prac. Cas. 630.

In an action by an indorsee against the acceptor of a bill of exchange, a plea that there was not at any time any consideration for his the said defendant's acceptance or paying the said bill of exchange, was held bad, on special demurrer. *Reynolds v. Iveney*, 3 Dowl. Prac. Cas. 453. To an action on a promissory note, by the executors of the payee against the maker, the defendant pleaded that he made the note without any consideration: Held bad, upon special demurrer. *Stoughton v. The Earl of Kilmorey*, 3 Dowl. Prac. Cas. 705. In an action by indorsee against acceptor, a plea that the bill was accepted for the accommodation of the payee, and without any consideration, and that it was indorsed after it became due, was held bad on demurrer; and also another plea, that the bill was indorsed after it was due, and that the payee, at the time of the indorsement, was indebted to the defendant in a larger sum than the amount of the bill. *Stein v. Yglesias*, 3 Dowl. Prac. Cas. 252. The Rules do not enable defendant acceptor, in an action on a bill of exchange at the suit of an indorsee, to plead that he had no consideration from the drawer, without shewing circumstances of fraud and knowledge of them on the part of the plaintiff. *French v. Archer*, 3 Dowl. Prac. Cas. 130. To a declaration in trover, the defendant pleaded the general issue, since the New Rules.

came into operation. At the trial, the defendant proposed to prove that he was a partner with the plaintiff, and took the goods, and sold them to pay a partnership debt: this evidence was rejected, and the plaintiff obtained a verdict. On a motion for a new trial: Held, that the defendant was not precluded by the New Rules from disputing the plaintiff's sole right of the property, but that the defence ought to have been specially pleaded by way of confession and avoidance. *Slancliffe v. Hardwick*, 3 Dowl. Prac. Cas. 762. Upon a plea of no consideration, to an action on a promissory note, to which the plaintiff replied that there was no consideration, the proof lies upon the defendant. *Lacey v. Forrester*, 3 Dowl. Prac. Cas. 668. To a declaration in *assumpsit* on a banker's check, the defendant pleaded that there was no consideration either for making or paying it. The replication stated that at the time of making the check there was a good consideration. At the trial, it appeared that the plaintiff was an auctioneer, and had been employed to sell some property by auction, and that one of the conditions of sale was that the purchaser should make a deposit. When the property was put up to sale, the defendant became the purchaser, and the check was given for the deposit, in part payment. The payment of the check was resisted, on the ground that the property was misdescribed, and that the vendor was not in a condition to convey what he pretended to have sold. The Judge was of opinion that the property had been fraudulently misdescribed by the plaintiff, to enhance the price. A verdict was taken for the plaintiff, subject to the opinion of the Court whether or not the defence could be given in evidence upon his plea: Held, that though the plea would have been bad on demurrer, it was sufficient after verdict; and that as the plaintiff's fraud rendered the transaction null and void *ab initio*, the plea was proved; and that the verdict should therefore be entered for the defendant. *Mills v. Oddy*, 3 Dowl. Prac. Cas. 722. In *assumpsit*, for refusing to allow the plaintiff to proceed with certain work according to agreement, the defendant pleaded that the work was to be done to the satisfaction of A. B., and that part of the work which was done, was not done to his satisfaction, and that, therefore, he discharged the plaintiff: Held, that upon this issue it was not necessary for the defendant to call A. B. *Vickers v. Cock*, 3 Dowl. Prac. Cas. 492. To *assumpsit* upon an agreement to gua-

rantee the payment of goods supplied to a third person, the defendant pleaded, that after that agreement was made, and before any breach, the defendant agreed with the plaintiff to pay for any goods supplied, by accepting a bill at three months. Upon demurrer, assigning for cause, that the agreement was not alleged in the plea to be in writing, and that it only varied in the time of payment stated in the declaration: Held, that the plea was sufficient. It may be a question whether, in an action for goods sold, it can be shewn under the general issue that the time of credit has not expired. *Taylor v. Hilary*, 3 Dowl. Prac. Cas. 461.

In *assumpsit* on a bill of exchange, by the indorsee against the immediate indorser, the defendant pleaded that he indorsed the bill to the plaintiff without having or receiving any consideration: upon which, the plaintiff took issue in the terms of the plea. After verdict for defendant, the plaintiff moved for judgment *non obstante verdicto*, on account of the insufficiency of the plea: Held, that the plea was good after verdict, though it might have been objected to on special demurrer. *Easton v. Pratchett*, 3 Dowl. Prac. Cas. 472. In an action by the indorsee against the indorser of a promissory note for 500*l.*, the defendant pleaded, as to 300*l.*, that the note was indorsed by the defendant for the accommodation of the maker, and as a security to the plaintiffs, who were the maker's bankers, for subsequent advances; and that only 200*l.* was subsequently advanced; and that, therefore, as to 300*l.*, there was no consideration. The plaintiffs replied, that they were holders of the note for value given to drawer to the full amount: Held, that upon this issue it was not incumbent on the plaintiff to give any evidence unless his title was impeached by the defendant, and that he was entitled to recover the whole amount of the bill. *Percival v. Framplin*, 3 Dowl. Prac. Cas. 748.

A plea of the Statute of Limitations, requires to be signed by counsel. The general issue being pleaded to part of a declaration, and the Statute of Limitations to the remainder, without the signature of counsel: Held, that the whole plea was a nullity. *Macher v. Billing*, 3 Dowl. Prac. Cas. 246. In *assumpsit*, the defendant pleaded as to 1*l.*s. parcel, &c., that before the commencement of the suit he paid the same to the plaintiff; and as to the residue of the said monies, that he did not promise, as in the declaration is alleged; and of

this he puts himself upon the country. The plaintiff having specially demurred, alleging duplicity, and the want of a proper conclusion with a verification, the Court held the plea bad, and that judgment for the plaintiff must be upon the whole plea. *Ansell v. Smith*, 3 Dowl. Prac. Cas. 193.

It has now been decided, in *Linley v. Polden*, 3 Dowl. Prac. Cas. 780, that in an action for use and occupation, since the New Rules, it cannot be left to the jury to say whether the evidence produced by the defendant does not amount to an admission by the plaintiff that he has been paid, and that nothing is due, without a plea of payment or settlement; and such evidence is inadmissible under a plea of set-off for money due on an account stated between the parties.

A plea, that the defendant was not detained in custody, as alleged in the declaration, was held not to be such a vexatious and frivolous plea as to deprive the defendant of his right to add the general issue, there being an affidavit of merits. *Rees v. Kingston*, 3 Dowl. Prac. Cas. 159.

Inconsistent pleas may be pleaded under the new rules, if intended, *bond fide*, to support different substantial grounds of defence. *Duer v. Triebuer*, 3 Dowl. Prac. Cas. 133. *Wilkinson v. Small*, ib. 564. To a declaration in trover, the defendant was allowed to plead a right of lien by usage, and the same usage in two other pleas, but with reference to a delivery of the goods by two different parties. *Leuchhart v. Cooper*, 3 Dowl. Prac. Cas. 415. Pleas of *non assumpsit* and part payment will not be allowed together, nor a plea of a warranty with sample, and a plea founded on the warranty implied in law. *Steill v. Sturry*, 3 Dowl. Prac. Cas. 133.

With respect to signature of pleas, it has been decided that the old practice in the Common Pleas, requiring pleas to be signed by a serjeant, is virtually repealed by his Majesty's warrant of 24th April, 1834, throwing open that court. *Power v. Fry*, 3 Dowl. Prac. Cas. 140.

Where a defendant pleads payment of money into court generally, upon the whole declaration, and then pleads other pleas to all, except as to the money paid in, and the plaintiff takes out the money paid in, and taxes his costs upon the rule 19 of H. T. 4 Will. 4, in full satisfaction, the cause is at an end, and the defendant has no right to the costs of the subsequent pleas, nor can he sign judgment of *non pros*. for want of a replication to them. Where a defendant has several defences to different parts of

the plaintiff's demand, and intends to plead payment into court as to other parts of the demand, he should first of all plead those pleas, and then the plea of payment of money into court as to the residue only. *Coates v. Stevens*, 3 Dowl. Prac. Cas. 784.

On a plea of payment, if that be the only one, the defendant is bound to begin. *Richardson v. Fell*, 4 Dowl. Prac. Cas. 10.

Next, with respect to the replication. It has been decided that where an acceptor to an action, on a bill of exchange, by an indorsee, pleads want of consideration, it is sufficient for the plaintiff, in his replication, simply to aver that there was consideration. *Prescott v. Levi*, 3 Dowl. Prac. Cas. 403. When an acceptor to an action on a bill of exchange, by an indorsee, pleads want of consideration and fraud, the plaintiff need not, in his replication, state the consideration at length. It should seem that it would be sufficient simply to negative the fraud and allege consideration, without stating its nature. *Bramah v. Baker*, 3 Dowl. Prac. Cas. 392.

Next as to the rejoinder. To a declaration on a promissory note against the maker, he pleaded no consideration; the plaintiff replied that the note was indorsed to her in part payment of a debt, and that she had no notice of the premises in the plea. The defendant rejoined that she had notice. On demurrer: held that the plaintiff was entitled to judgment. *Pearce v. Champneys*, 3 Dowl. Prac. Cas. 276.

Lastly, as to demurrer. A statement in the margin of a demurrer to a plea, that the matters disclosed in the plea contain no answer to the declaration: held insufficient, within the meaning of 2 H. T., R. G. 4 Will. 4. *Ross v. Robeson*, 3 Dowl. Prac. Cas. 779. It is not a sufficient objection to a demurrer being argued, that the point intended to be raised is not stated in the margin of the demurrer. The rule only enables the opposite party to set aside the demurrer. *Lacey v. Umbers*, 3 Dowl. Prac. Cas. 732. If the ground of demurrer, stated pursuant to 2 Reg. Gen. H. T., 4 Will. 4 (Practice Rules), in the margin, appears sufficient, the Court will not set the demurrer aside as frivolous. *Tyndall v. Ulleshome*, 3 Dowl. Prac. Cas. 2. A demurrer to a plea to an information on the revenue side of the Court of Exchequer, does not require a matter of law to be stated in the margin, according to Rule 2 of H. T. 4 Will. 4; but it must be signed by the Attorney-General before it is delivered. *The King v. Woollett*, 3 Dowl.

Prac. Cas. 694. Where a defendant pleaded a frivolous demurrer, so late in the term that there was not sufficient time to set it down for argument, and the motion was made to set it aside, the Court would only let the defendant in to plead on an affidavit of merits, pleading *instantly*, and paying the costs of the demurrer and the application. *Underhill v. Hurney*, 3 Dowl. Prac. Cas. 495. A rule *nisi*, for setting aside a demurrer, as being frivolous, should be drawn up on reading the pleadings. *Howorth v. Hubbersty*, 3 Dowl. Prac. Cas. 455. Where a demurrer is frivolous, and a motion is made to set it aside, the Court will grant "a rule for that purpose to be absolute, unless cause is shewn on a particular day." *Kinnear v. Keane*, 3 Dowl. Prac. Cas. 154. A defendant, after having had time to plead, demurred to the declaration, which was in debt on a bill of exchange, with the common counts in this form: "The defendant, by his attorney, says that the declaration is not sufficient in law;" and also, that an action of debt will not lie, and that the bill should have been stated to be for value received: held, that the plaintiff was not justified in signing judgment as upon a sham demurrer. *Lyons v. Cohen*, 3 Dowl. Prac. Cas. 243. If a party seeks to make his opponent pay the costs of copies of demurrer books, pursuant to 7 R. G. H. T. 4 Will. 4, he must deliver them on the day after the time of his opponent's delivering them expires. *Fisher v. Snow*, 3 Dowl. Prac. Cas. 27. A cause was entered in the paper for argument. A defendant having demurred to a replication, the plaintiff got the case put into the paper as for argument, and the defendant came prepared to argue the point; but it appeared that the plaintiff had not joined in demurrer, and of course no paper books were delivered to the Judges. The Court of Exchequer held that the defendant was not entitled to his costs of appearing to argue the demurrer. *Howorth v. Hubbersty*, 3 Dowl. Prac. Cas. 457. If one side neglects to deliver his demurrer books to the Judges, the other side should do so for him, and then he will be entitled to judgment; but otherwise the case will be struck out. *Abraham v. Cook*, 3 Dowl. Prac. Cas. 215.

In the case of *Harvey v. King*, 3 Dowl. Prac. Cas. 750, the Court of Exchequer laid down a rule, for the future, with respect to demurrers, which is of some importance. It was a demurrer to a replication. No one appeared in support of the plea, and Mr. Petersdorff applied for judgment. It was understood that no argument was intended;

but the paper books not having been delivered to the Judges, the Court refused to give judgment, and ordered it to be set down for the next paper day. Lord Abinger said: "I think it would be better, in future, that when a case is not intended to be argued, it should be mentioned to the officer, and that he should make out two lists, as there are in the King's Bench; one, of those cases which are intended to be argued, and the other, of those where no argument is intended; and that, as to the latter, the rule respecting the delivery of paper books should not apply."

## PRACTICE OF RETAINERS.

Sir,

As I see you have introduced into your work cases on the Law of Retainers, allow us to furnish you with one that occurred in our office.

Mr. V. S., his wife and children, filed a bill in Chancery against Mrs. H., F. R. S., and G. P. We were concerned for the defendant S., and on the 24th of January, 1832, gave a retainer to Mr. Knight, in the following words: *V. S. and others against H. and S.*—Retainer for the defendant S.

On the 9th of December, 1833, the plaintiff V. S. (who was the solicitor in the cause) gave a retainer also to Mr. Knight for the *plaintiffs, naming them all, and the three defendants*,—in short, giving the full title of the cause; and insisted, that as the defendant S.'s retainer did not name all the parties, plaintiffs and defendants, his retainer was bad; and that Mr. Knight ought to accept his (the plaintiff's) instead of the defendant's retainer.

Copies of the retainers and the above facts were laid before Mr. Rolfe (now the Solicitor General), and his opinion is as follows:

"I think Mr. E.'s retainer was sufficient, and that Mr. Knight cannot accept the retainer of the plaintiffs."

E. & SON.

A. commenced an action against B., C., and D. in trespass, and immediately on service of the process, delivered a retainer to Mr. Serjeant W., entitled in the cause *A. v. B.* and others. B. and C. were sheriffs, and pleaded a justification, whereupon the plaintiff entered a *nolle prosequi* against them, and the cause stood *A. v. D.* only. D. then sent a retainer to the same counsel, entitled *A. v. D.* After reference to other counsel, Mr. Serjeant W. decided on taking the brief of the first retainer, A.

J. & R. E. A.

## COSTS OF PAYING MONEY INTO COURT.

MANY of our readers may not be aware that the plaintiff's right to costs, where money is paid into Court, has become considerably fettered by the operation of the late rule (as to pleadings) of Hilary term, 4 W. 4, s. 19.

Previously to that rule, the plaintiff could at any time before trial obtain the costs up to the time of the money having been paid in by *taking them upon the rule*; and this even after he had given notice of trial (8 Term Rep. 408), or was under a peremptory undertaking to go to trial and made default (1 Y. & Jervis, 213), provided he desisted from further proceedings; and, I believe, at one period, even in some cases after trial, the plaintiff was enabled to obtain these costs (8 Term Rep. 408; *Id.* 486). But now, since the above regulation, the old rule for paying money in is no longer to be used—and the terms of, and decisions and practice upon that rule, have therefore become virtually abolished with it—but, in its stead, money paid into Court is to be *pleaded*, and the plaintiff is to be at liberty to reply to the same by accepting the sum so paid in satisfaction of the cause of action; “and in that case he shall be at liberty to tax his costs of suit.” But no provision being made for the costs when the plaintiff replies that he has “sustained greater damage,” it is presumed that in such case there is no means of obtaining the costs either before or after the trial, except, indeed, in the former case, the plaintiff would be enabled to do so by withdrawing his replication and replying *de novo*, according to the rule; and that, therefore, unless the plaintiff reply sooner or later that he is satisfied, that he has no right to costs; or at most that it is a right without a remedy.

This view of the case is assisted by inquiring,—in case any one disputes its correctness, and contends for the plaintiff's ancient right,—upon what *now* can you *tax*? The rule is gone, and the replication is not *such* as the new rules give you power to tax upon.

Perhaps, however, it may be contended, that the alteration is “a mere matter of form,” since “you have shewn that there is a way of obtaining the costs,” and that “nothing is easier than the one pointed out of withdrawing the replication and replying *de novo*, that the plaintiff is satisfied:” to such it may be replied, he must *first obtain leave* to withdraw his replication; and it must be recollected, that it is in the discretion of the Judge to *put the applicant under such terms as he may think proper*, and if any expense has been incurred by the defendant anterior to his payment of the money into Court, and which notwithstanding by the regular course of practice the plaintiff might not be liable to (as a special jury, &c.) the chances are that he, the plaintiff, in his present condition, will be laid under an obligation to pay them *ere he will be*

entitled to relief; and if, with the fear of this, he refuse to proceed, or decline to avail himself of the Judge's order, the alternative is a distant *non pros*. with the prospect of paying the defendant a full measure of costs. This should make plaintiffs careful how they endeavour to frighten a defendant by driving him close to trial after he has paid money into Court. Z.

## SUPERIOR COURTS.

### Lords Commissioners' Court.

#### PLEADING.—DEMURRER.

*Held, that the laying of an event “on or about” a day of a certain month and year, is a sufficient specification of time in pleadings.*

*A demurrer so framed, barring a suit in respect to time, is not to be overruled by reason of a charge in the bill as to the possession of documents, &c.*

This was an appeal from a decision of the Vice Chancellor. The bill was filed by Mr. James Leigh, claiming the estates of Lord Leigh, in the counties of Stafford, Buckingham, and other counties, as his next heir male; and it prayed that the defendants might be restrained from setting up a term of 500 years in bar of an action of ejectment, which he had brought against Mr. Chandos Leigh, the present possessor of the estates. The bill set out that the title of the plaintiff accrued on the death of Mrs. Mary Leigh, on or about the 2nd July, 1806. The defendants demurred to the bill, and for grounds of demurrer, stated that Mrs. Mary Leigh died, as alleged in the bill, on or about the 2nd July, 1806, and that the bill was not filed till 1834, making a period of eight years more than that required by the statute 3 & 4 W. 4, c. 27, ss. 2 & 24, to bar suits. When the demurrer came to be argued, the Vice Chancellor was of opinion that the words *on or about the 2nd July, 1806*, did not fix any precise date, and that it might be either many years before, or many years after that time, and overruled the demurrer. It was against this decision that the appeal was brought.

The Solicitor-General, Sir Wm. Horne, and Mr. Koe, for the defendants, in support of their appeal and demurrer. On or about the 2nd of July, 1806, meant in plain English on or about the 2nd day of the month of July, but certainly in the year 1806. It therefore fixed the month and the year, if it did not fix the day, although it might be supposed that the expression on would also fix the day. They had often heard that law was the perfection of reason, but they doubted much whether it would continue to bear that character, if the Vice Chancellor's decision was to stand.

Mr. Wakefield and Mr. Parker, in support of the decision of the Vice Chancellor, argued, that on or about, was fairly to be construed as meaning either before or after. In addition to



this objection, which his Honor considered fatal to the demurrer, the defendants admitted the charge in the bill, that they were in possession of books, papers, leases, hatchments, and headstones, which would prove plaintiff's title to the estates now wrongfully possessed by Mr. Chandos Leigh. The withholding of these documents and proofs formed a sufficient ground for disallowing the demurrer, even if the mere technicality was not to prevail. Moreover, the plaintiff's father did, in the year 1820, commence proceedings against the defendants, although he was afterwards, from the want of the necessary funds, compelled to abandon them. The present proceeding might be considered to be in the nature of a supplemental bill, although the plaintiff had thought it expedient to commence an entirely new proceeding.

Sir Wm. Horne, in reply, reminded the Court that the allegation of *on or about the 2nd of July*, was taken from the plaintiff's own bill.

Sir C. C. Pepys, giving his judgment on a subsequent day, said he was clearly of opinion, that from the known and accepted use of the expression *on or about*, in all the ordinary transactions of life, it was sufficiently definite for all the purposes of a demurrer, and that it did satisfactorily set out the fact, that Mary Leigh died in the year 1806. This view of the case was supported by a decision of Lord Hardwicke, in the case of *Richards v. Evans*,<sup>a</sup> where, in speaking of the specification of the time at which it was necessary to lay a *modus* to be payable, he says, "that as to the general question, whether it is necessary to lay, and prove a particular day of payment, the case in the Exchequer was so determined; but I remember that gave general dissatisfaction at Westminster Hall, as too nice to require the proof of a particular day, and it has since been adjudged, that *on or about* is sufficient; so that they have left off taking that exception in the Exchequer." For these reasons, and on this authority, he thought the decision of the Vice Chancellor could not be sustained. It had been urged at the bar, that the defendants admitted they were in possession of certain papers, books, and documents; and that they had removed certain tombstones and hatchments, which, if produced, would prove the plaintiff's title. This, however, could not be urged as a reason for disallowing the demurrer, which applied solely to the plaintiff's title, as set forth in this bill; and the demurrer being filed in bar of that title, on the ground of the expiration of the legal time for preferring the claim, it covered that allegation, which was relied on, as well as every other part of the plaintiff's case.

Sir J. Bosanquet was also of opinion, that the demurrer must be allowed. The whole question turned on the meaning of the word *about*, which as a preposition meant *nearly to*, and which used adverbially meant *nearly*.

Now, *on or about the 2nd of July*, 1806, meant near to the 2d of July, and it would be going much too far to say that it did not cover the period between 1806 and 1814, in which year, or later, it would be necessary for the plaintiff to fix the time of the death of Mary Leigh, to take his case out of the act. In addition to the case of *Richards v. Evans*, referred to before, it might be observed that it was common in criminal pleadings, where the utmost strictness was required, to charge an offence as having been committed *about a certain hour*, and that was held to be quite sufficient to sustain the indictment.

*Leigh v. Leigh*, and another, before the Lords Commissioners, at Lincoln's Inn, Aug. 6th and 8th, 1835.

### Vice Chancellor's Court.

#### PRACTICE. — ACT OF PARLIAMENT. — CONSTRUCTION

*The act 2 & 3 W. 4, c. 33, to effectuate service of process from Equity Courts in England and Ireland, empowers those Courts to direct in certain cases service of subpoenas, &c. and all subsequent process to be had thereon, on defendants residing in any part of the united kingdom. An order for an attachment against a defendant in Scotland was refused: sed quere.*

Mr. Knight and Mr. Koe, moved for an attachment against the defendant for not putting in his answer to a bill. The defendant was resident in Scotland, and he had been served with a subpoena, under the act 2 & 3 W. 4, c. 33, and had in fact entered an appearance to the suit. His Honor on a former occasion, after consulting with the Master of the Rolls, held that it was necessary personally to serve the defendant with notice of the present motion: that was done and the plaintiff now sought the common order for an attachment, upon his own responsibility as to the mode in which it should be executed.

Mr. Jacob, and Mr. Garrett said, they presumed the plaintiff intended to have the attachment executed by some officer in Scotland. If the sole object was to have the attachment issued to a sheriff in England, so as to lay a foundation for taking the bill *pro confesso*, there could be no objection to that course, for it was the usual course; but they contended that it was not the intention of the legislature that the Court of Chancery in England should issue a process, whereupon a party might be arrested in a foreign country—its whole object was to make service abroad good service.

The Vice Chancellor considered it was very fit that the matter should be heard by a tribunal competent to settle it. Contradictory constructions were put on the act: supposing that the defendant really meant to act fairly, the time for putting in his answer should be extended to the 23d of July, when if necessary this motion might be renewed, before the Lords Commissioners, and a final construction given

to the act. *Hasluck v. Stewart*, at Lincoln's Inn, June 30th, 1835.

The motion was not repeated. For the various and contradictory constructions of the act, 2 & 3 W. 4, c. 83, (sometimes called Lord Plunket's Act, as being brought in by him, to facilitate process between England and Ireland), and also in the act 4 & 5 W. 4, c. 82, to amend and extend the former, see 8 Leg. Obs. 58; 9 Leg. Obs. 46, 170; 1 Myl. & Keen, 32, 289; and 5 Sim. 508.

MARRIAGE PORTION.—LEGACY.—SUBSTITUTION.

*By a deed made in contemplation of a marriage which did not take place, the father of the lady covenanted to secure for her and children 20,000l. The father, by his will subsequently made, gave to his executors, in trust, 20,000l. for the daughter, in substitution of the like sum in the deed. Held that the deed became inoperative, and that 20,000l. was not a specialty debt, but a legacy.*

This was an ordinary legatees' bill, for the administration of the estate of the late Sir Anthony Hart. The only question raised in the cause, respected the following transaction. On the first of November, 1831, a deed was executed between Sir Anthony Hart, his daughter, Miss Hart, and certain trustees; and it recited that a marriage was about to take place between Miss Hart and Mr. B., and that Sir Anthony Hart was desirous to make provision for her and her children by her intended, or any future husband, to the extent of 20,000l.; and had resolved to enter into the covenants therein after contained. The deed then continued to state, that for making a provision for Miss Hart and her issue, Sir A. Hart covenanted, that in case the intended marriage should take effect, he would, within two years from that event, transfer stock to the value of 20,000l., upon certain trusts, for Miss Hart and her children. On the 10th of November following, Sir Anthony executed instructions for his will (a formal will, never having been executed), which stated that he gave to his executors 20,000l., "in substitution for the 20,000l. lately settled by deed, upon a contingency," upon certain trusts for Miss Hart and her children generally. Sir Anthony died shortly after; and the marriage with Mr. C. B. did not take place. Miss Hart since married the plaintiff, Mr. Davies. The question was whether, as this legacy was in substitution of the covenant, it should or should not be considered as a specialty debt, in the administration of the assets. The parties sought the declaration of the Court thereon; to prevent any doubt being raised hereafter respecting the operation of the deed.

Mr. Knight, Mr. Barber, Mr. Wigram, Mr. Kindersley, Mr. Kee, and Mr. G. Richards, appeared for the different parties.

His Honor the Vice Chancellor made a de-

claration, that as the contingency had not taken place, and could not now happen, the deed was in effect inoperative, and that the legacy of 20,000l. stood and was payable *pari-passu* with the other bequests.

*Davies v. Barber*, at Lincoln's Inn, July 8, 1835.

Equity Eschequer.

TITHES.—WHITE TITHES.

*The terms "Minute Tithes, called White Tithes," are an uncertain description, and the custom of a parish is the criterion of what is comprehended in them. The tithes of hops not being claimed by the owners of other tithes, and being necessarily payable to some one, fall within the description of "White Tithes."*

The bill was filed by the plaintiff as lessee under the Collegiate Church of Southwell, Nottinghamshire; and it prayed against the defendants an account of all the minute tithes, called white tithes, of the lands in their respective occupation, except the tithe of wool, lambs, pigs, geese, and eggs. The only question made in the cause, at the hearing, was, what tithes are comprehended under the description "minute tithes, called white tithes," and that question was argued by Mr. Boteler and Mr. Duckworth for the plaintiff, and by Mr. Simpinson and Mr. Lowndes for the defendants. The following judgment, delivered after consideration, comprises the material facts and arguments in the cause.

Mr. Baron Alderson. The plaintiff claimed, as lessee under the Collegiate Church of Southwell, the small tithes of the parish, with certain exceptions; and the sole question was, what tithes were comprehended under the terms "minute tithes, called white tithes." It appeared, that so far back as the year 1632, the chapter of Southwell had demised these tithes, by the same description, to lessees, and had received the profits arising from them. Concurrently with that, the chapter was also in the habit of granting leases of the tithe of wool and lambs, &c. to other lessees. He was fully satisfied, by the passages cited from the ecclesiastical survey, that the expression, "white tithes," was not particular or definite; it meant one thing in one parish, and another thing in another, so that the only criterion was the usage in this particular parish. In this parish it had always been the custom to collect, as white tithes, the tithes of gardens, orchards, flax, carraway seeds, rape, &c. This was in evidence, and uncontradicted. But it was said that the tithe of hops had been collected by mistake; but he did not think so; it had been collected for upwards of twenty years. For whom was the plaintiff mistaken? No other person claimed these tithes, and it was clear they belonged to some one. It seemed to him, therefore, that the tithe of hops fell under the term "white tithes," because they included all the small tithes not specifically leased. He must decree for the plaintiff; but with respect

to one item—the tithe of milch-cows—there appeared to be a customary payment of three-half-pence in respect of each cow. Unless, therefore, the plaintiff wished for an issue upon this point, he would decree that this payment was of the nature of a *modus*; and he would decree an account for him of the other tithes, as prayed by the bill.

*Beecher v. Clay and others*, at Gray's Inn Hall, July 2d and 13th, 1835.

### King's Bench Practice Court.

#### IN ERROR.—REMOVAL OF TRANSCRIPT.—SIGNING JUDGMENT OF NON PROS.—JURISDICTION OF THE COURT.

*The transcript of the record in error having been removed, the Court below has no power to order judgment of non pros. to be signed, because it shall not have been ready in due time, although the defendant in error shall have proceeded regularly.*

A rule had in this case been obtained calling upon the plaintiff below to shew cause why the defendant below should not sign judgment of *non pros.* under the following circumstances. A demurrer had been decided in favour of the defendant, and a notice of the allowance of a writ of error was subsequently served on him. A summons for time to transcribe the record was then obtained; but the appointed period having expired, and no transcript being taken, the defendant applied to the clerk of errors of this Court to sign judgment of *non pros.* in accordance with the rule whereby it was provided that the plaintiff in error should within twenty days after the allowance of the writ of error, get the transcript prepared and examined by the clerk of errors of the Court in which the judgment was given, and pay the transcript money to him, in default whereof the defendant in error shall be at liberty to sign judgment of *non pros.* The clerk, however, refused to allow judgment to be signed until the opposite party should have had notice of the same. The record was afterwards transcribed and removed.

Cause was now shewn against the rule, when it was contended, that the transcript having been removed into the Court of Error, this Court had no jurisdiction in the case, and any application should have been made to the Court of Error. Besides, it was sworn, that all possible despatch was used to obtain the transcript in due time. Under these circumstances it was submitted, that the rule ought to be discharged, and with costs.

On the other hand it was urged, that so long as the record remained in this Court, the Court had jurisdiction, because the clerk of errors was an officer of the Court. The defendant by the rule was entitled to sign judgment of *non pros.* the record being then in the Court; but the clerk of errors refused to permit such judgment to be signed. The defendant having used his utmost endeavours to sign judg-

ment, his present application was to sign it *nunc pro tunc*.

The Court said, that they had power to interfere only so long as the cause and record remained in the Court below; and the plaintiff having neglected to get the transcript prepared and examined, the defendant would have been entitled to sign judgment of *non pros.* The transcript, however, had in point of fact been removed, with the cause, to the Court above, and this Court, therefore, could not interfere. The party complaining of the clerk of errors was at liberty to take what steps he pleased against him, but the present rule must be discharged with costs.

Rule discharged with costs.—*Pitt v. Williams*, T. T. 1835: K. B. P. C.

#### RE-ADMISSION OF AN ATTORNEY.—NEGLECT TO APPLY AT THE APPOINTED TIME.

*An attorney having given notice of his intention to apply for re-admission on the last day of term, and not making the application until the following term, cannot be admitted on those notices.*

This was a motion to re-admit an attorney; and an affidavit was produced, which stated, that the necessary notices had been given for his re-admission on the last day of the previous term, but through some accident the proper affidavits could not be obtained in time, although they had been sworn.

The Court thought that the rules ought to be strictly adhered to. If any person had intended to oppose his re-admission he would have attended on the day appointed in the notices. The case, however, should be considered. *Curr. adv. vult.*

The Court subsequently gave its decision, and observed, that the case came under the same rule, which applied to the original admission of an attorney. In a former case a similar application was refused, on the ground that it would establish a dangerous precedent. A similar end must also attend the present case; but as it was a hard case on the party, fresh notices might be posted up now, for his admission on the last day of that term.

Application refused.—*Ex parte Museley*, T. T. 1835. K. B. P. C.

#### VERDICT.—ISSUES FOUND FOR DEFENDANT.—GENERAL COSTS OF THE CAUSE.

*A verdict having been found for the defendant on the principal issues, which constituted the plaintiff's cause of action, although the general issue shall have been found for the plaintiff, the former shall be entitled to the general costs of the cause.*

A rule to shew cause why the master's taxation should not be reviewed in this case, was moved for, under the following circumstances. It appeared, that it was an action on the case, and the plaintiff in his declaration alleged,

that he was possessed of a water corn mill and all the necessary appurtenances, and was thereby entitled to a certain stream of water which, however, the defendant had turned from its course, and he (the plaintiff) was in consequence deprived of the gains and profits which he would otherwise have obtained thereby. The defendant pleaded, first, not guilty; secondly, that the plaintiff was not entitled to the water merely from his being possessed of the mill; thirdly, that the defendant was seized in fee of certain meadows contiguous to the said stream, which by reason of the plaintiff's wrongfully penning back the water of the stream as aforesaid, had been overflowed, and that thereby the defendant had sustained damage, wherefore he diverted and turned the said stream; and fourthly, that the water so diverted and turned, ought not to run to the said mill as in the declaration mentioned. The plaintiff in his replication joined issue upon the first, second, and fourth pleas; and in reply to the third, alleged that the water had not been wrongfully penned back. The defendant then on this also joined issue; and on the trial of the cause, the jury gave a verdict for the plaintiff upon the third issue with 25*l.* damages, while on the rest a verdict for the defendant was given. A verdict for the plaintiff was subsequently ordered to be entered on the plea of not guilty, by the Court of King's Bench, but without damages. The question now in dispute is, who was entitled to the general costs of the cause? and it was contended, that the plaintiff having had the general issue found for him, was entitled to the general costs. The master, however, had expressed a different opinion, and thought, that as issues were found for the defendant, which went to the whole cause of action alleged by the plaintiff, he (the defendant) was properly entitled to the costs.

The Court thought that the master was correct in his judgment. The idea that the finding for the plaintiff on the plea of not guilty, being a finding on the general issue, was totally incorrect. That plea was only a short method of denying certain facts. The issues which had been found for the plaintiff were unimportant, when those on which depended the right to the water claimed by the plaintiff, had been found for the defendant.

Rule refused—*Frankum v. Lord Falmouth*, T. T. 1835. K. B. P. C.

came insolvent, and the present plaintiff was appointed his assignee. The latter, on the judgment which had previously been obtained, sued out a writ of *sci. fa.*, on which execution was awarded to him. The writ, however, was never put in force, and now a second *sci. fa.* was issued. The declaration on which, after reciting the circumstances above stated, went on to say, that execution was awarded to the plaintiff "as assignee as aforesaid," for "debt and damages aforesaid," as appeared by the record. The defendant, however, pleaded that no such thing was apparent by the record, which materially differed from the declaration. The plaintiff in his replication alleged that the declaration was correct, and pointed out the term and number of the roll. On the production of the latter, however, it turned out that the execution was awarded, that the said "John Klos, have his execution for the damages aforesaid." A difference therefore existed, inasmuch as that Klos was not described as the assignee of M'Dowall, nor was the execution pointed out as for debt and damages, but for damages only.

Under these circumstances, a rule was applied for, calling on the defendant to shew cause why the plaintiff should not be at liberty to amend his declaration. The real effect of the application would be to amend the roll in the second *sci. fa.* by the record in the action brought by M'Dowall.

The Court having granted a rule *nisi*—

Cause was now shewn, when it was contended, that the Court could not interfere to allow the plaintiff to make such an amendment as was required. The object was in point of fact to make evidence for the plaintiff in support of his replication.

The Court would not now decide the question, as to whether they could alter an old record. Any difficulty that existed might be removed by the plaintiff's proceeding on the original judgment obtained by M'Dowall, and leaving the writ of *sci. fa.* quite out of the question. He could then amend the second *sci. fa.* as well as his declaration thereon. He would, however, be required to pay the costs of the amendment, and of opposing the judgment of *nul tiel record*; and the defendant would also be at liberty to amend his plea.

Rule accordingly.—*Klos, assignee of M'Dowall, v. Dodd*, T. T. 1835. K. B. P. C.

### Common Pleas:

#### JUDGMENT.—ISSUING OF SECOND SCI. FA.— MIS-RECITAL OF PROCEEDINGS.

*A plaintiff having issued two writs of sci. fa. on the same judgment, and having mis-stated some part of the proceedings in the declaration on the second writ, is at liberty to abandon that, and to proceed on the original writ.*

In this case it appeared, that M'Dowall had obtained a verdict against the defendant for 500*l.* debt, and 3*l.* 5*s.* damages for the detention of that sum; but he subsequently be-

#### AWARD.—DELIVERY OF DOCUMENTS TO ONE OF SEVERAL APPLICANTS.

*If an award shall have been obtained directing the delivery of certain documents to three plaintiffs, the defendant may refuse to deliver the same to one unless it shall be clearly shewn that he acts by the consent of the others.*

*A power of attorney should be obtained from all, to authorize the delivery of the document to the one.*

An award had been made that the defendant

should deliver a certain bond to the three plaintiffs. One of them demanded the bond and produced the affidavits of the other two, in which they expressed a desire, that the one should receive it. The defendant nevertheless refused to deliver the bond, and an attachment was in consequence now applied for.

The Court thought the proper course would be to procure a power of attorney from all the plaintiffs. By the award they were all jointly entitled to the bond, and unless it was properly shewn to the plaintiff that they were all willing that the one should receive it, his refusing to deliver it was justifiable. Some reason might exist why the whole of the plaintiffs did not make the demand.

Rule refused.—*Sykes and others, caecutors, &c. v. Haigh*, T. T. 1835. C. P.

**SIGNING JUDGMENT.—WARRANT OF ATTORNEY.—PROOF OF SIGNATURE OF ATTESTING WITNESS.**

*On a motion to sign judgment if the attesting witness to a warrant of attorney cannot be found, proof of his signature will be sufficient to authorise the required step being taken.*

This was a motion to sign judgment on a warrant of attorney of long standing. The affidavit of the attesting witness, however, could not be obtained, but there was a deponent who was able to prove the signature. Every effort had been made to discover the person alluded to, but without success, and it was believed that he was the defendant's servant.

The Court granted the application.

Rule nisi accordingly.—*Holiday v. Lord Oxford*, T. T. 1835. C. P.

**Eschequer of Pleas.**

**PLEADING.—ACCORD AND SATISFACTION.—DEMURRER.—AGREEMENT.**

*A plea of an agreement, which amounts to an undertaking by the defendant to do a particular act, without any agreement to accept it in satisfaction of the plaintiff's action; is bad, as amounting to accord without satisfaction.*

Demurrer to a plea.—The following was the state of the pleadings: The declaration, which was in *assumpsit*, contained one count on a bill of exchange for 50*l.* at three months, accepted by the defendant; a count for 500*l.* for goods sold; and for 500*l.*, a count on an account stated.

The defendant pleaded, that as to the said declaration, so far as relates to the sum of 83*l.*, the plaintiffs ought not to have or maintain their aforesaid action thereof against him, because, he says, that before the commencement of this suit, and after the several causes of action in respect of the said sum of money in the introductory part of this plea mentioned had accrued to the plaintiffs, by a certain me-

morandum of agreement in writing, bearing date the 14th day of August, A. D. 1833, and signed by W. F. Geach, being the agent of the plaintiffs, thereunto by them lawfully authorized, in consideration that the defendant would secure the said sum of money in the introductory part of this plea referred to, by further mortgage upon certain property at Pontypool, in mortgage to Messrs. Henry Fox and the said W. F. Geach respectively, and would execute such further mortgage, which should contain a power of sale of the premises mortgaged, when called upon so to do; 80*l.* parcel of the same money, to carry interest at 5*l.* per cent. from the said 14th day of August, and to be paid off by annual instalments of 15*l.*, the first payment to be made on the 14th day of August then and now next; the plaintiffs undertook and promised the defendant that no proceedings in respect of the said sum of money in the introductory part of this plea mentioned, should be instituted against the defendant, unless in case of default of the payment of the amount due by the said instalments: And the defendant in fact says, that although he, the defendant, has been always ready and willing to execute such further mortgage as aforesaid, whenever called upon so to do, yet he hath not been called upon so to do, and this the defendant is ready to verify; wherefore he prays judgment if the plaintiffs ought to have or maintain their aforesaid action thereof against him.

To this plea the plaintiffs demurred. The plaintiffs say, that the plea of the defendant, so far as the same relates to 83*l.* parcel of the monies in the declaration mentioned, is insufficient in law. And the plaintiffs, according to the form of the statute in such case provided, state to the Court here the following causes of demurrer to the said plea of 83*l.* parcel, &c.:—For that the said defendant has in his said plea to 83*l.* parcel, &c. pleaded matters in bar to the plaintiffs' action in respect of 83*l.* parcel, &c. which in form amount merely to matter of accord, and has not pleaded the same by way of satisfaction; and also for that the said plea is in other respects uncertain, informal, and insufficient.

In the margin these objections were stated, as those on which the plaintiffs would insist: The plaintiffs will contend, that the plea to 83*l.* parcel, &c. is bad. 1st, Because the matters therein stated do not amount to a release by the plaintiffs of their right of action against the defendant, as the agreement is not stated to be by deed. 2d, Nor to accord and satisfaction, because there is no allegation of performance by the defendant of the matter of accord. 3d, Nor is there any sufficient consideration for the plaintiffs' promise not to proceed against defendant in respect of the said sum of 83*l.* 4th, The matters disclosed in the said plea are bad by way of mutual agreement between the plaintiffs and the defendant, inasmuch as no right of action is given to the plaintiffs at the time of making that agreement. 5th, The defendant has stated no acceptance by the plaintiffs in satisfaction of the

cause of action in respect of 83*l*. 6th, The defendant has not shewn that he offered to execute the mortgage in manner and form as he promised by the agreement stated in the plea, nor that the plaintiffs dispensed with such offer. 7th, The agreement stated in the plea specified no certain method by which the plaintiffs can obtain payment of the sum of 83*l*., as it does not appear how many mortgages, prior to that proposed to be given to the plaintiffs, encumber the property at Pontypool, or when it may be made available to the discharge of defendant's debt of 83*l*. to plaintiffs; or whether, upon default of payment of instalments, plaintiffs are remitted to their original right of action. 8th, By the agreement it appears that the defendant was not to pay interest for 3*l*. parcel of the said sum of 83*l*., parcel, &c. 9th, The plea is bad for the causes specified.

The Court was of opinion that the plea in the present case was clearly bad. It amounted only to an undertaking to do a particular thing. It was indeed an attempt to plead record without satisfaction. The judgment of the Court must therefore be for the plaintiffs.

Judgment for the plaintiffs. — *Allice v. Probyn*, T. T. 1838. Excheq.

## ANSWERS TO QUERIES.

### Estate of Property and Conveyancing.

#### LEGACY.—PERPETUITY. P. 336.

The limitation to the issue of *C. D.* is clearly void for remoteness, and so is the limitation over to the testator's daughter, *E. F.* See *Cambridge v. Rous*, 8 Ves. 12. 24. In that case personal property was bequeathed to *A.* for life, and after her decease to her children when they should attain the age of 27 years, and in the event of her having no child, to the persons therein mentioned. Sir *W. Grant*, M.R. held the trust for the children to be too remote; and on that account, both the first limitation, and the limitation over, were held to be void. In the present case the inference is, that *C. D.*, by force of the limitation to his issue, in analogy to the doctrine of estates tail in personality, takes the fund absolutely. T. L. J.

#### SETTLEMENT.—CONCEALED MORTGAGE. P. 352.

I have heard of the recitals being referred to for the purpose of explaining the meaning of the operative part, upon which of course the validity of the deed would depend, and they determining its validity or invalidity,—but never of the deed being rendered void for

want of recitals. It is very likely that this settlement is void for want of a subject-matter to be settled, as perhaps *A.* neglected to inform his solicitor of his having renewed the lease, as well as of his having mortgaged it. This seems most likely, as the solicitor could not see the necessity for such renewal, supposing the original one to be still in existence; and therefore the deed would settle a thing which had already perished. C.

#### LEGACY.—PERPETUITY. P. 336.

The law against perpetuities allows a limitation to be made, extending as far, but no further, than a *life or lives in being, and twenty-one years afterwards*. The case *V.* has put it perfectly agreeable to that law; as according to his statement it would appear that all the lives on which the limitation is to depend would be *in case* before the limitation began to operate, those whose initials are mentioned of course being so at present; and *A.*'s issue necessarily being so, or *in ventre sa mere* (which is the same thing in law), before his decease; and that, therefore, if the limitation had been extended till the issue of *A.*'s issue should attain their majority, it would have been no infringement of that law. C.

### Practice.

#### PLEADING.—UNIFORMITY OF PROCESS ACT. P. 345.

In practice it is *always* considered that a defendant has the same number of days to deliver any pleading after the 24th of Oct. as he had left to plead on the 10th of August. I therefore think that your correspondent should either deliver his plea on the 24th of Oct. or take out a summons for time to plead on the 23d. I am also of opinion, that by the words, "preceding pleading" is meant, the time to appear after the service of the writ, and also after a rule to declare—that is to say, that if a defendant is served with a writ on the 8th of August, he has until the 30th of Oct. to enter his appearance, and if same be entered *sec. stat.*; I think it would be irregular; and the same applies to a rule to declare. J. S. H.

#### PARTIAL TENDER. P. 304.

A negative of tender in an affidavit of debt (which is, I suppose, the species of affidavit referred to by G. B.) is unnecessary, and has been so for nearly the last twelve years. Besides, the tender of a smaller sum would not disenable him from denying a tender of the larger sum. C.

## WIFE'S DEBT.—ARREST. P. 304.

In general a debt contracted by a female before marriage, after that ceremony becomes that of the husband, or that at any rate it would become so in this case; and he can be arrested at the same time and under the same process for debts incurred on separate occasions, but with the same person; and by stating the real circumstances of the transaction, he would find all his difficulties removed; thus:—"C. is indebted to B. in the sum of £. for goods sold and delivered partly to him and partly to A., now A. D., the wife of the said C., and at their respective requests." C.

## QUERIES.

## Practice.

## CHANGE OF NAME.

If an estate be given or devised to an individual, on condition that he shall assume and thenceforth use a certain name (either that of the donor or testator, or any other); can he, of his own will and power, and without the authority of any Court or officer, assume and use the name, and enjoy the estate in question? X. X.

## HUSBAND AND WIFE.

A. and B. have been married, and resided together for a number of years, and have several children. Some months ago, B. (the wife) had considerable personal property given her by the will of a relative, though it is placed in the hands of trustees, who pay her the interest. A few weeks ago the wife left the husband without any just cause, and refuses to allow him any part of her income. A. is now in years, and unable to support himself. In what way is A. to proceed, so as to obtain an allowance from his wife? J. P.

## LORDS' ACT.—ACTION OF DEBT.

A. was arrested on a *ca. sa.* for 20*l.* It is A.'s intention to avail himself of the Lords' Act, which enacts that "All persons in execution upon any judgment for any debt or damages not exceeding 20*l.*, exclusive of costs, and who shall have lain in prison twelve months, shall, upon application to his Majesty's Courts at Westminster, to the satisfaction of such Court, be forthwith discharged out of custody as to such execution by rule or order of Court." Will not the one shilling damages (it being an action of debt) prevent the operation of the statute, and be sufficient to oppose his discharge? J.

## FINE AND RECOVERY ACT.

The 82d section of the Fine and Recovery Act enacts, that "Any person appointed commissioner for any particular county, &c. shall be competent to take the acknowledgment of any married woman, *wheresoever* she may reside, and *wheresoever* the lands or money in respect of which the acknowledgment is to be taken may be." The officer of the Common Pleas refuses to file the certificate, &c. on account that the commissioners who signed the acknowledgment resided in two different counties; is such to be the established practice of the Court? J.

## Common Law.

## FEW RENTS—CHURCHWARDENS.

An important question appears to have been put to an archdeacon on his visitation at Coventry, by a churchwarden elect, which was, "Whether a parishioner paying church or vicar rates, could demand to be furnished with a seat in the church without paying rent for it? The archdeacon's answer was in the affirmative. The question was put again and again in various forms, and the answer was, "That every parishioner was entitled to a seat, and that the churchwardens had no legal power to charge even the amount of one farthing for it to them." It was urged that it was regularly done, and the difficulty of keeping order without was pointed out; to which the archdeacon replied, "he was aware of all that, but still there was no law to justify a money charge." It was then asked how were certain expenses to be met; the answer was, by "church rates." Will any of your numerous correspondents inform me if such be a correct state of the law? and a reference to cases will oblige. J.

## Law of Landlord and Tenant.

## UNDERTENANT.—DISTRESS.

A. lets a house to B.; B. underlets part of the same to C., an attorney, for his offices; B. absconds the evening before the rent becomes due, without leaving any effects on the premises, and, of course, being in arrear in his rent. C., to avoid a distress, removes his goods on the quarter-day the rent becomes due; can the landlord follow and distrain C.'s goods? How far are the books of a scholar and the articles of an attorney's office, privileged from distress? J.

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**SUPPLEMENT  
FOR SEPTEMBER, 1835.**

No. CCXCIII.

—“ Quod magis ad nos  
Pertinet, et nescire malum est, agitur.”  
HORAT.

## LEGAL BIOGRAPHY.

No. X.

### LORD BACON.

ALTHOUGH the principal events in the Life of Lord Bacon, and the excellence of his Works, are well known to lawyers in general, we deem it important to enrich our series of Memoirs with this distinguished ornament of the profession. We shall concisely state the incidents of his career, and notice his character and writings.

Francis Bacon was born on the 22d of January 1560-1, at York House in the Strand. He was the youngest son of Lord Keeper Bacon. He attracted the attention, when he was very young, of Queen Elizabeth, who put questions to him, and called him her young Lord Keeper. Being asked by the Queen how old he was, he answered, “two years younger than your Majesty’s happy reign.”

He is said to have left his companions, whilst playing in St. James’s Park, to discover the cause of a singular echo. As a child, he was delicate, and acutely sensible; but made so much progress in his studies, that at the age of thirteen (on the 10th of June, 1573) he was entered of Trinity College, Cambridge. Here he remained three years, and then went to reside at Paris with Sir Amyas Paulet, the English ambassador. From thence he travelled the French Provinces.

He invented, whilst abroad, a new system of cyphers, and actively engaged in examining the phenomena of nature, and particularly of sound. He it was who first suggested the Ear-trumpet, which he then named the “Ear-spectacle.”

NO. CCXCIII.

In Feb. 1578-9, Sir Nicholas Bacon died, and his distinguished son returned to England. He was then only about eighteen, and sought the assistance of his uncle, Lord Burleigh, to procure employment at Court. Happily he did not succeed, and in 1580, entered upon the study of the law at Gray’s Inn. He took great delight in the garden, substituting new plants for those that decayed.

In due time he was admitted within the Bar; and in rapid succession called to the Bench, nominated a Recorder, and appointed her Majesty’s Counsel Extraordinary—a grace scarcely known before.

In 1592 Bacon was returned as one of the Knights for Middlesex, and spoke early in the Sessions in favor of a reform in the Law. He said, “that which these honorable persons have spoken of their experience, may it please you to give me leave likewise to deliver of my common knowledge. The cause of assembling all parliaments hath been hitherto for laws or monies; the one being the sinews of peace, the other of war. To one I am not privy; but the other I should know. I did take great contentment in her Majesty’s speech the other day, delivered by the Lord Keeper, for that it was a thing *not to be done suddenly or at one parliament*, nor scarce a year would suffice to purge the statute book, nor lessen it, the volumes of law being so many in number, that neither common people can half practise them, nor lawyers sufficiently understand them, than the which nothing would tend more to the praise of her majesty. The Romans, they appointed ten men, who were to collect or recall all former laws, and to set forth those twelve tables, so much of all men commended. The Athenians



likewise appointed six for that purpose; and Lewis IX, King of France, did the like in reforming his laws." Bacon also distinguished himself by opposing the immediate payment of a double subsidy, to which the House had assented, alleging that "the poor man's rent is such as they are not able to yield it, and that the gentlemen must sell their plate, and farmers their brass pots, ere this will be paid. We are here to search the wounds of the realm, and not to skin them over."

Although this freedom of speech was displeasing to the Court, Bacon continued to take an active part in debate, and acquired eminent reputation as a speaker. Ben Jonson says, "There happened in my time one noble speaker, who was full of gravity in his speaking; his language, where he could spare or pass by a jest, was nobly censorious. No man ever spake more neatly, more pressly, more weightily, or suffered lessempitness, less idleness, in what he uttered: no member of his speech but consisted of its own graces. His hearers could not cough or look aside from him without loss: he commanded when he spoke, and had his judges angry and pleased at his devotion. No man had their affections more in his power: the fear of every man that heard him was lest he should make an end."

The speech regarding the subsidy, and an opinion that Bacon was rather a man of wit and knowledge than a profound lawyer, retarded his advancement; so that when the office of Solicitor General became vacant, his friend, Lord Essex, was unable to procure the appointment for him, although Bacon said, "her Majesty had by set speech more than once assured him of her intention to call him to her service, which he could not understand but of the place he had been named to." Feeling himself aggrieved by this treatment, he signified his intention to some of his friends of leaving England, of which the Queen hearing, declared with an oath that if he continued in this manner, she would seek all England for a Solicitor rather than take him.

The University of Cambridge about this time (July 1594), conferred on him the degree of Master of Arts, and he now meditated retiring to Cambridge, there to spend his life in study and contemplation. "I will," said he, "sell the inheritance that I have, and purchase some lease of quick revenue, or some office of gain that shall be executed by deputy, and so give over all care of service, and become some sorry book-maker, or a true pioneer in that mine of truth which lay so deep."

His noble friend, Lord Essex, in return, as he said, for Bacon's having "spent his time and thoughts in his matters," bestowed on him a piece of land, with such expressions of regard that Bacon was induced to accept it, and abandoning his second intention of retirement, applied himself with renewed ardour to his professional pursuits, and soon afterwards composed his *Treatise on the Elements of the Common Law*, in which the generalizing and philosophical character of his mind is in a considerable degree displayed; but the subject was too technical to admit of the unfolding of those brilliant qualities of the intellect by which his principal works are distinguished. The plan of the work, however, is admirable, and the preface a master-piece of composition.

A volume of his *Essays*—the most popular of his works, because the best adapted to the general mind—was published in 1597. These he considered as the recreations of his other studies. Soon after the time of this publication, he sought the rich Lady Hatton in marriage; but as it appeared afterwards, was fortunately unsuccessful; for she rejected him, and accepted his eminent rival, Sir Edward Coke, whose life her temper greatly embittered.

An incident is related of Bacon in Sept. 1598, which shews that his success in the profession had not yet been sufficient to secure him from pecuniary difficulty. About five years before the death of Elizabeth, one Sympson, a goldsmith, living in Lombard Street, a man noted much for extremities and stoutness upon his purse, arrested Bacon whilst returning from the Tower on the Queen's business, for a debt of 300*l.*, and but for the intervention of Sheriff More, who recommended him to a handsome house in Coleman Street, he would immediately have been carried to prison. From the letters which Bacon wrote whilst in custody, it appears that the goldsmith had treated him with cruel harshness.

In 1600, he was appointed Double Reader, and delivered his celebrated reading on the Statute of Uses, which Mr. Hargrave (a competent authority) considered as very profound, showing that the author had the clearest conception of this most abstruse part of the law.

His difficulties continued even till the death of Elizabeth. She had granted him the reversion of the registership of the Star Chamber; but this, as he said, "like another man's ground reaching upon his house, might mend his prospect, but did not fill his barn." He was obliged therefore to

sell part of his manor of Gorhambury, near St. Albans, to relieve his immediate necessities.

On the 2d of July 1603, Bacon was knighted at Whitehall—an honor which it appears was then held in light estimation, King James, on his accession, having bestowed the title too indiscriminately. In the following year, he was returned to parliament for St. Albans and Ipswich, and sat for the latter borough. He had formerly remarked, that parliament assembled only to make laws and grant monies; he now found it had met to redress grievances. Wardship, monopolies, and purveyance, were particularly condemned, committees of inquiry were appointed, and Bacon was entrusted with the petition to the King against purveyors.

In 1604, Bacon was appointed counsel learned extraordinary to the King, an office which he had held under Elizabeth, with a salary of 40*l.* a year; and by another patent, he received a pension of 60*l.* a year, for special services rendered to the King before his accession.

The following note, from Mr. Martin's "Character of Lord Bacon," is interesting on this professional subject:

"In the third volume of his Commentaries, Sir William Blackstone observes, that 'the first King's Counsel, under the degree of Serjeant, was Sir Francis Bacon, who was made so, *honoris causa*, WITHOUT patent or FEE; so that the first of the modern order, who are now the sworn servants of the crown, with a standing SALARY, seems to have been Sir Francis North.' For the first position reference is made to Bacon's own letter; for the second, to Roger North's Life of the Lord Keeper. It is surprising that not one of the numerous editors of the Commentaries has ever animadverted on the erroneous statement in this passage. From the whole tenor of it, and especially from the manner in which the words '*without fee*' and '*with salary*' are used—evidently placed in opposition to each other—it is plain that the illustrious Commentator designed to convey to his readers the impression that Bacon was the *first* King's Counsel under the degree of Serjeant *who did not receive a fee or salary*, and that North was the first King's Counsel, under the degree of Serjeant, *who did receive a salary*.

"1. It is to be observed, that the only authority for the assertion that Bacon was the *first* King's Counsel under the degree of Serjeant, etc., is the scholastic expression '*individuum vagum*,' used in the passage which we shall presently cite; but surely this of itself is of little weight, especially when we find Lord Bacon's own chaplain, Dr. Rawley, asserting that the appointment was 'a grace, if I err not, scarce known before.'

"2. If Sir William Blackstone means (as he evidently does) that Bacon did not *receive* any fee or salary, as counsel extraordinary, then he is most certainly mistaken; for, in Rymer's *Fœdera*, vol. xvi. p. 596, there is a copy of the letters patent which settle upon Bacon, as counsel extraordinary, a salary or fee of forty pounds a year. He appears not to have been aware of this patent, and solely relied upon the following passage in one of Bacon's letters to the King:—'You formed me of the learned counsel extraordinary, without patent or fee, a kind of *individuum vagum*.'—(Bacon's Works, vol. xii. p. 402.) It might, with some plausibility, be argued, that, in this passage, Bacon means to say, that the King *did not put him to the expense* of a patent or fee—not that he graciously abstained from settling a salary upon him—he being, in fact, at that time (and, indeed, always,) much in need of money. Bacon, however, as already observed in the text, and as appears from a recital in the patent itself, had been previously appointed to the office of counsel extraordinary by King James, in the same way as in the previous reign, by Queen Elizabeth, *i. e.* without patent and without fee; and we entertain not the slightest doubt that, in the paragraph just cited, Bacon refers to this antecedent appointment.

"3. The circumstances of North's appointment are rather interesting. He was made 'one of the King's counsel extraordinary,' in consequence of his having greatly distinguished himself, as counsel for the crown, in the celebrated case of the six members, then before the House of Peers on a writ of error. This important duty was imposed upon him by his cousin, the Attorney-General, who could not himself argue for the King, as he was an assistant in the House of Lords, nor could he prevail on any of the serjeants, or other eminent practitioners, to do it; 'for they said it was against the commons of England, and they dare not undertake it.' 'This action, and its consequences,' says his most interesting biographer, 'had the effect of a trumpet to his fame, for the King had no counsel at law then, except serjeants.' The benchers of the Middle Temple, alleging North's youth, refused to call him up to the bench; but for this slight, says Roger North, 'the very next day, in Westminster Hall, when any of the benchers appeared at the courts, they received reprimands from the Judges for their insolence, as if a person whom his Majesty had thought fit to make one of his counsel extraordinary was not worthy to come into their company; and so dismissed them unheard, with declaration that until they had done their duty, in calling Mr. North to their bench, they must not expect to be heard as counsel in his Majesty's courts. This was English, and that evening they conformed, and so were re-instated.'—North's Lives, vol. i. pp. 64, 69. It appears from the books of the Middle Temple that North was called to the bench on the 5th of June, 1686.

"The epithet 'extraordinary' is applied to the King's Counsel in order to distinguish them from the Attorney and Solicitor-General, who

are the regular counsel of the crown; and it was thus that Bacon was described both by Elizabeth and James. We may add to this already extended note, that there is this difference between King's Counsel and barristers with patents of precedence:—the former have standing salaries, and cannot, without license, plead against the crown; the latter receive no salaries, and are not sworn, and, therefore, may so plead."—*Notes*, pp. 315—319.

In 1605 Bacon published his treatise on the Proficiency and Advancement of Learning, and in 1606 his Considerations touching the Plantations in Ireland. Under Bacon's advice, aided by Sir Arthur Chichester, the territories of Ulster, which had escheated to the crown, were effectually colonized, and, from being the most barbarous, became the best cultivated of the Irish provinces.

During the reign of Elizabeth, her prejudices, the opposition of her ministers, and the enmity of Coke, had excluded Bacon from promotion; but these impediments ceased on the accession of James. Coke being made Chief Justice of the Common Pleas, Bacon was appointed Solicitor General, on the 25th June, 1607. In one of his letters, he says, "I am not ignorant how mean a thing I stand for, in desiring to come into the Solicitor's place, for I know well it is not the thing it hath been, time having wrought an alteration both in the profession and in that special place. Yet, because I think it will increase my practice, and because I have been voiced to it, I would be glad it were done." And, in another letter, he repeats, "I would be glad now, at last, to be Solicitor, chiefly because I think it will increase my practice, wherein, God blessing me a few years, I may mend my state, and so after all fall to my studies and ease, whereof one is requisite for my body, and the other serveth for my mind."

About 1609 Bacon published his "Wisdom of the Ancients." In the next year he was appointed one of the Judges of the Knight-Marshall's Court. In 1613 he was promoted to the office of Attorney General, and in June 1616 sworn one of the King's Privy Council. While Attorney General he endeavoured to put an end to private duels, which were very prevalent at that time. He proposed to the King a plan for reducing and recompiling the laws of England, of which he said, "I hold them wise, just and moderate; they give to God—they give to *Cæsar*—they give to the subject what appertaineth. It is true (he added) they are as mixt as our language, compounded of British, Roman, Saxon, Danish, and Norman customs; and surely as our language is

thereby so much the richer, so our laws are, likewise, by that mixture, the more complete. I have commended them for the matter, but they ask much amendment for the form, which to reduce and perfect I hold to be one of the greatest dowries that can be conferred upon this kingdom." He commences by noticing the objections which might be urged to his proposal:

"It may be objected, he observes, that it is a thing needless; that the law, as it now stands, is in good estate, comparable to any foreign law; and that it is not possible for the wit of man, in respect of the frailty thereof, to provide against the incertainties, or evasions, or omissions of law. 'For the comparison with foreign laws, it is in vain,' says Bacon, 'to speak of it, for men will never agree about it. Our lawyers will maintain for our municipal laws: civilians, scholars, travellers, will be of the other opinion.' But certain it is, he adds, that our laws are subject to great uncertainties, variety of opinion, delays, and evasions.

"Again, it is said, that labour would be better bestowed in bringing the common law to a text-law, as the statutes are, and setting both of them down in method and by titles; in other words, in framing a Code. 'It is too long a business to debate,' replies Bacon, 'whether *lex scripta*, aut *non scripta*, a text-law, or customs well registered, with received and approved grounds and maxims, and acts and resolutions judicial, from time to time duly entered and reported, be the better form of declaring and authorizing laws. Customs are laws written in living tables. In all sciences, they are the soundest that keep close to particulars; and sure I am, there are more doubts rise upon our statutes, which are a text-law, than upon the common law, which is no text-law.'

"Again, it is objected, that it will turn the judges, counsellors, and students to school again, and impose upon all lawyers a new charge for books of law. 'For the former of these, touching the new labour, it is true,' says Bacon, 'that it would follow, if the law were new unrolled into a text-law; for then men must be new to begin, and that is one of the reasons for which I disallow that course. But, in the way that I shall now propound, the entire body and substance of law shall remain, only discharged of idle and unprofitable or hurtful matter; and illustrated by order and other helps, towards the better understanding of it, and judgment thereof. For the latter, touching the new charge, it is not worthy the speaking of in a matter of so high importance; it might have been used of the new translation of the Bible, and such like works. Books must follow sciences, and not sciences books.'

He then states his plan of reform. *First*, the digest, or recompiling the common laws. 1. The compiling of a book *De Antiquitatibus juris*. 2. The reducing or perfecting of the course or corps of the common laws. 3. The

composing of certain introductive and auxiliary books, touching the study of the laws. Secondly, the reforming and recompiling of the statute law—towards which he proposed that all obsolete acts should be expunged from the Statute Book, the grievousness of the penalty in many of them mitigated; and, lastly, that all concurrent statute should be reduced to one clear and uniform law.

It is singular that Bacon, upwards of two centuries ago, thus anticipated a great part of the reformation of the law which it has been the business of the present age to carry into effect. It is also remarkable, in reference to the great questions of our own time, that he also projected the best mode of remedying the abuses and settling the controversies of the Church. He published two Tracts on this important subject, which it may be wise for those whom it concerns diligently to consider.

On the 7th of March, 1617, he was appointed Lord Keeper of the Great Seal, and was enabled, on the 8th of June, to write thus satisfactorily of his judicial labours: "I have made even with the business of the kingdom for common justice; not one cause unheard; the lawyers drawn dry of all the motions they were to make; not one petition unanswered. And this, I think, could not be said in our age before. This I speak not out of ostentation, but out of gladness, when I have done my duty. I know men think I cannot continue if I should thus oppress myself with business; but that account is made. *The duties of life are more than life*; and if I die now I shall die before the world be weary of me, which, in these times, is somewhat rare."

In the same year he promulgated a series of ordinances for the more regular and perfect administration of justice in Chancery; and, by a patent from the King, constituted two law reporters, with an annual salary of 100*l.* a-year each. It was required that the reports should be reviewed by the Judges before publication.

In 1618 he was made Lord Chancellor, created Baron of Verulam, and afterwards Viscount St. Alban. He attained his 60th year on the 22d Jan., 1620; and in October in that year published his *Novum Organum*.

We must reserve the narrative of the remainder of his life, and the account of his writings and character, for another Number.

We are indebted almost entirely for the materials of this sketch to "The Character of Lord Bacon, his Life and Works," by Tho. Martin, Esq., Barrister at Law;—an excellent book.

## PROGRESS OF THE ENGLISH LAW SINCE 1660.

To this day the public at large have very indefinite notions as to the real meaning of our technical term "Equity;" and at the time when Lord Clarendon took his seat as Lord Chancellor, even the most learned part of the legal profession did not regard it as reducible to fixed rules, as a real science. The Chancellors of previous reigns often felt themselves bound by precedent; and during the Commonwealth, the judgments of the Commissioners who held the republican great seal, usually commence with a recital of the precedents having been read. As late as 1672, Sir Matthew Hale said, "A little law, a good tongue, and a good memory, would fit any man for the Chancery." Lord Clarendon, however, evidently did not think a little law sufficient, for we continually find him assisted in his judicial office by the other judges. Sometimes Sir Harbottle Grimston, the Master of the Rolls; sometimes one or two of the Chief Justices, sometimes one of the Chief Justices, the Chief Baron, and a Puisne Judge, sat with him: in important cases he seldom took upon himself to decide without assistance.

The principles of Chancery law were so little established, that notwithstanding all this caution many cases were decided upon erroneous principles. In Michaelmas term of the first year of the restoration, 12 Car. 2, a case came before the Court, as to whether the heir or the personal representative of a mortgagee was entitled to receive the payment of the mortgage money. In the case of *St. John v. Grabham*, decided in the 11th year of Charles 1; it seems to have been held by the Lord Keeper, that the money being reserved payable to the heirs or assigns of the mortgagee, the heir, and not the executor, ought to have it. In the case which now came before the Court (*Tilley v. Egerton*), Lord Clarendon, who was assisted by Sir Orlando Bridgman, was of opinion, that forasmuch as a defect of assets in the hands of the personal representatives was not proved, the heir of the mortgagee ought to have the money paid for redemption. In a subsequent case, on the authority of the above, the Master of the Rolls held that the mortgage money belonged to the heir. Sir Heneage Finch, created Lord Nottingham (of whom the fine eulogium of Sir W. Blackstone, 3 Com. 55, will be remembered), afterwards placed the point on its right footing; and the student will find his arguments in *Thornbrough v. Baker*, 1 Cha. Ca. 285, well worthy his attention. It has (says Mr. Butler, in Co. Lit. 208 a, n. 1) long been settled in equity, that mortgage money is to be paid, not to the heir, but to the executor: and this holds, though the mortgage be in fee; though the condition be for payment to the mortgagee, his heirs or executors; though there be no want of assets; though there be no bond given or covenant entered into by the mortgagor, for payment of the money; and, whether the mortgage be

forfeited or not, at the death of the mortgagee; for equity considers a mortgage as part of the mortgagee's personality. In equity, the lands are only considered as a pledge or security for the money lent, and the money is the principal, if not the sole object.

The courts of law construed powers strictly, and required in the execution of them, that every circumstance prescribed should be complied with; but the courts of equity have assumed a jurisdiction in matters of this kind, and have relieved against the consequences of a defective execution of a power, not only in cases of fraud and accident, but also where there is a meritorious consideration in the appointer. One of the earliest reported instances of the Court of Chancery affording this relief occurred in this year. In the case of *Pollard v. Graenville*, 1 Cha. Rep. 93, it appeared that the defendant having a power to make leases for twenty-one years in possession, had made a lease to commence *in futuro*, in trust for payment of debts; and had afterwards objected to the lease, that the power had not been properly executed. It was decided by the Lord Chancellor, with the assistance of the Master of the Rolls, one of the Chief Justices, and one of the Puisne Judges, that although the power was not strictly pursued, yet being in trust to pay the debts of the party exercising it, equity would consider it to amount to a good declaration of the power.

The question, whether a term of years could be settled in tail, was twice brought before the Court of Chancery about this time (*Apriss v. Flower*, and *Moupeau v. Drew*), and of course decided in the negative.

Among the cases decided in the courts of common law during Hilary term, 12 & 13 Car. 2, is one relating to maritime law, which merits attention. It is a case of bottomry. Strictly speaking, the term bottomry is limited to agreements by which, in consideration of money lent for the purposes of an intended voyage, the borrower binds himself, and the ship and tackle (or the bottom or keel of the ship), for the repayment of the money borrowed, with a stipulated interest or premium, if the intended voyage should terminate safely. Formerly it was also applied to a contract, by the terms of which the ship itself was not pledged as a security, but the repayment of the money, with a high premium for the risk, was made to depend upon the success of the voyage. Such contracts were used at so early a period, that the origin of them cannot now be accurately ascertained. In the fragments which have come down to us of the celebrated Rhodian laws, supposed to have been compiled nearly one thousand years before the Christian era, explicit mention is made of *naval interest* on money borrowed for sea voyages. The Romans, in the time of Justinian, were perfectly acquainted with a kind of contract similar to bottomry, and the code and digests contain express laws respecting it, by the name of *sœnus nauticum*. In the middle ages, the laws of Oleron (compiled by our Richard 1st, in the twelfth century) speak of taking up

money on bottomry: but the question, whether such contracts came within the English laws against usury, does not seem to have come before our courts of law until the beginning of the seventeenth century. In Trinity term, 6 Jac. 1, the case of *Sharpley v. Hurrell*, Cro. Jac. 208, was tried in the King's Bench. The plaintiff had advanced 50*l.* for the purposes of a ship going to the Newfoundland fishery; and the condition of the defendant's bond was, that if the ship returned to a certain port, the plaintiff should receive 60*l.*; and in case the ship returned to any other port, only 50*l.*, the principal; and if the ship never returned, he was to receive nothing. It was held by the Court, that this contract was not usury, within the then statute. In the case (tried this term) *Soome v. Glean*, 1 Sid. 27, (which is also reported, 1 Levinz, 54, as *Soyer v. Glean*), the bond was for 300*l.*, on condition that if the ship went to Surat in the East Indies, and returned safe, the plaintiff should receive, not only the principal, but also 40*l.* for each hundred; but if the ship perished by unavoidable casualty of sea, fire, or enemy, the plaintiff was to have nothing. It was resolved by Chief Justice Bridgman and the whole Court, that the statute was not pleadable to such a bottomry bond, by reason of the great peril of the sea. As allowing the repayment of the money to be secured upon the mere hazard of the voyage itself gave rise to gaming and usurious contracts, the 7 Geo. 1, c. 21, and the 19 Geo. 2, c. 37, were enacted to remedy the evil.

On the dissolution of the convention parliament, the King had immediately convened a new one, and the new parliament met on the 8th May, 1661, and sat until the 30th July. Several acts of great importance to the constitutional lawyer were passed, such as 13 Car. 2, st. 1, c. 1, for the safety and preservation of the King's person and government, one of the principal enactments of which was to maintain, that either or both the houses had a legislative power, without the King subjects the offender to a præmunire: and c. 5, which enacted that no more than 20 hands should be fixed to any petition, unless with the sanction of three justices, or of the grand jury: and st. 2, c. 1, an act for the well governing and regulating of corporations.

But the act most connected with the practice of the civil part of the law, was st. 2, c. 2, for the prevention of vexations and oppression by arrears, and of delays in suits of law. This statute enacted, that bailable writs should express the true cause of action; and but for the invention of the now abolished, and nearly forgotten *ac etiam*, it would have ousted the King's Bench of all its jurisdiction over civil injuries without force. This invention, the opposition offered to it by the Court of Common Pleas, which would have nearly regained the whole of its exclusive jurisdiction over civil injuries without force, and the subsequent triumph of the innovation, and its adoption by the Common Pleas, form a curious episode in the history of the practice of the law.

The term and conditions of every contract which the law can enforce, must be certain, or capable of being rendered certain; and accordingly, in the first year of the reign of Queen Mary, when the case of an agreement to sell so many trees as might reasonably be spared, came before the Court, they held it to be a void contract. On the strength of this case, in the time of James I., *Rogers v. Head*, Cro. Jac. 262, where a common carrier had undertaken to deliver goods, and had failed to do so, verdict being given against him, it was moved in arrest of judgment, that the plaintiff had not promised to pay any certain sum for the carriage of the goods, and that the consideration, that he would *rationabiliter* content the defendant, being uncertain, was void. But the Court held, that the consideration was sufficient for a carrier, as much as for a tailor making a garment, or smith shoeing a horse, who may demand as much as is reasonable. But notwithstanding this decision, a case (*Nichols v. Moore*, 1 Sid. 36, was tried in the Common Pleas in Easter Term, 13 Car. 2, in which a carrier set up a defence, that as there was no agreement for a certain sum for the carriage of goods which he had lost, the plaintiff could not recover; and a similar case was tried some years after (31 Car. 2, *Bastard v. Bastard*, 2 Show. 82) in the King's Bench; but in neither case was the defence allowed. The consideration was held sufficient, as the defendant might have recovered the hire of his carriage upon a *quantum meruit*. G. B.

# NOTICES OF MOTIONS FOR ALTERING THE LAW IN THE NEXT SESSION.

The following are selected from the general list, as more or less relating to the law:

Mr. Wallace—To move, with a view to improve the system of *taking evidence* before select committees; that the name of any member putting questions, be taken down and printed with the question.

Mr. Wallace—Select committee to inquire into the practice of the law of Scotland; the means in progress for the better administration of justice in that country, and for diminishing the number and expense of *appeals to the House of Lords*; the said inquiry to include the evidence taken, the reports which have been made, and the various bills which have been introduced into parliament for the above purpose, within the last three years: to inquire into the present system of conveyancing; and whether the time has not arrived for abolishing the forms and fictions of the feudal law in Scotland, and to provide against the vexatious hardships, grievous expense, and admitted insecurity of that mode of conveying heritable property.

Mr. Aaron Chapman—Bill to render the

*mortgagee of any ship* liable to her contract debts, equally with her managing, or other owners.

Mr. Rippon—To move that *deans and chapters*, not having cure of souls, are useless: that it is proper to place the property at present employed by such bodies, in the hands of commissioners to be appointed by the crown, and acting under the authority of parliament; regard being had to existing interests, the preservation of the fabrics, and the performance of divine worship in the respective cathedrals.

Mr. Rippon—Bill to remove archbishops and bishops from the *upper house of parliament*.

Mr. Aglionby—Select committee to examine the returns of "*justices in the commissions of the peace in the several counties, cities, and boroughs in England and Wales*;" laid on the table of the house in the present session, with power to call for information necessary to make these returns complete, where they are now defective, and afterwards to classify, arrange, and submit them to the house.

Mr. Freshfield—Bill to prevent actions for damages in cases of *libel and slander*, until after notice in writing to the party intended to be sued, and to enable such party to tender amends.

Mr. Charles Villiers—Bill to provide for the better regulation of *elections for members of parliament*, in the city of York.

Mr. Ruthven—Select committee to inquire into the existing state of the law respecting *joint stock companies*, with a view to take into consideration the improvement thereof.

Mr. Ruthven—To call the attention of the house to the state of the law respecting *salvage*, and the proceedings of the Admiralty Court in Ireland.

Mr. Ruthven—To move for a more effectual mode of enforcing, without unnecessary delay, returns ordered by this house.

Mr. Winthrop Praed—Bill for preventing the election of insolvent persons to *seats in parliament*; for causing the seats of insolvent members to be vacated; for giving facilities to the creditors of bankrupt members in the prosecution of their claims; and for rendering the property qualification of members more effectual towards the securing of the dignity and independence of the house.

Mr. Thomas Duncombe—Resolution in favour of the repeal of that portion of the reform bill, that requires the payment of the King's and parochial taxes by a certain

day, as the qualification for exercising the *elective franchise*.

Sir Andrew Agnew—Bill or bills to extend to all classes of his Majesty's subjects, the privileges of protection in the due observance of the Lord's Day.

Mr. Edward Lytton Bulwer—Bill for the admission of *Dissenters* to the Universities.

Mr. Tooke—That, for securing the more uniform and convenient conduct through this house, of *divorce bills*, *estate bills*, and bills of *naturalization*, it is expedient, that at the commencement of the next, and of each succeeding session, a select committee, consisting of not more than nine members (three of whom to be the quorum) should be appointed, to whom shall be referred every divorce, estate, and naturalization bill on the second reading thereof respectively, with power to examine witnesses, and verify the documentary evidence adduced in support of each of such bills, and to report thereon accordingly, three at least of the members of such committee, who shall have attended the opening of any bill, to be present on each meeting on it, until report made; and that, from and after the appointment of such committee, the practice of hearing counsel, and examining witnesses on divorce bills at the bar of this house be discontinued, except when otherwise specially ordered.

Mr. Baring Wall—Select committee, upon the state of the inland communication by *railroads* and *canals* in England and Wales, with a view to ascertain how far it may be practicable and expedient to refer all plans for the improvement of the same, to a board appointed by, and under the controul of government.

Mr. O'Connell—Bill to repeal 4 & 5 W. 4, c. 29, for facilitating the loan of money upon *landed securities in Ireland*.

Mr. Hesketh Fleetwood—Bill to declare, alter, and amend the law relating to certain matters of *Church discipline*, and more especially to regulate the conduct of all persons in Holy Orders, as regards offences committed by them in their spiritual character; to provide for the better prevention of all matters tending to produce that scandal in the Church, which the misconduct of spiritual persons may at any time occasion; to provide for the better encouragement and protection of all those who may be distinguished by exemplary conduct, and to facilitate the removal from spiritual or clerical offices of all who may have been rendered unfit to fill them, in consequence of moral, intellectual, or physical incapacity, as well as to make adequate provision for those

who, without any delinquency on their part, may be removed out of the *funds* of such benefice or curacy as they may previously have been possessed.

Mr. Fowell Buxton—Motion for the extinction of the system of *apprenticeship in the colonies*.

Mr. Roebuck—In order to give due credit to the wishes of the people in the great matter of legislation, will move for leave to bring in a bill to take away the veto now possessed by the *House of Lords* in all legislative measures; and to substitute in lieu thereof a suspensive power in that house, so that if bills which have been passed by the House of Commons, be rejected by the House of Lords, and again during the same session be passed by the Commons, such bills shall become law on the royal assent being thereunto given.

Mr. Hume—Select committee to inquire as to the numbers of *peers* in parliament, their qualification and privileges as such; into the constitution of that house, its powers, privileges, and immunities, and to consider how far that house has fulfilled the important duties of a legislative body, and of the high court of appeal of parliament. Also, into the manner in which conferences are held with, and communications made between the House of Lords and Commons.

Mr. Poulett Scroupe—Bill to require the *poor rate* of all parishes in England and Wales, to be levied on an uniform system of valuation.

Mr. W. S. O'Brien—To move, that in order to make provision at the least possible expense to the public, for the amount which still remains to be paid as compensation to the proprietors of *slaves*, as well as with the view of displacing to a certain extent the metallic circulation, by a more cheap and convenient currency, it is expedient that government should be authorised to issue one and two pound notes, to the extent of five millions sterling; such notes to be receivable in payment of taxes, and to be convertible into gold on demand, at such bank as the Lords Commissioners of the Treasury shall appoint.

Mr. O'Connell—Bill to amend the law of *libel*.

Mr. O'Connell—Select committee to inquire and report whether it be necessary for the maintenance of the rights and liberties of the people of Great Britain and Ireland, that the principle of *representation* shall be introduced into the other house of parliament.

Mr. Hume—Bill to regulate the expenses of *elections of members* to serve in parliament for England and Wales.

Sir Wm. Molesworth—Bill to dispense with the *qualification of members* of the Commons House of Parliament.

Mr. Buckingham—Bill for the better classification and regulation of *public-houses*, with a view to restrict the further increase of their numbers, within certain limits proportioned to the existing population, and to place them under such inspection as shall afford the best security for the preservation of the public health and morals.

Mr. Hawes—Bill to amend the 4th of G. 4, commonly called the *Gaol Act*.

Mr. Wakley—Bill for the repeal of 1 G. 1, stat. 2, c. 38, commonly called the *Septennial Act*.

Mr. Wakley—Bill for the repeal of 59 G. 3, c. 12, commonly called *Sturge's Bourne's Select Vestry Act*.

Mr. Ewart—On moving sessional order, to propose resolutions relative to select committees:

1. That hereafter select committees do not (except on special cause approved of by the house) consist of more than eleven members.

2. That it is expedient that no member be a member of more than three select committees at the same time.

3. That lists be affixed in some conspicuous place in the committee clerk's office, and in the lobby of the house, of all members serving on each select committee.

4. That notice be given to each member intended to be proposed to be a member of a select committee, three days before he is called upon to serve on such select committee.

5. That the name of every member proposing a question in select committee be prefixed to such question in the printed minutes of evidence.

6. That the names of members present at the framing of the report be appended thereto, distinguishing the assentients from the dissentients.

7. That at the end of every session, a return be laid before the house, and printed, of the number of days, and of the number of hours each day, during which each member attends in such select committee.

Mr. O'Connell—In the bill for the amendment of the *Corporate Reform Bill*, to move a clause to extend the rights of parliamentary suffrage by birth, servitude, and marriage to the sons, apprentices, and sons-in-law of the new burgesses.

Mr. Charles Buller—Select committee on the *revond commission*.

Mr. Pryme—Bill to abolish *grand juries* in England and Wales.

Mr. Pryme—Bill to repeal the *stamp duties* on arbitrations and awards.

Mr. Pryme—Motion, that the committee on every *inclosure bill* shall, in their report, certify whether a portion of land, as near to the village as conveniently may be, and not less than in the proportion of one acre to every twenty-five inhabitants, according to the last population census, has been by such bill directed to be allotted out of the commonable land or waste grounds to the incumbent of the living, and the parish officers for the time being, and the owners of 100 acres of land in such parish, as trustees, in trust to let the same in small portions, at low rents, to all labourers resident in the parish, who may be desirous of hiring the same; such rents to be paid to the parish officers for the time being, in aid of the poor rates; or whether there be any special reason why such allotment cannot conveniently or properly be made in that particular instance.

Mr. Wilks—Bill to amend the law by which clergymen officially preside at *parish vestries*, and persons have a plurality of votes.

Mr. Wilks—Select committee to consider the present system as to *justices of the peace*, and to suggest remedies for its defects.

Mr. Ewart—Address in favour of appointing *peers for life*.

Mr. Ewart—Bill to provide, that in cases of intestacy, and in the absence of any settlement to the contrary, *landed property* shall be equally divided among the children, male and female, of the family.

Mr. Wilks—For the consideration and redress of the practical grievances of Protestant *Dissenters*.

Mr. Wilks—Bill for the better *registration of births, marriages, and deaths* in: England and Wales, unless such measure be brought forward by his Majesty's government.

Mr. Grove Price—To move, that the notice of the honourable member for Bath, given on Wednesday, 2nd September, 1835, as to the veto of the house of peers, and the notice of the same day by the honourable member for Middlesex, as to the peers, be erased from the list of notices, as subversive of the principles of our balanced constitution, as derogatory to the character, and an abuse of the privileges of this house.



## ATTORNEYS TO BE ADMITTED

*In Michaelmas Term, 1835.*

## KING'S BENCH.

*[Concluded from p. 394.]**Clerks' Names.**To whom articulated.*

Marshall, Hugh John, Leeds.  
 Mathews, James, Everton, near Liverpool.  
 Maude, Gideon Michael Angelo, Wetherby,  
 York.  
 Mellers, Henry, 3, Symond's Inn.  
 Merivale, Reginald, 15, Woburn Place.  
 Miller, Ingleby Thomas, 12, Upper Bedford  
 Place.

Edwin Eddison, Leeds.  
 William Tristram Keightley, Liverpool.  
 Gideon Maude, same place.

William Ebenezer Burke, New Inn.  
 Archer Denman Croft, Lincoln's Inn Fields.  
 Thomas Miller, Ely Place.

Nelson, Henry, Leeds.  
 Nixon, Francis, Bristol.  
 Norris, Edward, Liverpool, county Lancaster.  
 North, John, York.  
 Norton, William, 58, Great Queen Street,  
 Lincoln's Inn Fields.

Robert Barr, Leeds.  
 Richard Smith, Basinghall Street.  
 Thomas Toulmin, same place.  
 Henry Pearson, York.  
 Thomas Frederick Cole, Godalming, Surrey;  
 assigned to Giles Clarke, of Saddler's Hall,  
 Cheapside.

Notley, Charles, Camden Street, Islington.

John Notley, Gray's Inn Square.

Oldknow, Samuel, 2, Belgrave Street, New  
 Road.

Henry Enfield, Nottingham.

Orlebar, Charles Daniel, 46, Torrington Sq.

George Thomas Railton Willoughby, Bath,  
 assigned to Benjamin Edward Willoughby,  
 13, Clifford's Inn.

Owen, Henry Hugh, Burton Crescent.

Josiah Towne, Broad Street Buildings.

Palmer, Arthur, Gray's Inn.  
 Panting, John, Shrewsbury.

Charles John Whishaw, same place.  
 Thomas Panting, same place; assigned to Ro-  
 bert Medcalf, Lincoln's Inn Fields; re-  
 assigned to Thomas Panting.

Parker, James, Chelmsford, Essex.  
 Parker, Thomas, the younger, Cambridge.  
 Parkes, Thomas William, 17, Mabledon Place,  
 Burton Crescent.

Charles George Parker, same place.  
 John Edward Robinson, Cambridge.  
 William Parkes, 10, South Square, Gray's Inn.

Parsons, Thomas, 25, Norfolk Street, Strand.

William Harrison Ainsworth, 12, Grafton  
 Street; assigned to George Dehmar, 25,  
 Norfolk Street, Strand.

Piper, William, of Whitby, county York.

Henry Belcher, same place.

*[Notice of intention to apply on the first day of Michaelmas term; to be admitted on the  
 last day of the term. Dated 16th June, 1835.]*

Poole, Robert Burton, Kenilworth, Warwick.  
 Poole, George, 13, Southampton Street,  
 Bloomsbury.

Robert Poole, same place.  
 George Woolley Poole, same place.

Prentice, Samuel, 9, Bedford Street, Mile End.  
 Price, Arthur Munton, Lympstone, Devon.  
 Price, William, the younger, Llandovery,  
 county Carmarthen.

Thomas Humphreys, 32, Cannon Street Road.  
 Charles Smaale, Bideford, Devon.  
 David Lloyd Harries, same place.

Price, Henry L., Ruwinstone, Leicester.

Thomas Hallen, Kidderminster; assigned to  
 Edward Smith Bigg, Southampton Buildings.

Race, William, of Shortmead, parish of Big-  
 gleswade, Bedford.

George King, of Petton, county Bedford.

Richardson, Thomas, 88, White Lion Street,  
 Pentonville.

Thomas Rushton, Uttoxeter, Stafford.

Roberts, Joseph, 23, Upper Stamford Street,  
 Blackfriars Road.

John Smith, Rugeley, Stafford.

Robson, Richard Chessman, Oxford Street.  
 Rogers, Pearce William, Helston, Cornwall.

Frederic Talbot, Bedford Row.  
 Arundel Rogers, same place.

Rowlatt, Samuel, 54, Upper Manor Street,  
 King's Road, Chelsea.

Stephen Garrard, 13, Suffolk Street, Pall Mall  
 East.

Sabben, William Thompson, 27, King Street,  
 Cheapside.

William Minchin, Portsea.

*Clerks' Names.*

*To whom articulated.*

Sanders, Frederick, Exeter.  
 Scholes, Frederick, 2, Chatham Place.  
 Scott, Henry, Hollinwood, Within - Oldham,  
 Lancaster.  
 Shaw, Joseph, Manchester.  
 Shepherd, John, the younger, Leeds.  
 Sherratt, Job, Derby.  
 Smith, Henry, Richmond, Surrey.  
 Smith, Francis Edward, Crediton, Devon.

William Richard Bishop, Exeter.  
 Messrs. Clough and Lyon, Manchester.  
 William Barlow, Oldham.

Solomon, Samuel, 3, Albion Street, Wanda-  
 worth Road.

William Christopher Chew, same place.  
 John Atkinson, same place.  
 William Williamson, Derby.  
 William Smith, same place.  
 John Smith, same place; assigned to John  
 George Smith, same place.  
 William Wills, Cherry Street, Warwick; as-  
 signed to Joseph King, 5, Gray's Inn  
 Square.  
 Mark Kennaway, Exeter.

South, Samuel, Munckey, 6, Lincoln's Inn  
 New Square.

Stevenson, John, 3, King's Road, Bedford  
 Row.

Swatman, Edward Lane, Greek Street, Soho.

Thomas Gilchrist, Berwick-upon-Tweed; as-  
 signed to William Pringle, 3, King's Road.  
 Frederic Lane, King's Lynn; assigned to John  
 Tomkins, Essex Court; and by him assigned  
 to Joseph Blunt, the younger, Liverpool  
 Street.

Taunton, John, Oxford.

Thomas Henry Taunton, late of Oxford, de-  
 ceased; assigned to Charles Leake, Oxford.  
 Thomas Bury, Manchester; assigned to John  
 Norris, Manchester; and by him assigned  
 to Thomas Bagnall Collier, Manchester;  
 and by him assigned to Charles Wood,  
 Manchester.

Taylor, William, 45, Great Ormond Street.

Henry Smithson, same place.  
 William Whitter, Worthing; assigned to  
 George Mounsey Gray, Staple Inn.  
 Charles Richardson, Golden Square.  
 Daniel Times, same place.  
 Messrs. Sowton and Fuller, Chichester.  
 Richard Stevens Tripp, Gray's Inn.

Temple, Mark, Malton, York.  
 Thomas, George Evans, 16, Furnival's Inn.

Thompson, John, Old Burlington Street.  
 Times, Charles, Hitchin, Herts.  
 Titchener, Edward, 26, Surrey Street, Strand.  
 Tripp, Stevens, 11, Wilson Street, Gray's Inn  
 Lane.

Vaughan, Evan, Prestelgn, Radnor.  
 Venables, Rowland Jones, Furnival's Inn.

John James, same place.  
 Thomas Frederick Maples, 6, Frederick's  
 Place.  
 William Read King, Serjeant's Inn, Fleet  
 Street; assigned to Samuel Gwinnett Hor-  
 nidge, of Bloomsbury Square.

Voules, Charles Smart, Southampton Street,  
 Strand.

Wainwright, Henry Money, 15, Lincoln's Inn  
 Fields.

John Henry Benbow, 1, Seene Buildings.

Walker, Richard, 32, Great James's Street,  
 Bedford Row.

William Loaden, same place.

Wallis, Charles William, Commercial Place,  
 City Road.

Henry Aston, New Broad Street.

Walsh, Francis Eldridge, Sudbury.

Samuel Spode, same place; assigned to Wil-  
 liam Caster Gates, of Great Charlotte Street,  
 Blackfriars' Road; and by him assigned to  
 James Lester, 3, New Inn.

Walters, William, 14, Swinton Street, Gray's  
 Inn Road.

Thomas Rogers Jones, Swansea; assigned to  
 David Rowland, 4, White Lion Court, Corn-  
 hill; and now with John Hodson, 4, New  
 Square, Lincoln's Inn, Barrister.

Walters, John Voden, Winchester.  
 Watson, Joseph, Guisborough, York.  
 White, Francis Kirkill, 5, Prince's Street,  
 Bedford Row.

Messrs. Woolridge, same place.  
 Thomas Stephenson, same place.  
 George White, Grantham; assigned to Francis  
 Jessopp, Derby; and by him assigned to  
 William Hungerford Holditch, Sleaford,  
 Lincoln.

Wilkinson, Thomas, Newcastle-upon-Tyne.

Thomas Moor, Durham; assigned to Francis  
 Seymour, Newcastle-upon-Tyne.

Williams, John Bickerton, the younger, Shrews-  
 bury.

John Bickerton Williams, the elder, same  
 place; assigned to George Hadfield, Man-  
 chester.

## Clerks' Names.

Williams, William, Penrhos, near Carnarvon.

Wilson, Robert, Vauxhall.

Woolbright, William, Liverpool.

## To whom articulated.

William Williams, late of Carnarvon, deceased; assigned to Henry Rumsey Williams, Penrhos.

William Richardson, 47, Bedford Row.

John Smith, Berkeley, Gloucester, deceased; assigned to Daniel Croome, Berkeley.

## COMMON PLEAS.

Bull, Edwin, Aylesbury.

Thomas Briggs, Lincoln's Inn Fields; assigned to William Bull, Aylesbury, deceased; assigned to James James, Aylesbury.

Bellars, Thomas Caput, Whittlesey, Isle of Ely.

John Bellars, same place.

Bywater, John Ingram, Sackville Street, Piccadilly.

Ralph Colley Smith, Lincoln's Inn.

Phillpotts, John, Monmouth.

Thomas Griffin Phillpotts, same place.

## RE-ADMISSIONS.

## KING'S BENCH.

Bowler, William, late of St. Thomas's Street, East Southwark, now of the parish of St. George, Southwark.

Champ, George Edward, Gravel Lane, Southwark, county Surrey.

Leithhead, William, formerly of Alnwick, Northumberland, now of 4, Brownlow Street, Middlesex.

Walter, Major, of Woodford, Essex.

## PARLIAMENTARY RETURNS.

## WRITS.

Return to an Order of the Honourable the House of Commons, dated 6th April, 1835, for

A Return of the number of Writs issued between 1st January 1834, and 1st January 1835, out of the several Courts of Common Law, distinguishing Bailable from Serviceable Process.

## Court of King's Bench.

Serviceable Writs	-	-	-	-	31,003
Bailable ditto	-	-	-	-	9,461

Total	-	-	-	-	40,464
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H. G. HORN, *Signer of the Writs.*

16th April, 1835.

## Court of Common Pleas.

Bailables	-	-	-	-	4,417
Serviceables	-	-	-	-	10,294

Total	-	-	-	-	14,711
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ROBERT ROSE,

Filacer's Office, 4, Elm Court, Temple.

16th April, 1835.

## Court of Exchequer.

Bailable Capiases	-	-	-	-	8,769
Alias	-	-	-	-	374
Detainers	-	-	-	-	160

	-	-	-	-	9,303
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Serviceable Summonses	-	-	-	-	34,221
Alias	-	-	-	-	477
Distringas	-	-	-	-	184

Total	-	-	-	-	34,882
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EDMUND WALKER, *Master.*

## PRIVY COUNCIL DECISIONS.—CAPITAL PUNISHMENTS.

A Return of the number of Capital Cases reported to the King in Council during the following periods; distinguishing those cases in which the Sentence was mitigated previous to the Order for Execution; those in which the persons convicted were ordered for Execution; those on which the Sentence was mitigated after the Order for Execution; and those on which the Sentence was executed.

From 1st May 1826, to 1st January 1827, 160 cases were reported; in 140 of which, the sentence was mitigated previous to the order for execution, and 20 remained for execution. *After* the order for execution, the sentence was mitigated in five cases, leaving 15, which were executed.

From 1st May 1827, to 1st January 1828, 168 cases were reported; in 153 of which the sentence was mitigated previous to the order for execution, and 15 remained for execution. *After* the order for execution, the sentence was mitigated in 3 cases, leaving 12, which were executed.

From 1st May, 1828, to 1st January 1829, 107 cases were reported; in 89 of which the sentence was mitigated previous to the order for execution, and 18 remained for execution. *After* the order for execution, the sentence was mitigated in 5 cases, leaving 13, which were executed.

From 1st May 1831, to 1st January 1832, 110 cases were reported; in 108 of which the sentence was mitigated previous to the order for execution, leaving 2, which were executed.

From 1st May 1833, to 1st January 1834, 69 cases were reported, in all of which the sentence was mitigated.  
*Whitehall, 19 June, 1835.*

## REMARKABLE TRIALS. No. XXXII.

### BROWN'S CASE FOR MURDER.

This case was tried before Mr. Baron Parke, at Bury St. Edmunds, on the 31st of July 1835. The prisoner Samuel Brown, aged 80, was indicted for the wilful murder of James Ayton in the year 1817.

Mr. Prendergast and Mr. Maltby conducted the prosecution: Mr. Palmer the defence.

The particulars of this very singular case, as proved on the trial, were these:—Mr. Ayton, the murdered man, was an innkeeper, and possessed considerable property in the neighbourhood of Woodbridge, in this county. About 10 o'clock on the night of the 8th of October, 1817, a tradesman residing in that town, named Hurd, was returning home on foot, and when he arrived at a place called Drybridge Mill, he met the prisoner running fast. Hurd went on, and in the road opposite the garden of a Mr. Howard he saw a man lying in the road; upon examining the state of the man, Hurd found that he was bleeding from the head, and insensible, but he was not quite dead. A few yards further on stood a horse saddled and bridled, and the saddle turned nearly round on the right side. Mr. Hurd immediately called Howard up, and upon examining the body of the dying man, for such he evidently was, they found that it was Mr. Ayton. He had some silver in one of his pockets, and a handkerchief in his hat, which was lying two yards off, and none of his pockets appeared to have been rifled. They put the body of the man into an outhouse, where they left him for the night, and Howard went to bed. At 5 in the morning Howard went to his outhouse, and finding that the wounded man was yet living, he sent for a surgeon, by whose desire Mr. Ayton was removed to the Swan, where he died in four hours. He never spoke from the time of his being found on the road by Hurd. Having deposited the body in the outhouse, as before-mentioned, Hurd went on his way, and again met the prisoner, who had a large stick in his hand and a dog with him, and to whom he spoke without receiving any answer.

Upon examining the body after death, the surgeons found an external contused wound above the right ear, but no injury to the brain or inner bones of the head at that place. About an inch above this wound the skull was fractured from the back part of the head to the top, and there was a second line of fracture extending from the temple to the left ear, on the side opposite to the external injury. Two pieces of bone were quite detached near the left ear, and there were two depressions of the inner table of the skull, and three ounces of blood extravasated on the *dura mater*. It appeared,

therefore, beyond all question, that the unfortunate man had been murdered. An inquest was held, and after a laborious investigation, the coroner's jury found that the man was "murdered by some person unknown."

Suspicion had fallen upon the prisoner, but no sufficient proof had been adduced, and he was suffered to go at large. Thus this dreadful matter remained wrapped in mystery and doubt for 18 years, and the circumstance had nearly been forgotten when the public attention was called to it in a very singular manner. One William Green, a notorious thief, was in Ipswich gaol in the month of June, in the present year, under sentence of transportation for sheep stealing. He was very ill, and fancying himself in great danger of speedy dissolution, he sent a note to a magistrate to come and receive his "penitent confession" upon "a matter which hung very heavily on his mind." The magistrate went to the prison, and to him the prisoner gave the following account of this murder, which he swore to on the trial to-day. He was living at Woodbridge, in October, 1817, and was well acquainted with Brown and Ayton. On the 8th of that month he was returning home from driving some beasts to a fair, and at 9 in the evening he met the prisoner near Drybridge Mill, walking fast, and Mr. Ayton, on horseback, almost directly afterwards. He "shot into the hedge and hid himself" when he saw Brown coming up, as he lived in fear of him from a quarrel he had formerly had with him. No sooner was he in ambush, than he saw the prisoner turn round, stop Mr. Ayton's horse, and with a heavy club, give Ayton a tremendous blow upon the head, which knocked him off his horse. The prisoner then put his hands into some of Ayton's pockets, and afterwards ran away down the road towards Woodbridge. The witness knew of the inquest being held upon the body, but never breathed a syllable implicating Brown. About three years ago, however, he and Brown were playing at "ten pins," and having lost a pint of beer he refused to play any more, when the prisoner struck him. Upon this the witness said to the prisoner, "Mind what you're at; you murdered Mr. Ayton, and nobody but you; I saw you, and I can swear to it." To this the prisoner replied, "Oh, for God's sake don't say that, for it will hang me;" and so they parted, and Green never did say any thing more about it till June last, when he thought he was going to die. The witness told an unintelligible story of a former quarrel with the prisoner about some pigs they had jointly stolen, in order to account for his dread of him, and to explain why, on the night of the murder, he had "shot into the hedge" in order to avoid him. It certainly appeared, from Green's own account of himself, that he was a most infamous man. He said he earned his living "by getting a sixpence how he could," and stated that he had for many years carried a knife about him to cut his own throat, which he had once done, though not with any great success.

His story, strange as it was, was confirmed by several circumstances, which were proved

to have occurred on the night of the murder. It appeared, that about 9 o'clock, Mr. Ayton was at the public house to which his body was afterwards carried, the Swan, and after getting about half tipsy there, he mounted his horse, and proceeded on his homeward journey; he seemed quite comfortable, and got upon his horse without assistance. Martha Upchurch was putting to her shutters at five minutes past nine, and Ayton passed her house on his horse, going in the direction of Drybridge Mill, which was only a quarter of a mile distant. Brown, the prisoner, was following him up the hill. He had a club in his hand, and a dog by his side. In ten minutes the prisoner returned, walking much faster than when he went, and having no dog with him; he got over a stile. At the time Mrs. Upchurch saw Mr. Hurd in the road, her husband was with her. She gave this account at the inquest, and on the following day the prisoner called at her house and asked her husband "what he was going to say against him to the crowner." Upchurch replied, "I shall say what I saw;" to which Brown answered, "I shall look out for you, depend on't." In addition to this, it was shown that Brown went to the Queen's Head, not far from the scene of the murder, on the fatal night, at 7 o'clock. He left between 8 and 9, and was followed by his dog, which the landlord of the Queen's Head had given him shortly before. The dog returned alone soon after 9 o'clock, and made a low growl, and a dismal moaning noise at the door, and was admitted; and at half past 10 the prisoner returned also. He asked if the dog was returned, observing that he "had lost him, and was at a distance when he heard his growl, to which he could swear as well as if it was his own child." After Green had accused him of this murder lately, the prisoner went to the landlord of the Queen's Head and begged him not to hurt him, remarking, that he "was as innocent as a child of the murder." The man said he should tell the truth, and the prisoner replied, "You know I was at your's all the evening," which the witness denied, answering, "You were absent from half past 8 till half past 10, and your dog came home alone, Brown."

In order to show a motive for this murder, one Mrs. Arnold swore that two or three years before his death she was at Ayton's house, the Dog, at Fakenham, when there was a dispute between him and the prisoner respecting a smuggling transaction. Ayton said, "You've done me an injury, Brown, and you shall not be in my yard." Brown replied, "Then depend on't, I'll happen on you another time." On another occasion, when Brown had just come out of prison, he was at dinner in the field with some other people, and one of them said to him, "You look very ill, Master Brown," and he replied, "and so would you, if you'd been underground as long as I have." He then named several persons who were his enemies, and amongst them Mr. Ayton, and observed, "D—n my flesh, I shouldn't mind striking this (a large knife) through his heart, and d—n me if I don't the first opportunity."

This closed the case for the prosecution.

Mr. Baron *Parke*, in a very elaborate and clear statement, summed up the evidence, and the jury, after an absence of some hours, returned, with a verdict of *guilty* of manslaughter.

## MISCELLANEA.

### THE COIF.

"Many of my readers perhaps may not know what I mean by the *Coif*. It is a round piece of lawn or cambric, covered all but the edge with black silk, taffety, (or I know not what,) but supposed to represent the *corona clericalis*, intended to hide the *tonsura clericalis*, or shaven pate of those in *holy orders*, which the members of the law in former times generally wore. It is now placed on the hinder parts of the wigs of all serjeants and judges; which reminds me of a very ridiculous mistake of a worthy serjeant, not long deceased, and for the truth of which I can vouch. He was left executor of one of his *brethren*, a Judge of the Court of Common Pleas, whose will, by accident, was thrown into Chancery, upon what they call an *amicable suit*; that is, merely to obtain for the executors the solemn sanction of that Court to do what they ought to have been hanged for not doing without that sanction, upon their own discretion. It was, moreover, something that could have been performed and effectually accomplished in the compass of *ten minutes*, without the interposition of the Chancellor, but which it literally took *seven years* to adjust (*very imperfectly*) under his Lordship's jurisdiction. But I am wandering from the point, as though I had got into Chancery myself. In the will which the worthy serjeant had to administer, the testator had bequeathed to his eldest son a *very ancient piece of plate*, called, in "olden times," a *quaff*, being a shallow sort of silver cup with two solid handles. The words of the will were, "I bequeath to my son Nicodemus, (or whatever it might be) *my old quaff*." At the end of the Chancery suit, when the family of the deceased was finally to be put in possession of what had descended to them severally and particularly, it was discovered that the worthy serjeant had for the space of *seven years* fully believed that his friend the Judge had, by a *special bequest*, left to his eldest son, *not* his "old" *silver* "quaff," but the *old black patch* he wore upon his wig, videlicet, *coif*. This is literally fact; but it is quite proper to add, for the vindication of the worthy person alluded to, that "coif" was formerly spelt "quœif."—From "*Heraldic Anomalies*."

## LIST OF NEW PUBLICATIONS.

The Law and Practice of Elections, as altered by the 2 & 3 W. 4, c. 45, and the 5 & 6 W. 4, c. 36. With an Appendix, containing the Acts of Parliament for England, Scotland, and Ireland, brought down to the end of the Session 1835. 4th edition. By F. N. Rogers, Esq. Price 1*l*.

The Act for the Amendment of the Poor Laws: Notes and Forms. 3d edition. By J. F. Archbold, Esq. Price 7*s*. 6*d*.

The Law and Practice in Bankruptcy, as founded on the recent Statutes. By J. F. Archbold, Esq. 6th edition, enlarged by the Statutes to 5 & 6 W. 4; Orders, new Forms, and Costs. By J. Flather, Esq. Price 1*l*. boards.

Cases of Controverted Elections in the 12th Parliament. By J. W. Knapp and E. Omblor, Esqrs. Vol. I, Part II. Price 7*s*. 6*d*.

## MASTERS EXTRAORDINARY IN CHANCERY.

*From August 21 to September 18, 1835, both inclusive, with dates when gazetted.*

Storie, William, Tunbridge Wells, Kent. Sept. 8.

Postlethwaite, John Pearson, Ulverstone, Lancaster. Sept. 11.

Heatherly, William Collins, Bideford, Devon. Sept. 15.

## DISSOLUTIONS OF PROFESSIONAL PARTNERSHIPS.

*From August 21 to September 18, 1835, both inclusive, with dates when gazetted.*

\*. \* The names printed in Italics are the partners who receive and pay debts.

Matthews, John, and Charles Pearson, Gravesend, Kent, Attorneys and Solicitors. Ang. 21.

Angell, Alfred, and Richard Rastall, Lincoln's Inn Fields, Attorneys and Solicitors. Sept. 1.

Harris, George, William Wise, and George Harris, jun., Rugby, Warwick, Attorneys and Solicitors. Sept. 11.

Whyte, William John, and Thomas Faulconer, Lincoln's Inn Fields, Attorneys and Solicitors. Sept. 18.

## BANKRUPTCIES SUPERSEDED.

*From Aug. 21, to Sept. 18, 1835, both inclusive, with Dates when gazetted.*

Coupees, Francis, and William Coupees, Luton, Bedford, Straw Hat Manufacturers. Sept. 4.

## BANKRUPTS.

*From August 21, to Sept. 18, 1835, both inclusive, with Dates when gazetted.*

Adams, Travers, Liverpool, Commission Agent. *Adlington & Co., Bedford Row: Radcliffe & Co., Liverpool.* Aug. 31.

Angold, John, John Street, Tottenham Court Road, Timber Merchant. *Williams, Alfred Place, Bedford Square: Clark, Off. Ass.* Sept. 11.

Ayling, Wm., Great Portland Street, Mary-le-Bone, Chemist. *Groom, Off. Ass.: Lane, Argyll Street.* Sept. 18.

Brown, John, Southampton, Jeweller and Watchmaker. *Spyer, Broad Street Buildings: Graham, Off. Ass.* Sept. 8.

Brighton, Thomas Woodhouse, Cheltenham, Gloucester, Draper and Upholder. *Edwards, Off. Ass.: Lock & Co., Freeman's Court, Cornhill.* Sept. 11.

Breakwell, Henry, Throgmorton Street, Tailor and Draper. *Becher, Off. Ass.: Keme, Farnhill St.* Sept. 18.

Bailey, John Elm Street, Gray's Inn Lane, Horse Hair Manufacturer. *Harrison, South Square, Gray's Inn: Whitmore, Off. Ass.* Aug. 31.

Blacklock, Wm., and George Thompson, Charlton-upon-Medlock, Manchester, Joiners and Builders. *Wills & Co., Tottenhouse Yard: Mortimer, Manchester.* Aug. 21.

Brittain, Henry, Hesse, Kingston-upon-Hull, Innkeeper. *Hicks & Co., Gray's Inn Square: Holden & Co., Hull.* Sept. 1.

Bishton, George, Parkfields, Sedale, Stafford, Ironmaster. *Norton & Co., Gray's Inn Square: Corns, Wolverhampton.* Sept. 15.

Bailey, Wm., Gate Street, Lincoln's Inn Fields, Carrier and Leather Seller. *Pook, Clement's Inn: Lockington, Off. Ass.* Sept. 18.

Cox, Stephen, Hendon, Middlesex, and Brunswick Street, Stamford Street, Blackfriars Road, Surrey, Horse Dealer. *Ryan & Co., Essex Street, Strand: Payne, Dover.* Aug. 26.

Chesterman, Benjamin, Blackmore Street, Drury Lane, Victualler and Builder. *Edwards, Off. Ass.: Smith, Tottenhouse, Yard.* Aug. 26.

Cox, Wm. Hawkins, Cheltenham, Gloucester, Printer. *Blower & Co., Lincoln's Inn Fields: Griffiths & Co., Cheltenham.* Aug. 28.

Craig, Andrew, Newcastle-upon-Tyne, Cabinet Maker and Wood Merchant. *Scotts & Co., Frederick's Place, Old Jewry: Gibson, Newcastle-upon-Tyne.* Sept. 1.

Deane, Thomas, Greenwich, Kent, Lodging-house Keeper. *Edwards, Off. Ass.: Keme, Staple Inn.* Aug. 26.

Dodd, Henry, Ambleide, Westmoreland, Innkeeper. *Wilson & Co., Kendal: Michael, Red Lion Square.* Sept. 1.

Evans, Samuel, George Tavern, Castle Street, Leicester Square, Victualler. *Edwards, Off. Ass.: Dimmock, Pancras Lane, Chapside.* Sept. 1.

Fell, Jacob, New Mills, Glossop, Derby, Flour Seller. *Rodgers, Devonshire Square: Vickers, Sheffield.* Aug. 26.

Fisher, George, Liverpool, Merchant. *Mandley, Liverpool: Adlington & Co., Bedford Row.* Aug. 28.

Greels, John, Preston, Lancaster, Draper. *Adlington & Co., Bedford Row: Coates, Manchester.* Aug. 28.

Godson, Stephen, Devonshire Street, Bishopsgate, and Mining Lane, Wine and Spirit Merchant. *Boochey, New Bowell Court: Graham, Off. Ass.* Sept. 18.

Heather, George, Saint Ann's Place, Limehouse, and Edward Argles, Brunswick Terrace, Commercial Road East, Mahogany Merchants. *Edwards, Off. Ass.: Kenney & Co., Leadenhall Street.* Sept. 4.

Hindell, Wm., Brayton, York, Victualler. *Smith, Selby: Farrer, Clement's Inn.* Sept. 4.

Henderson, John, Great Surrey Street, Blackfriars, and of Trinidad in the West Indies, Master Mariner and Merchant. *Groom, Off. Ass.: Cox & Co., Pancras Lane, Bucklersbury.* Sept. 8.

Heywood, George, St. Martin's Lane, Chemist and Druggist. *St. Martin's Lane: St. Thomas Apostle. Lockington, Off. Ass.* Sept. 11.

Hough, Wm., Manchester, Builder & Bricklayer. *Adlington & Co., Bedford Row: Mahon, Manchester.* Sept. 15.

Hodgens, Wm., Liverpool, Merchant. *Taylor & Co., Bedford Row: Miller & Co., Liverpool.* Sept. 18.

Hides, Robert, Chesterfield, Derby, Grocer. *Spencer, Alfred Place, Bedford Square: Lucas & Co., Chesterfield.* Sept. 18.

Hilder, Samuel, Brighton, Sussex, Builder. *Thompson, Brighton: Stevens & Co., Little St. Thomas Apostle.* Sept. 18.

Johnstone, Henry, Sheffield, York, Coach Maker. *Wilson & Co., Sheffield: Wilson, Southampton Street, Moorsbury Square.* Aug. 21.

Jackson, Job, Burslem, Stafford, Earthenware Manufacturer. *Harding, Burslem: Smith, Chancery Lane.* Aug. 28.

- Jones, Elias, Hemel Hempstead, Hertford, Saddler and Harness Maker. *Edwards*, Off. Ass.: *Bailey*, Ely Place. Sept. 1.
- Kerr, Hall, Mulgrave Place, Woolwich, Kent, Tailor. *Groom*, Off. Ass.: *Fisher*, Walbrook. Sept. 1.
- Kilby, Richard, Douthead Saint Andrew, Wilts, Victualler. *Pain*, Great Marlborough Street: *Squarey*, Salisbury. Sept. 11.
- Keyes, James, Abersychan and Pontypool, Monmouth, Grocer and Draper. Messrs. *Daniel*, Bristol: *Pearson*, Pump Court, Temple. Sept. 11.
- Knight, Thomas, Gilbert Street, Oxford Street, Corn Chandler and Chop & Coffee-House Keeper. *Lawrence*, Lyon's Inn, Strand. *Graham*, Off. Ass. Sept. 18.
- Lewis, Mary Ann, Norfolk Street, Strand, Milliner and Dress Maker. *Nicholson*, Charlotte Street, Fitzroy Square: *Cumans*, Off. Ass. Aug. 21.
- Lees, John, Bilston, Stafford, Grocer and Corn Dealer. *Phillips & Co.*, Southampton Street, Bloomsbury: *Phillips*, Wolverhampton. Aug. 25.
- Molyneux, Henry, Penzance, Cornwall, Linen Draper. *Sole*, Aldermanbury: *Johnson*, Off. Ass. Aug. 21.
- Muschen, James, Birmingham, Innkeeper. *Woodroffe & Co.*, Lincoln's Inn: *Mole*, or *Stable* & Co., Birmingham. Aug. 25.
- Matthews, Wm., Bushey, Hertford, Timber Merchant and Builder. *Groom*, Off. Ass.: *Turner*, Clifford's Inn. Aug. 28.
- Morgan, Thomas, Llanddilos, Montgomery, Grocer and Draper. *Bigg*, Southampton Buildings, Chancery Lane: *Marsh*, jun., and *Hayward*, Llanddilos. Aug. 25.
- Matthews, Thomas, Bushey, Hertford, Carpenter and Builder. *Groom*, Off. Ass.: *Turner*, Clifford's Inn. Sept. 1.
- Mathews, Wm., Staverton, Devon, Miller. *Froude & Co.*, Lincoln's Inn Fields: *Nicholson*, Totnes. Sept. 1.
- Molyneux, Thomas, Falmouth, Cornwall, Linen Draper. *Edwards*, Off. Ass.: *Sole*, Aldermanbury. Sept. 9.
- Macey, George, Rose Street, Newgate Market, Commission Cattle and Meat Salesman. *Abbott*, Off. Ass.: *Evans*, Took's Court, Curitor Street. Sept. 11.
- Mounstain, James, Sculcoates, York, Common Brewer. *Shaw*, Ely Place: *Richardson*, Hull. Sept. 11.
- Mason, Harry Swaine, and Harry Mason Kettlewell, Surrey Wharf, Adington Square, Camberwell, Surrey, Iron and Coal Merchants. *Fennell*, Off. Ass.: *Nind & Co.*, Throgmorton Street. Sept. 15.
- Maybury, Joseph, John Maybury, and Joseph Maybury the Younger, Bilston, Stafford, Iron and Tin-plate Manufacturers. *East*, New Bowell Court, Lincoln's Inn: *William*, jun., Bileston. Sept. 15.
- Nokes, Joseph, Hinkley, Leicester, Hosier. *Stone & Co.*, Leicester: *Sharpe & Co.*, Old Jewry. Sept. 11.
- Powell, Charles, Saint Mary-at-Hill, London, Wine Merchant and Tavern Keeper. *Edwards*, Off. Ass.: *Turner & Co.*, Basing Lane, Chesapeake. Aug. 21.
- Phibbs, George, Bleuheim Street, Boud street, Wine Merchant. *Groom*, Off. Ass.: *Bird*, Lincoln's Inn Fields. Aug. 25.
- Power, John, sen., and John Power, jun., Atherstone, Warwick, Hat Manufacturers. Messrs. *Baxter*, Lincoln's Inn Fields: *Baxter*, Atherstone. Sept. 1.
- Reisertoft, Thomas, Whitechapel, Salt Peter, Isle of Ely, Cambridge, Gentlemen; formerly carrying on business at Pembrey, Carmarthen, in partnership with Charles Bonner and John Calthrop, as Iron Masters and Coal Fitters. *Belcher*, Off. Ass.: *Willis & Co.*, Tokenhouse Yard. Sept. 4.
- Pemberton, Isaac, Worcester, Brush Maker and Tobacco-pipe Manufacturer. *Gale*, Basinghall Street: *Graham*, Off. Ass. Sept. 15.
- Postlethwaite, James, Liverpool, Draper. *Adlington & Co.*, Bedford Row: *Coates*, Manchester. Sept. 15.
- Potter, Wm. James, Little Compton Street, Soho, Victualler. *Fennell*, Off. Ass.: *Glynnes*, America Square. Sept. 18.
- Rhodes, John, Longwood, Huddersfield, York, Clothier. *Lake*, Cateaton Street: *Battye & Co.*, Huddersfield. Aug. 25.
- Raven, John, Suffolk Lane, Cannon Street, Wholesale Grocer. *Groom*, Off. Ass.: *Temple & Co.*, Great Tower Street. Sept. 4.
- Redman, Charles, Herne Bay, Herne, Kent, Builder. *Constable & Co.*, Symond's Inn, Chancery Lane: *De Launay*, Canterbury. Sept. 11.
- Roberts, Samuel, Farrington Street, Floor Cloth Manufacturer. *Abbott*, Off. Ass.: *Bowden & Co.*, Aldermanbury. Sept. 18.
- Sowerby, George, Hibalastowe, Lincoln, Carpenter and Wheelwright. *Nicholson & Co.*, Glamford Bridge: *Dusley & Co.*, Field Court, Gray's Inn. Aug. 25.
- Sawyer, George William, Brighton, Sussex, Builder. *Bennett*, Brighton: *Dax & Co.*, Lincoln's Inn Fields. Sept. 1.
- Smith, John Ashwin, Bilston, Stafford, Grocer. *Phillips & Co.*, Southampton Street, Bloomsbury: *Phillips*, Wolverhampton. Sept. 4.
- Seaber, James, Newmarket, Suffolk, Scrivener. *Pickering & Co.*, Stone Buildings, Lincoln's Inn: *Evans & Co.*, Ely. Thring, John Tiviot, Warminster, Wilts, Scrivener. *Hedder*, Clement's Inn: *Goodman*, Warminster. Aug. 25.
- Turner, Miles, Haigh, Lancaster, Bleacher. *Adlington & Co.*, Bedford Row: *Leigh*, Wigan. Aug. 25.
- Travis, John, Manchester, Dry Salter. *Milne & Co.*, Temple: *Crosley & Co.*, Manchester. Aug. 25.
- Taylor, James, Manchester, and of Chettwood, Lancaster, Brushmaker. *Adlington & Co.*, Bedford Row: *Law*, Manchester. Sept. 1.
- Turberville, Thomas, Worcester, Grocer and Hop Merchant. *Cardale & Co.*, Bedford Row: *Gillam & Co.*, Worcester. Sept. 4.
- Wade, Wm., Liverpool, Grocer. *Maudslayi*, Liverpool: *Adlington & Co.*, Bedford Row. Aug. 21.
- Williamson, Wm. Edward, and Edward Beckley Ousey, Salford, Lancaster, Ale and Porter Brewers. *Scott*, Lincoln's Inn Fields: *Greenhalgh*, Manchester. Aug. 21.
- Wren, Wm. Thomas, Chichester, Sussex, Brewer. *Price & Co.*, Chichester: *Sewton*, Great James Street, Bedford Row. Aug. 25.
- Wakeham, Wm., Plymouth, Devon, Roman Cement Manufacturer. *Sole*, Aldermanbury: *Bennett*, Plymouth. Sept. 1.
- Wehster, John, and Jonathan Abraham Webster, Wadley, Ecclesfield, York, Paper Manufacturers. *Battye & Co.*, Chancery Lane: *Dixon*, Sheffield. Sept. 8.
- Willett, Jasper, Brandon, Suffolk, Grocer and Draper. *Turner & Co.*, Basing Lane, Chesapeake. Sept. 11.
- Weatherley, Hilderton John, Newcastle-upon-Tyne, Merchant. *Meggison & Co.*, King's Road, Bedford Row: *Brockett & Co.*, Newcastle-upon-Tyne. Sept. 11.
- Wright, Henry, Norwich, Norfolk, Wine and Spirit Merchant. *Browning*, Hatton Court, Threadneedle Street: *Clerk*, Off. Ass. Sept. 18.
- Wrigley, John, Manchester, Fustian Manufacturer and Finisher. *Johnson & Co.*, Temple: *Booth*, Manchester. Sept. 18.

## THE EDITOR'S LETTER BOX.

The First Part of the *Commentaries on the New Statutes*, containing a full Digest of the Law and Practice of Corporations, as altered by the New Act, with the Act and Order in Council *verbatim*, will be ready on Saturday next, October 3.

The *Legal Almanac, Remembrancer, and Diary*, for 1836, will be published before Michaelmas Term. The plan adopted last year will be somewhat altered. Particular attention will be paid to the preparation of an *Office Diary*. Several new Professional Lists will be added; and it is expected that with the suggestions we have received, the Work will be rendered particularly useful to the profession at large.

The Commissioners' Report on the Consolidation of the Statute Law is now published, price 2s.

The further contribution of G. B. has been received.

We are obliged by several further suggestions relating to The Legal Almanac.

We thank a correspondent at Epsom for his communication.

The Queries and Answers of E. R.; "A Young Clerk;" L. H.; "Genus;" N. N.; and W. S., have been received.

The Case, and Opinion of "Aspiro" is acceptable, and we are obliged by our correspondent's offer of other similar articles.

A correspondent is informed that the Enfranchisement of Copyholds Bill was referred to a Select Committee of the House of Lords, and proceeded no farther. The subject is a very difficult one.

# The Legal Observer.

Vol. X.

SATURDAY, OCTOBER 3, 1835. No. CCXCIV.

— "Quod magis ad nos  
Pertinet, et necesse malum est, agitamus.

HORAT:

## THE RIGHTS OF FRENCHMEN IN ENGLAND.

BY A FRENCH ADVOCATE.

### No. II.

My dear Friend,

As I hope you have now had time to digest the contents of my last letter on Frenchmen's rights, I shall now proceed to give you a little more information on the same subject.

You may remember that in my last I pointed out the distinctions between natural-born subjects, aliens, denizens, and naturalized foreigners. I also told you the rights or restrictions possessed and borne by the three latter classes, with respect to holding property, real and personal. I shall now point out to you some of the commercial rights and restrictions bestowed and imposed by the English law.

The Common Law of England has always been jealous of foreigners; from the Conquest till upwards of two hundred years afterwards, it does not appear that strangers were permitted to reside in England, even on account of commerce, beyond a limited time, except by a special warrant; for they were considered only as sojourners coming to a fair or market, and were obliged to employ their landlords as brokers to buy and sell their commodities; and I find that one stranger was often arrested for the debt, or punished for the misdemeanour of another, as if all strangers were to be looked upon as a people with whom the English were in a state of perpetual war, and therefore might make reprisals on the first they could lay hands on. (Tucker's Remarks on Naturalization Bill, 2, 3, 13-15; 2 Inst. 204; Rymer's Fœdera, vols. 1, 2, 3, 4.) It is stated in 1 Anderson's History of Commerce, (pp. 237, 242) that in A. D. 1276 it was a general rule in England, that the aggregate body of every particular nation of foreigners residing here were obliged to answer for mis-

demeanours of every individual person of their number. It was said by Lord Coke, in *Calvin's case*, (7 Co. 21b.; 4 Inst. 155), "that a monarch, or an absolute prince, as owing no allegiance to the English crown, cannot come into England without license of the King; and that in ancient time no ambassador came into this realm before he had a safe-conduct; for as no king can come into this realm without a license or safe-conduct, so no prorex, which representeth a king's person can do it." And it appears from the same author, (2 Inst. 57), that by the ancient kings, amongst whom Alfred was one, it was forbidden that any alien merchant should make his haunt in England, except at the four fairs, or sojourn in the land beyond forty days. In the *Mirror* (c. 5, s. 5) it is said, that the stay of alien merchants shall not be to the prejudice of the towns or merchants of England, and there shall be oaths to the king and pledges, if they stay more than forty days. (*Mirror*, c. 3, s. 8, quoted 2 Inst. 63.) And at this day, even those aliens who are private subjects of a nation at peace with us, are liable to be sent home whenever the King sees occasion. (1 Bla. Com. 260; 56 Geo. 3, c. 86.)

In favour of commerce, however, some of the restrictions upon aliens were very early relaxed. Thus a law was made by King *Ethelred*, that all ships of merchants, even enemies, entering any port from the sea, even without stress of weather, should enjoy undisturbed peace. (2 Inst. 57.) The prerogative of the Crown over aliens was greatly abused by King John, who converted it into an instrument for extorting exorbitant duties from foreign merchants; and therefore, that such disgrace might no longer continue, it was enacted in *Magna Charta*, that "all merchants (if they were not openly prohibited before) shall have their safe and sure conduct to depart out of England, to come into England, to tarry in and go through England, as well by land as



by water, to *buy* and *sell*, without any manner of evil tolls, by the old and rightful customs, except in time of war; and ~~if~~ they be of a land making war against us, and such be found in our realm at the beginning of the wars, they shall be attached, without harm of body or goods, until it be known unto us, or our chief justice, how our merchants be intreated there in the land making war against; and if our merchants be well entreated there, theirs shall be likewise with us." This last enactment will no doubt remind you of Article 11 of our Civil Code: "Foreigners shall enjoy in France the same civil rights as those which are or shall be granted to Frenchmen by the treaties of the nation to which such foreigners shall belong." Sir Edward Coke (2 Inst. 57.) says, that it is provided by Magna Charta, "that all merchant strangers in amity (except such as be so publicly prohibited) shall have safe and sure conduct in seven things: 1st, to depart out of England; 2d, to come into England; 3d, to tarry here; 4th, to go in and through England, as well by land as by water; 5th, to buy and sell; 6th, without any manner of evil tolls; and 7th, by the old and rightful customs." And Sir Edward Coke observes, (*ibid.*) that the *public* prohibition of alien merchants to which the statute refers, must be by common or public council of the realm, that is, by *Act of Parliament*, for that it concerneth the whole realm, and is implied by this word *publice*. And it is to be further remarked upon that chapter of Magna Charta, that it exempts the alien merchant from all evil tolls, and entitles him to trade according to the ancient and rightful customs. "Tolls," says Sir Edward Coke (2 Inst. 58), "signify, in a general sense, any manner of *custom*, subsidy, prestation, imposition, or sum of money demanded for exporting or importing of any wares or merchandizes, to be taken of the buyer. They are called *mala tolmeta*, evil tolls, when the thing demanded for wares or merchandizes does so burthen the commodity as the merchant cannot have a convenient gain by trading therewith, and thereby the trade itself is lost or hindered; and in divers statutes, *maletout* for *maletot*; *maletout* is a French word, and signifieth an unjust exaction." It seems that Sir Edward Coke, by the word "customs," meant the *revenue* impositions, and not the customs of the country.

In earlier times, when the extent of the prerogative was undefined, it was considered a branch of the royal power to impose upon

the merchandize of aliens such tolls as were not evil, but for the advancement of trade and the public good. But when the liberties of the realm were fixed at the revolution of 1688, it was enacted, (1 W. & M. Sess. 2, c. 2, s. 1; 2 Anders. Hist. Com. 69) "that levying money for or to the use of the Crown, by pretence of prerogative, without assent of Parliament, for longer time or in other manner than the same is or shall be granted, is illegal;" so that now no tax or custom can be imposed upon *alien merchants*, but by the same authority which binds the natural-born subjects of the British empire,—the legislature; and thus the provisions of Magna Charta in favour of *foreign* traders, which I have been stating and analysing, are now endowed with a force and efficacy which they would never have possessed, amid the ceaseless fluctuations of the prerogative, in the uncertain ages of the British constitution.

You will join with me in the admiration of Mr. Justice Blackstone, and our own Montesquieu, of the provisions thus contained in the English charter of liberty. The English Judge and Professor remarks: "It is somewhat extraordinary that these provisions should have found a place in Magna Charta, a mere interior treaty between the King and his natural-born subjects."

Our own Montesquieu (*Esprit des Loix*, liv. 20, chap. 14) has remarked, that "the great charter of the English forbids the seizure and confiscation, in case of war, of foreign merchants' goods, unless by way of reprisal. It is worthy of admiration, that England should have made it one of the articles of her liberty." And again (chap. 7) "The English are the nation which, more than any other, has been able to give effect to those three great objects, religion, commerce, and liberty." It should seem that at this time even the great principle of free trade began to develop itself in England, or at least that an extended view of the principles of commerce was already possessed by those valiant Britons who forced their charter from the tyrant *Johs*.

In the reign of Edward the First, aliens were enabled to proceed summarily for their debts, (11 Edw. 1. Stat. de Mercatoribus; 1 Anders. Hist. Com. 242); and by charter they were permitted to hire houses of their own, and to dispose of their goods themselves to the best advantage. (12 Edw. 1. and 31 Edw. 1; Tucker on Naturalization Bill, 3, 5; Rymer, vol. 4, p. 361; 1 Anders. Hist. Com. 268.) The stat. of 2 Edw. 3,

c. 9, confirms Magna Charta, by enacting that all *merchants*, strangers and privy, may go and come with their merchandizes into England, and buy and sell as they please, after the tenor of the great charter. (Tucker on Naturalization, 9; 1 Anders. Hist. Com. 268, 9.) And it was enacted by 9 Edw. III, st. 1, c. 1, "that all *merchants*, strangers and others, might deal in all things vendible within the realm, and sell to any but the king's enemies, notwithstanding any franchises or usages to the contrary, save the king's customs;" and persons disturbing alien merchants in the protection given by this statute are subjected to double damages. (This Act, confirmed by 25 Edw. 3, 27 Edw. 3; Tucker on Naturalization Bill, 15, 17.) To this enactment, however, was added an exception, forbidding aliens to carry *wine* out of the realm. By the statute of the Staples, 27 Edw. 3, st. 2, c. 17, the abominable practice of arresting one alien for another's debt was put an end to, and time given to aliens, in case of war, to remove with their effects. It was enacted, (27 Edw. 3, st. 2, c. 17; Tucker on Naturalization Bill, 15—17) that a merchant stranger shall not be impeached for another's debt, but upon a good cause; merchants of enemies' countries shall sell their goods in convenient time, and depart; and that no merchant-stranger shall be impeached for another's trespass, or for another's debt, whereof he is not debtor, pledge, nor mainpennor. A proviso then follows in favour of reprisals, and a period of forty days after the commencement of war is allowed them to depart, and in the mean time to sell their merchandize.

By 36 Edw. 3, c. 7, a court was constituted, composed partly of foreigners, to try mercantile causes; and other regulations in favour of alien merchants were passed. (1 Anders. Hist. Com. 347.) In the succeeding reign of Richard 2, he deprived the foreigner of the liberty of buying and selling of or to any other foreigner within the precinct of London; but by two subsequent statutes of the same reign, the several statutes of Edward 3, in favour of aliens were explained and confirmed; and in 14 Ric. 2, c. 9, it was expressly enacted, "that merchant strangers repairing into the realm of England shall be well and courteously and rightfully used and governed in the said realm, to the intent that they shall have the greater courage to repair into the same."

Soon after this, the country was embroiled in civil war, and down to the end

of Richard the Third's reign I find continual interferences by the legislature with the freedom of commerce by aliens. Some of these were so absurd, that it is hardly possible to imagine they were the laws of the same nation as obtained Magna Charta. They were of such a description, that the evil consequences resulting from them were even recited in the preamble of the 19 Hen. 6, c. 6. Some of the mischiefs arising from this course of proceeding on the part of the legislature have been well remarked by Dr. Tucker, who wrote on the Naturalization Bill (p. 37). He has observed that which the principles of political economy render evident to any one who considers the matter: First, the cloth imported from abroad could be had at a cheaper rate than what was made at home; and whosoever sells cheapest, whether he be a foreigner or native, will always have the preference at market. Secondly, the English journeymen and lower manufacturers, who have been the most noisy and clamorous against foreigners, being now destitute of work at home, were glad to retire to foreign countries to seek for employment. They then found to their cost, that the *expulsion* of foreigners was the cause of taking the bread out of their mouths, not the *admission* of them. Thirdly, the consumption of provisions growing less every day on these accounts, there was no encouragement to the farmers and landed gentlemen to raise any thing but numerous flocks of sheep, which they were sure would turn to good account by the demand for wool in Flanders; and so great was the decay of the woollen and all other manufactures, that the very remembrance seems to have been lost among the English.

The country having thus become impoverished, we find the tide in favour of aliens and commerce turned by the influx of foreign workmen and artificers, who took refuge in England in the reign of Elizabeth, attributable to the persecution of the Duke d'Alva. (Tucker, 38, 39). But these foreigners were rather tolerated than encouraged; and when King James came to the throne, the citizens of London preferred petitions against aliens; and the rules and orders made in consequence of their solicitations were most injurious to them, as well as quite opposite to the nature of a free, open, and extensive trade. (Tucker, 41.) In the commission dated 5th June, 1622, his majesty saith, "he would endeavour to keep such a due temperment between the interests of the complainants and that of foreigners, that the latter should

have no cause to fear being disturbed in their industrious and sedulous courses, whereof he wished his own people would take example."

But this seeming indulgence ends in real oppression, as may be seen by the two succeeding clauses. (Tucker, 42.) "And further our will and pleasure is, that every such stranger born, denizen or not denizen, or others born of parents strangers, not having served their apprenticeships as aforesaid, who either use any manual or handicraft trade, or buying or selling of the home commodities of our kingdom, shall pay to our use, as a thankful acknowledgment of our royal favour, such rates and payments, out of their earnings or gains, to be distributed and disposed of for the ease and comfort of our own people, as we shall think fit, as shall be directed by a schedule subscribed by our own hand; or in default thereof, such rates or payments as our said commissioners, under their hands, or under the hands of three of them, shall set down, whereby our natural-born subjects may discern that we put a proportionable difference between them and the strangers, if their own want of industry or honest workmanship be not the impediment. Nevertheless, our pleasure and command is, that this favour, which we shall thus vouchsafe to extend to such strangers who have settled themselves and their families in this our realm already, or to such who by their service, according to our laws, shall hereafter deserve the like favour, shall not draw his ther or continue here any increasing number of masterless men of handicraft trades, to the extreme hurt both of the English and strangers; but that such either speedily return into their own countries, or put themselves to work as hired servants, according to the true meaning of our laws, or else shall undergo the severity of our laws provided and in force against them." Then comes a third, in relation to the persecuted French Protestants, which is too interesting to you as a Frenchman to be omitted. "Notwithstanding our will and pleasure is, that unto such of the French nation, who, by reason of the late troubles in that kingdom, (according to the league of the Duke of Guise to arrest the Protestants,) have had their refuge hither, there shall be showed such favour beyond the proportion of other strangers as our commissioners shall think fit, if, within a convenient time after these troubles shall have overblown, they shall return into their own country

again." Thus stood the matter in the reign of King James I.

In my next I shall proceed further on this subject of commercial rights.

I remain yours, &c.

## THE PROPERTY LAWYER.

### No. LI.

#### ON THE FORCE OF THE WORD "PROVIDED" IN A LEASE.

"Provided always," and it is hereby agreed, that in case at any time hereafter during the continuance of this demise, *J. H.* or his heirs shall be desirous of residing at *B.*, and signify the same to *C. H.*, his executors, &c., that he shall, within three months after receiving notice, surrender to him or them the possession of the dwelling-house, &c. hereby demised for the remainder of the term; in consideration whereof *J. H.* or his heirs shall build the skilling part of the house called the White House, in *B.* aforesaid, as high as the front, and make proper chambers in the upper part thereof for the gratuitous occupation of *C. H.*, his executors, &c. during the remainder of the term; and also allow to *C. H.*, his executors, &c., out of the rent, the annual sum of 22*l.* 5*s.* by half-yearly portions, *C. H.*, his executors, continuing to pay all taxes as before; those for the White House to be paid by *J. H.* or his heirs."

The notice required was given, and possession demanded, but refused. Mr. *Abbott* (afterwards Lord *Tenterden*) was desired to draw a declaration in ejectment, and to give his opinion whether an action would lie against *C. H.* for not quitting.

The following was his opinion:—

The import of the clause for surrendering the possession of the mansion house, &c. may admit of strong doubt; but according to Litt. sect. 329, *Lord Cromwell's case*, 2 Co. 696, and the cases of *Simson v. Titnell* and *Lord Pembroke v. Barclay*, (2 And. 20; Cro. Eliz. 384; Moor. 706) cited in that case, fo. 716. I think the word "provided" in this clause makes a condition to which the whole term is subject; and that for the non-performance of the condition, *J. H.* may avoid the lease as to all the premises demised. From this, however, he will have disabled himself, if he has done any act that may amount to a dispensation of the forfeiture, as acceptance of the rent due since the expiration of the three months; I also think he cannot maintain an ejectment, unless he built up the White House so as to have it ready for the reception of *C. H.* at the end of the three months. See the last case put by *Anderson*, Ch. J. in his argument on *Lord Cromwell's case*, 2 And. 72. The declaration I have drawn is so framed as to enable *J. H.* to recover all the premises comprised in the lease; and if the clause in the question be considered not as a condition

extending to the whole estate, but only as a limitation of the term in the particular part to be surrendered, (see 2 And. 72; Dyer, 221, (a) in margin) that part alone may be recovered under this declaration: unless, however, the word "*provided*" shall be held to make either a general condition, or a partial limitation, *J. H.* cannot maintain an ejectment even for the particular part, but must bring an action of covenant; for the clause in question is certainly a covenant on the part of the lessee, and the two cases above cited from 2 Co. shew that it may be both a condition and a covenant. But if the lessor choose to bring an ejectment as for the breach of a condition, it seems, from the opinion of *Montague*, Ch. J., Dal. 8, that he cannot also maintain an action of covenant. If he choose to waive the forfeiture, he most certainly may maintain an action of covenant, and I would advise him to bring that action rather than an ejectment, to avoid all doubts; because I think it probable that if an action of covenant is brought, the lessee will give up the premises specified, in order to compromise that action; but of this matter *J. H.* can form the best judgment for himself, if it should be held that this is a condition, and that the lessor has by law a right of re-entry into all the premises. Yet I think a Court of Equity will relieve the lessor, upon his surrendering the particular parts, and making compensation to *J. H.* for the damage he may have sustained by the neglect to surrender in due time."

## CHANGES MADE IN THE LAW DURING THE LAST SESSION OF PARLIAMENT.

### No. III.

#### LIMITATION OF POLLS AT ELECTIONS.

5 & 6 W. 4, c. 36.

THIS is intituled "An Act to limit the Time of taking the Poll in Boroughs at contested Elections of Members to serve in Parliament to One Day."

It recites, that it would tend to promote the purity of elections and the diminution of expense if the poll at all contested elections of members to serve in parliament were taken in one day. By the 2 & 3 W. 4, c. 45, such poll might remain open during two days. It is now enacted,—

1. That from the passing of this act such part of the recited act as allows the poll to continue open during two days in cities, boroughs, and towns, or in counties of cities or counties of towns, shall be repealed.

2. That at every contested election of a member or members to serve in parliament for any city, borough, or town, or county of a city, or county of a town, the polling shall commence at *eight* of the clock in the forenoon of the day next following the day fixed for the election; and the polling shall continue during such one day only; and no poll shall be kept open later than *four* of the clock in the afternoon: Provided, that when such day next following the day fixed for the election shall be Sunday, Good Friday, or Christmas Day, then in the case it be Sunday the poll shall be on the Monday next following; and in the case it be Good Friday, then on the Saturday next following; and in the case it be Christmas Day, then on the next following day, if the same shall not be Sunday, and if it be Sunday, on the next following Monday.

3. That the polling booths or compartments at each polling place shall be so divided and arranged by the sheriff or other returning officer that not more than *three hundred* electors shall be allotted to poll in each such booth or compartment.

4. That on the requisition of any candidate, or of any elector being the proposer or seconder of any candidate, the booths or compartments of each polling place shall be so divided and arranged by the sheriff or other returning officer that not more than *one hundred* electors shall be allotted to poll in each such booth or compartment: Provided, that such candidate or elector making such requisition shall pay all expenses incident upon such division or arrangement.

5. That in case any requisition as aforesaid shall be made on or before the day fixed for the election, the sheriff or other returning officer shall forthwith give public notice of the situation of such booths, which shall be deemed to be sufficient notice, any law or statute to the contrary notwithstanding.

6. That no elector at any election shall be required to take the oaths commonly called the oaths of allegiance, abjuration, and supremacy, nor any oath or oaths required to be taken by any act of parliament in lieu thereof; any law or statute to the contrary notwithstanding.

7. That such of the freemen of the city of London, being liverymen, as are or shall be entitled to vote in the election of members to serve in any future parliament for the city of London in the Guildhall, and who are or shall be also entitled to vote in such election as owner or tenant of premises in such city, shall be entitled to vote at any

such election at the booth or place appointed for the parish, district, or part wherein the property may be situate in respect of which he is so entitled to vote as aforesaid; and that such vote shall be entered in the poll books either as the vote of a liveryman, or as owner or tenant, as the person so voting shall direct.

8. That where the proceedings at any election shall be interrupted or obstructed by any riot or open violence, whether such proceedings shall consist of the nomination of candidates or of the taking the poll, the sheriff or other returning officer, or the lawful deputy of any returning officer, shall not for such cause terminate the business of such nomination, nor finally close the poll, but shall adjourn the nomination or the taking the poll at the particular polling place or places at which such interruption or obstruction shall have happened until the following day, and, if necessary, shall further adjourn such nomination or poll, as the case may be, until such interruption or obstruction shall have ceased, when the returning officer or his deputy shall again proceed with the business of the nomination or with the taking the poll, as the case may be, at the place or places at which the same respectively may have been interrupted or obstructed; and the day on which the business of the nomination shall have been concluded shall be deemed to have been the day fixed for the election, and the commencement of the poll shall be regulated accordingly; and any day whereon the poll shall have been so adjourned shall not as to such place or places be reckoned the day of polling at such election, within the meaning of this act; and whenever the poll shall have been so adjourned by any deputy of any sheriff or other returning officer, such deputy shall forthwith give notice of such adjournment to the sheriff or returning officer, who shall not finally declare the state of the poll, or make proclamation of the member or members chosen, until the poll so adjourned at such place or places as aforesaid shall have been finally closed, and the poll books delivered or transmitted to such sheriff or other returning officer: Provided that this act shall not be taken to authorize an adjournment to a Sunday; but that in every case in which the day to which the adjournment would otherwise be made shall happen to be a Sunday, Good Friday, or Christmas Day, that day or days shall be passed over, and the following shall be the day to which the adjournment shall be made.

9. This act shall not be construed to apply to Ireland or to Scotland.

We observe that Mr. Wordsworth has added this act as an Appendix to his book; and he remarks that the provision in section 2, for the commencement and duration of the poll, applies only to a contested election; therefore, where there is no opposition, the election may be held and concluded on the precise day fixed for the election; but, in the former case, an adjournment must take place after the candidates shall have been nominated.

The expenses of polling booths must not exceed 25*l.* for the booth or booths for any parish, &c. These booths may be situated either in one place or in several places.

Public notice, two days before the commencement of the poll, stating the situation, division, and allotment of the different booths, must have been given by the returning officer under the Reform Act. But this act of 5 & 6 W. 4, c. 36, having by the 2d section directed the poll to take place on the day following the nomination day, it follows that this two days' notice cannot be given; and as that enactment is silent as to any notice, except in the case of a subdivision of the booths, so as that only one hundred electors shall be polled thereat, it may be said that no notice is hereafter to be given of the number and places of the polling booths, with the single exception before mentioned.

By the present act the oaths of allegiance, abjuration, and supremacy, or any oaths required by the statute to be taken in lieu thereof, are now abolished. Sec. 6.

With respect to London, the poll of the liverymen was required to be taken in Guildhall; and no where else. But now, where the liverymen are also entitled to vote as owners or tenants of premises in London, they may vote at the booth for the particular district in which such property may be situated, and have their names entered in the poll books as liverymen, or owners, or tenants, as they themselves shall direct. Sec. 7.

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#### LIST OF ALL THE STATUTES, 5 & 6 GUL. IV., 1836.

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##### PUBLIC GENERAL ACTS.

1. An act to explain an act of the first year of his present Majesty, for the more effectual administration of justice in England and Wales, so far as relates to the execution of criminals in the county of Chester.

2. An act to amend an act of the thirty-eighth year of King George the Third, for preventing the mischiefs arising from the printing and publishing newspapers, and papers of a like nature, by persons not known, and for regulating the printing and publication of such papers in other respects; and to discontinue certain actions commenced under the provisions of the said act.

3. An act to apply certain sums to the service of the year 1835.

4. An act for raising the sum of fifteen millions by Exchequer bills, for the service of the year 1835.

5. An act for punishing mutiny and desertion, and for the better payment of the army and their quarters.

6. An act to indemnify the Governor-General and other persons in respect of certain acts done in the administration of the government of the British territories in the East Indies, subsequent to the 22d day of April, 1834, and to make those acts valid.

7. An act for the regulation of his Majesty's Royal Marine forces while on shore.

8. An act for the more effectual abolition of oaths and affirmations taken and made in various departments of the State, and to substitute declarations in lieu thereof; and for the more entire suppression of voluntary and extra-judicial oaths and affidavits.

9. An act to apply a sum of eight millions, out of the consolidated fund, to the service of the year 1835.

10. An act to allow, until the 28th day of July 1835, the importation of certain articles, duty free, into the island of Dominica, and to indemnify the governor and others for having permitted the importation of such articles duty free.

11. An act to indemnify such persons in the United Kingdom as have omitted to qualify themselves for offices and employments, and for extending the time limited for those purposes respectively until the 25th day of March, 1836, to permit such persons in Great Britain as have omitted to make and file affidavits of the execution of indentures of clerks to attorneys and solicitors to make and file the same on or before the first day of Hilary term 1836; and to allow persons to file and make such affidavits, although the persons whom they served shall have neglected to take out their annual certificates.

12. An act for continuing to his Majesty, until the 5th day of July 1836, certain duties on sugar imported into the United Kingdom, for the service of the year 1835.

13. An act to regulate the importation of corn into the Isle of Man.

14. An act to continue to the 31st day of December 1836, and from thence to the end of the then next session of parliament, an act of the tenth year of his late Majesty's reign, for providing for the government of his Majesty's settlements in Western Australia on the Western Coast of New Holland.

15. An act to continue until the 31st day of May 1838, and to the end of the then next

session of parliament, the allowances of the duty of excise on soap used in certain manufactures.

16. An act for altering and amending the law regarding commitments by courts of equity for contempt, and the taking bills *pro confesso*, in Ireland.

17. An act to extend to Ireland certain provisions of an act made and passed in the first year of his present Majesty's reign, intituled an act for consolidating and amending the laws relating to property belonging to infants, females covert, lunatics, and persons of unsound mind.

18. An act to exempt carriages carrying manure from toll.

19. An act to amend and consolidate the laws relating to the merchant seamen of the United Kingdom, and for forming and maintaining a register of all the men engaged in that service.

20. An act to consolidate certain offices in the collection of the revenues of stamps and taxes, and to amend the laws relating thereto.

21. An act to amend and alter an act of the 59th year of his late Majesty King George the Third, for vesting in commissioners the line of road from Shrewsbury in the county of Salop, to Bangor Ferry in the county of Carnarvon; and for discharging the trustees under several acts of the 17th, 28th, 36th, 41st, 42d, 47th, and 50th years of his then present Majesty, from the future repair and maintenance thereof, and for repealing so much of the said acts as affects the same line of road.

22. An act to continue for three years, and from thence to the end of the then next session of parliament, two acts of the second and third year and the third and fourth year of his present Majesty, relating to the care and treatment of insane persons in England.

23. An act for the establishment of loan societies in England and Wales; and to extend the provisions of the friendly societies' acts to the islands of Guernsey, Jersey, and Man.

24. An act for the encouragement of the voluntary enlistment of seamen, and to make regulations for more effectually manning his Majesty's navy.

25. An act to extend the accommodation by the post to and from foreign parts, and for other purposes relating to the Post-office.

26. An act for the appointment of convenient places for the holding of Assizes in Ireland.

27. An act to continue and amend certain regulations for the linen and hempen manufactures in Ireland.

28. An act for removing doubts as to the declaration to be made and oaths to be taken by persons appointed to the office of sheriff of any city or town being a county of itself.

29. An act for investing in government securities a portion of the cash lying unemployed in the Bank of England belonging to bankrupt estates, and applying the interest thereon in discharge of the expences of the Court of Bankruptcy, and for the relief of the suitors in the said court; and for removing

doubts as to the extent of the powers of the Court of Review, and of the Subdivision Courts.

30. An act for protecting the revenues of vacant ecclesiastical dignities, prebends, canons, and benefices without cure of souls, and for preventing the lapse thereof, during the pending inquiries respecting the state of the established church in England and Wales.

31. An act to give effect and validity to certain contracts and presentments for repairing and keeping in repair certain public roads in Ireland, and the sureties entered into for the execution thereof.

32. An act to impose certain duties on tea.

33. An act for preventing the vexatious removal of indictments into the Court of King's Bench; and for extending the provisions of an act of the fifth year of King William and Queen Mary, for preventing delays at the quarter sessions of the peace, to other indictments; and for extending the provisions of an act of the 7th year of King George the Fourth, as to taking bail in cases of felony.

34. An act to amend two clerical errors contained in an act passed in the ninth year of the reign of his late Majesty King George the Fourth, intituled an act for consolidating and amending the Laws in Ireland relative to larceny and other offences connected therewith.

35. An act for consolidating the offices of Paymaster-General, Paymaster and Treasurer of Chelsea Hospital, Treasurer of the Navy, and Treasurer of the Ordnance.

36. An act to limit the time of taking the poll in boroughs at contested elections of members to serve in parliament to one day.

37. An act for the further reduction of the militia staff, and to suspend the ballot for the militia.

38. An act for effecting greater uniformity of practice in the government of the several prisons in England and Wales; and for appointing inspectors of prisons in Great Britain.

39. An act to exempt certain retailers of spirits to a small amount from the additional duties on licenses; and to discontinue the excise survey on wine, and the use of permits for the removal thereof.

40. An act to provide for the better collection of the duties on wood, the produce of places in Europe.

41. An act to amend the law relating to securities given for considerations arising out of gaming, usurious, and certain other illegal transactions.

42. An act to authorize the granting of superannuation allowances to the commissioners and officers of the courts for the Relief of insolvent debtors.

43. An act for enlarging the powers of magistrates in the appointment of special constables.

44. An act for raising the sum of thirteen millions five hundred twenty-one thousand five hundred and fifty pounds by exchequer bills, for the service of the year 1835.

45. An act to carry into further execution

the provisions of an act passed in the third and fourth years of his present Majesty, for compensating owners of slaves upon the abolition of slavery.

46. An act to amend until the end of the next session of parliament, an act of the second year of his present Majesty, for making provision for the dispatch of the business now done by the Court of Exchequer in Scotland.

47. An act to repeal so much of an act passed in the third and fourth years of his present Majesty as relates to the amount of the salary granted to the clerk of the crown in Chancery, and to make other provisions in relation to the said office.

48. An act for the better prevention and more speedy punishment of offences endangering the public peace in Ireland.

49. An act for continuing, until the first day of June 1837, the several acts for regulating the turnpike roads in Great Britain which will expire on the first day of June 1836, or with the next session of parliament.

50. An act to consolidate and amend the laws relating to highways in that part of Great Britain called England.

51. An act for granting relief to the island of Dominica; and to amend an act of the second and third years of his present Majesty, for enabling his Majesty to direct the issue of exchequer bills to a limited amount for the purposes therein mentioned.

52. An act to authorize the Court of Directors of the East India Company to suspend the execution of the provisions of the act of the third and fourth William the Fourth, chapter eighty-five, so far as they relate to the creation of the government of Agra.

53. An act to repeal an act of the ninth year of his late Majesty, for regulating the carriage of passengers in merchant vessels from the United Kingdom to the British Possessions on the continent and islands of North America; and to make further provisions for regulating the carriage of passengers from the United Kingdom.

54. An act to render certain marriages valid, and to alter the law with respect to certain voidable marriages.

55. An act for facilitating the appointment of sheriffs in Ireland, and the more effectual audit and passing of their accounts; and for the more speedy return and recovery of fines, fees, forfeitures, recognizances, penalties, and deodands; and to abolish certain offices in the Court of Exchequer in Ireland; and to amend the laws relating to grants in custodiam and recovery of debts in Ireland; and to amend an act of the second and third years of his present Majesty, for transferring the powers and duties of the commissioners of public accounts in Ireland to the commissioners for auditing the public accounts of Great Britain.

56. An act to regulate the admeasurement of the tonnage and burthen of the merchant shipping of the United Kingdom.

57. An act to extend to Scotland certain provisions of an act of the ninth year of his late Majesty, to consolidate and amend the

laws relating to savings banks; and to consolidate and amend the laws relating to savings banks in Scotland.

58. An act to amend the acts relating to the hereditary land revenues of the crown in Scotland.

59. An act to consolidate and amend the several laws relating to the cruel and improper treatment of animals, and the mischiefs arising from the driving of cattle, and to make other provisions in regard thereto.

60. An act for carrying into effect a treaty with the King of the French and the King of Sardinia for suppressing the slave trade.

61. An act for carrying into effect the treaty with the King of the French and the King of Denmark for suppressing the slave trade.

62. An act to repeal an act of the present session of parliament, intituled an act for the more effectual abolition of oaths and affirmations taken and made in various departments of the State, and to substitute declarations in lieu thereof, and for the more entire suppression of voluntary and extra-judicial oaths and affidavits, and to make other provisions for the abolition of unnecessary oaths.

63. An act to repeal an act of the fourth and fifth year of his present Majesty relating to weights and measures, and to make other provisions instead thereof.

64. An act to alter certain duties of stamps and assessed taxes, and to regulate the collection thereof.

65. An act for preventing the publication of lectures without consent.

66. An act to amend the law relating to the customs.

67. An act for the improvement of the navigation of the river Shannon.

68. An act to defray the charge of the pay, clothing, and contingent and other expences of the disembodied militia in Great Britain and Ireland; and to grant allowances in certain cases to subaltern officers, adjutants, paymasters, quarter-masters, surgeons, assistant surgeons, surgeons mates, and serjeant-majors of the militia, until the 1st day of July 1836.

69. An act to facilitate the conveyance of workhouses and other property of parishes and of incorporations or unions of parishes in England and Wales.

70. An act for abolishing in Scotland, imprisonment for civil debts of small amount.

71. An act for appointing commissioners to continue the inquiries concerning charities in England and Wales until the 1st day of March 1837.

72. An act for abolishing the excise incorporation in Scotland, and for transferring the funds of the said incorporation to the consolidated fund, and providing for the payment of the annuities to the widows and orphans of late and present members of the incorporation fund.

73. An act to provide that persons accused of forgery in Scotland shall not be entitled to bail unless in certain cases.

74. An act for the more easy recovery of tithes.

75. An act for the amendment of the law as to the tithing of turnips in certain cases.

76. An act to provide for the regulation of municipal corporations in England and Wales.

77. An act to repeal the duty and drawback on flint glass, to impose other duties and another drawback in lieu thereof, and to reduce the drawback on German sheet glass exported in panes; and to repeal the drawback on unground and unpolished plate glass; and to amend the laws relating to the duties on glass.

78. An act to explain and amend an act passed in the second and third year of the reign of King William the Fourth, for amending the representation of the people in Scotland; and to diminish the expenses there.

79. An act to suspend, until after the 6th day of April 1836, proceedings for recovering payment of certain instalments of the money advanced under the acts for establishing tithe compositions in Ireland.

80. An act to apply a sum of money out of the consolidated fund and the surplus of ways and means to the service of the year 1835, and to appropriate the supplies granted in this session of parliament.

81. An act for abolishing capital punishments in cases of letter stealing and sacrilege.

82. An act to abolish certain offices connected with fines and recoveries and the cursitors in the Court of Chancery, and to make provision for the abolition of certain offices in the superior courts of common law in England.

83. An act to amend the law touching letters-patent for inventions.

84. An act to empower grand juries in Ireland to raise money by presentment for the construction, enlargement, or repair of piers and quays.

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## USAGE OF THE PROFESSION.

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### PREPARATION OF LEASE.

*To the Editor of the Legal Observer.*

Sir,

*A.* is mortgagor of leasehold property; *B.* is mortgagee, in receipt of the rents and profits. A new lease of the property is about to be made to the under-tenant, for the purpose of completing a sale to *C.*, who has contracted for the purchase with *A.*, *B.* consenting to the sale. Out of the purchase money, *B.* by the contract between *A.* and *C.*, is to be paid his mortgage money and interest. Which solicitor is entitled to the preparing such lease—*A.*'s or *B.*'s?

H. M. R.



## SUPERIOR COURTS.

## Lords Commissioners' Court.

## WILL.—CONSTRUCTION.—SEPARATE USE.

*A testator directed the interest of 10,000*l.* to be for the separate use of his daughter, the wife of J. B. Lane, during her life, free from the debts and control of her husband. The daughter survived her husband J. B. Lane, and married again: Held, that the trust for her separate use ceased on the death of her first husband, and that the second husband was entitled to receive the interest.*

This was an appeal from a decision of the Vice Chancellor, on a demurrer to the plaintiff's bill. The question arose out of the construction of the will of a person named Griffith, who had charged a plantation in Barbadoes with the payment of a sum of 10,000*l.*, Barbadoes currency; the annual interest thereof to be paid to the exclusive use and benefit of his daughter, the wife of John Branford Lane, Esq. during her life, free from the debts and control of her husband, and the principal to be divided among her children at her death, and in default of children, then to return to the estate of the testator's eldest son. J. B. Lane having died, the widow married the plaintiff, and he claimed to be absolutely entitled to the interest of his wife in the fund, on the ground that the exclusion in the will of the testator applied solely to the first husband, and was not to be construed as applying to a second husband. A general demurrer to the bill was overruled by the Vice Chancellor.

Mr. Tinney, and Mr. Blenman, in support of the appeal from his Honor's decision, cited and commented on a great number of cases, among which were the following: *Mussey v. Parker*,<sup>a</sup> *Woodmeston v. Walker*,<sup>b</sup> *Barton v. Briscoe*,<sup>c</sup> *Acton v. White*,<sup>d</sup> *Adamson v. Armistage*,<sup>e</sup> *Anderson v. Anderson*,<sup>f</sup> *Blake v. Lyne*,<sup>g</sup> *Tyler v. Lake*,<sup>h</sup> *Newton v. Reid*,<sup>i</sup> *Brandon v. Robinson*,<sup>k</sup> *Beable v. Dodd*,<sup>l</sup> *Brown v. Pocock*,<sup>m</sup> and *Knight v. Knight*.<sup>n</sup>

Sir C. C. Pepys stopped Mr. Kindersley, who was about to support the decision of the Court below, by declaring that he entertained not the

least doubt on the question. The will, being read as a whole, clearly shewed the testator's intention to be the exclusion of the husband John Branford Lane. It was true that he did not seem to have contemplated the possibility of a second marriage, or of the husband dying before the wife; but as he had not excluded any future husband, the Court was not to do that for him which he had not thought proper to do himself. If it did so, it would insert words which were not to be found in the will of the testator, and it might be giving an improper construction to his intentions. It was his opinion, on a consideration of the whole of the language of the will, that the Vice Chancellor's decision was right.

Sir J. Bosanquet was of the same opinion. The case of *Beable v. Dodd*,<sup>o</sup> had been cited as precisely similar to the present; but it would be found on examination, that it was materially different, and that the present and every future husband were in that case distinctly excluded. That was clear from the will, but more clear from a codicil, in which the testator having outlived his daughter's first husband, repeated his restriction with respect to every future husband. In the present case the will pointed at only one husband, who was expressly named.

*Benson v. Benson*,<sup>p</sup> before the Lords Commissioners at Lincoln's Inn, August 7, 1835.

<sup>o</sup> 1 T. Rep. 193.

<sup>p</sup> The words of the testator in this case were, "I do hereby charge and make my said plantation, called Windsor, and the lands, buildings, slaves, and stock thereof, liable to the payment of the sum of 10,000*l.* Barbadoes currency, at lawful interest, from the day of my death, to the following uses, that is to say: the annual interest to accrue thereon, to be to and for the sole, separate, and exclusive use and benefit of my daughter Jane Abel Lane, the wife of John Branford Lane, Esq. for and during her natural life, totally free and independent of the debts, control, or engagements of her husband, and for which her receipt alone, or the receipts of such person or persons as she shall alone appoint from time to time, to be a sufficient discharge; and I do direct that such interest shall be paid to her at the end of every six months, either in this island, or in England, as she shall desire. And from and after the death of my said daughter, I do give &c. the said sum of 10,000*l.* unto and amongst all and every the children of my said daughter, by her said husband the said J. B. Lane; save and except the child who shall be entitled to and become possessed of Castle Grant Plantation, &c. to be equally divided between and amongst them, share and share alike, at the age of twenty-four years if sons, and at the said age of twenty-four years, or day or days of marriage if daughters, &c."

<sup>a</sup> 2 Myl. & K. 174; S. C. 9 Leg. Obs. 203.

<sup>b</sup> Ib. 197.

<sup>c</sup> Jacob, 603.

<sup>d</sup> 1 Sim. & Stu. 429.

<sup>e</sup> 19 Ves. 416.

<sup>f</sup> 2 Myl. & K. 427.

<sup>g</sup> 1 Younge, 562.

<sup>h</sup> 2 Russ. & M. 183; S. C. 4 Sim. 144.

<sup>i</sup> 4 Sim. 141.

<sup>k</sup> 8 Ves. 429.

<sup>l</sup> 1 Ter. Rep. 193.

<sup>m</sup> 2 Russ. & Myl. 210; S. C. 2 Myl. & Keen, 189.

<sup>n</sup> 8 Leg. Obs. 107. See also the cases collected, and the observations on them, 7 Leg. Obs. 113; 9 Leg. Obs. 228; 10 Leg. Obs. 122.

**Rolls Court.****PLEADING.—DEMURRER.**

*Demurrer to a bill of discovery, in aid of a defence to an action at law, was overruled, on the ground that one of the plaintiffs in the bill was not a party to the action, and the other plaintiffs being mere stakeholders, stood indifferent as to the result of the action.*

This was a demurrer to a bill for a discovery, in aid of a defence to an action at law, and for a commission to examine witnesses in Portugal. The bill stated, among other things, that in the year 1833, Don Miguel, then *de facto* King of Portugal, having occasion to raise a sum of money, empowered the house of Outrequin and Jange, of Paris, to negotiate a loan by means of bonds, which were transmitted to them, and for payment of which the Portuguese government made itself liable. These bonds were sold, and the proceeds remitted by the agents to Lisbon. Among the proceeds were six bills of exchange, alleged in the bill to have been drawn by a Baron D'Este, and accepted by the plaintiffs, Gower and Co., Bankers in London. The Baron remitted these bills to Senor Conto, the treasurer of the Portuguese Government, in whose bureau they remained until the accession of Donna Maria to the throne, whose ministers seized on the treasury, and finding these bills among the contents, sent them over to this country to be paid by the acceptors. The defendant Soares, the agent of the present Portuguese Government, brought an action in his own name, and in that of Donna Maria, against the plaintiffs, for the amount of the bills, and that action is still pending.\* The plaintiffs Gower and Co., and a Mr. Richardson, endorsee of the bills, filed the bill; and the chief ground of demurrer was, that Mr. Richardson was not a proper party to the bill, because he was not a party to the action at law.

Mr. Pemberton, in support of the demurrer.  
Mr. J. Russell contra.

The Master of the Rolls, after referring to the facts as disclosed by the bill, said that there were three grounds, on which this demurrer was sought to be sustained. The first was, that Mr. Richardson had been improperly made a party to the bill; the second, that the matters sought to be disclosed, were not material to the defence of the action at law; and the third, that the Queen of Portugal had been improperly made a party defendant. It was not his intention to enter into the two latter points, one of which was lately much discussed,<sup>b</sup> or to express any opinion upon them; for the first objection was in itself sufficient to enable him to come to a decision as to the merits of this demurrer. Messrs. Gower distinctly stated, that they had no interest in the

subject matter of the suit; they were only the acceptors of the bills, which had been put into their hands by the plaintiff Mr. Richardson. They were in possession of the funds for payment of the acceptances, as soon as either of the contending parties made a good title to it. Mr. Richardson clearly had no right to come to a Court of Equity for a discovery or defence of an action to which he was not a party: and the other plaintiffs, who stood nearly in his situation, although they might perhaps have obtained some discovery, had no right to put themselves in a better situation than he: under these circumstances he should allow the demurrer, and not give leave to amend the bill.—*Gower and others v. Soares and others*, at the Rolls, July 21, 1835.

**King's Bench Practice Court.****AFFIDAVIT OF DEBT.—ASSIGNEES.—BANKRUPT.—INTEREST.—PRINCIPAL.—REQUEST.**

*If an affidavit to hold to bail is made by the assignee of a bankrupt, it is sufficient, although there is nothing to show that the bankrupt himself cannot make the affidavit. An affidavit to hold to bail, if it claims interest generally, is sufficient if it claims it in respect of an "agreement" for that purpose; but its claim generally as damages vitiates the affidavit.*

This was an application to discharge a defendant out of custody on meane process, on the ground of a defect alleged to exist in the affidavit to hold to bail.

The affidavit was made by the assignee of a bankrupt, and was in the following terms:—"George Harrison, of Whitehaven, in the county of Cumberland, banker, one of the assignees of the estate and effects of Edward Johnston, Anthony Adamson, and John Hope, late of Whitehaven aforesaid, bankers, bankrupts, maketh oath and saith, that Miles Turner, of Haigh, near Wigan, in the county of Lancaster, and William Bland, of Whitehaven, in the county of Cumberland, late ironmongers and partners, are justly and truly indebted unto him this deponent, Thomas Milward and Thomas Braithwaite, as assignees of the estate and effects of the said Edward Johnston, Anthony Adamson, and John Hope, bankrupts, in the sum of 79*l.* and upwards, on the balance of accounts for money lent and advanced, and money paid, laid out, and expended by the said Edward Johnston, Anthony Adamson, and John Hope, before they became bankrupts, to and for the use and on the account of the said Miles Turner and William Bland, and at their request, and for interest thereon agreed to be paid by the said Miles Turner and William Bland, as appears to deponent by the books of account of the said bankrupts, and as he this deponent verily believes to be true."

The alleged objections were—First, that the affidavit was made by the assignees of the bankrupt, and not by the bankrupt, there being no

\* The late Lord Chancellor granted an injunction on terms, to restrain the action.

<sup>b</sup> See *King of Spain v. Hullock*, 1 Dow. & Clark, 169; and 1 Clark & Finnelly, 333.

thing to shew that the bankrupt could not make it himself. Secondly, that the claim for interest was not sufficiently stated to authorize the arrest of the defendant. On the first point, it was contended, that the defendant's assignee, who appeared to be the person making the affidavit, had no means of knowledge as to the concerns of the bankrupt, and consequently of the debt now sought to be claimed, except by hearsay. Under these circumstances he was not a proper person to make the affidavit to hold to bail. With respect to the second point, if the Court should be of opinion that the assignee was a proper person to make the affidavit, the cases had decided that the claim of interest generally, as for damages, would not be allowed, and therefore here the claim for interest was insufficient to maintain the affidavit. According to the mode in which it was here claimed, the interest might be claimed in respect of a mere claim of interest as damages, or upon an insufficient consideration.

In support of the affidavit, it was contended, that the claim was sufficiently stated in order to authorize the detention of the defendant in custody. It did not follow that because the assignee who made the affidavit might have no knowledge of the debt except from the books of the bankrupt, that therefore he had none other. He might have been present at the time when the debt was incurred. If any reason existed for believing that he had no knowledge on that point, it was for the defendant to shew that such want of knowledge existed. If he had sworn falsely he was liable to an indictment for perjury, which might be preferred. It was true, it had been decided that the claim for interest in an affidavit of debt, as damages merely, could not be supported; but it could be supported, if it appeared that the interest was claimed in respect of an agreement. Here such a claim was disclosed in the affidavit, and therefore the affidavit was sufficient.

*Coleridge, J.*, was of opinion that the affidavit was sufficiently distinct to entitle the plaintiff to hold the defendant to bail. It was unusual to enter into the means of knowledge possessed by any person making an affidavit. If such an inquiry were entertained, it would be almost trying the merits of the case. With respect to the claim of interest, the statement being of a claim pursuant to an agreement, it is as much a claim for a debt as any other claim which could be set up. The present affidavit stated the claim for interest to be in pursuance of an agreement; it was therefore sufficient. The present rule must therefore be discharged.

Rule discharged.—*Harrison and others, assignees, &c. v. Turner and another*, T. T. 1835. K. B. P. C.

### Common Pleas.

PLEADING.—SPECIAL PLEA.—ATTORNEY'S SIGNED BILL.—MERITS.—NEW RULES OF PLEADING.—GENERAL ISSUE.

*A plea of no attorney's signed bill having been delivered, is not a plea to the merits after a defendant has been let in to try them, as a term on which a regular interlocutory judgment is set aside.*

*It is doubtful, since the new pleading rules have come into operation, whether such an alleged deficiency can be taken advantage of under the general issue, or ought to be pleaded specially to the declaration.*

On shewing cause against a rule *nisi* for rescinding a Judge's order for striking out a special plea, the following facts appeared:

The present was an action on an attorney's bill. The defendant not pleading in time, an interlocutory judgment was signed by the plaintiff. The defendant afterwards applied to set aside the judgment, which was regularly signed, on condition of paying costs, and an affidavit of merits. The Court, on these terms, set aside the judgment. Instead of pleading to the merits, the defendant pleaded that the plaintiff had not delivered in due time a signed bill of costs, charges, and disbursements. This plea having been delivered, the plaintiff kept it in his possession for twenty-two days. He then took out a summons before Mr. Justice *Park* at chambers, requiring the defendant to shew cause why the plea so pleaded should not be struck out, on the ground that it was not a plea to the merits, as was required after his affidavit of merits. His Lordship made an order to strike out the plea, and a rule *nisi* was obtained for rescinding that order.

Cause was now shewn against this rule. It was contended, that the plea in question was not such a one as was required on the part of the defendant after making an affidavit of merits. This could not, under such circumstances, be considered as a plea to the merits.

In support of the rule, it was submitted, that as the statute required the delivery of a signed bill in due time, in order to entitle the attorney to recover, the non-delivery of such a bill must be considered as a plea to the merits. It had been held in one case at *nisi prius*, that such a defence cannot be rendered available under the general issue. The plaintiff had, however, clearly waived any supposed objection he might have to this plea, by the length of time he had kept it in his possession.

The Court was of opinion that this was not a plea to the merits. Whether it could or could not be rendered available under the general issue, was not necessary here to decide, although the inclination of Mr. Justice *Park's* mind was that it could, and therefore that it was not necessary that it should be pleaded specially. With regard to the delay, if the objectionable proceeding was a mere irregularity, it might be an answer to the application; but by treating this plea as one to the merits, the plaintiff would be deprived of the benefit of all the expenses and trouble he has incurred

already, and compelled to bring a new action. Under these circumstances the Court could not interfere to rescind the order made by Mr. Justice Park. The present rule must therefore be discharged, but without costs, on account of the delay on the part of the plaintiff in objecting to the plea.

Rule discharged, without costs.—*Beck v. Mordaunt*, T. T. 1835. C. P.

### Exchequer of Pleas.

#### ARBITRATION.—AWARD.—TRESPASS.—FINAL DECISION.

*If an arbitrator makes an award by which he substantially, though not formally, determines the matter in dispute, his award is good.*

This was an application for a rule to show cause why an award should not be set aside on the ground of its not having decided finally the question raised before the arbitrator. It was an action of trespass, and the following was the state of the pleadings:—

The declaration contained three counts—1st. for breaking and entering the plaintiff's house, where he carried on the business of a linen-draper, and carrying away a large quantity of the plaintiff's goods; 2d. for breaking and entering another dwelling-house, and turning the plaintiff and his family out of possession; 3d. that the defendants assaulted Mary Bird, the wife of the plaintiff, and imprisoned her, whereby the plaintiff lost her society and assistance. The defendant pleaded as to breaking and entering the plaintiff's house in the first count, and making a noise and disturbance, and seizing and taking away the goods there mentioned, being in the possession of the plaintiff, that he paid 5*l.* into Court, and that the plaintiff had not sustained more damage than 5*l.* in respect of those trespasses; and as to the carrying away of the goods and converting and disposing thereof to their own use, that the defendants committed those trespasses as the servants of one J. S. Groom, the assignee of Mr. Baker, and by command of the assignee and by the leave and licence of the plaintiff; and as to the residue of the trespasses, not guilty. The defendant replied to the first plea, that he had sustained more damages than 5*l.*; and to the 2d, that the defendants committed the trespasses of their own wrong and without the leave or licence of the plaintiff.

When the cause came on for trial at the Warwick Assizes, it was agreed that a verdict to the amount of 5,000*l.* should be entered for the plaintiff, subject to a reference. The order of *nisi prius* empowered the arbitrator to settle all matters in difference between the parties, to order and determine what was fit to be done by either of the parties concerning the matters in dispute. He was also to say for what sum the verdict was finally to be entered. By his award the arbitrator directed that the verdict should stand but only for a sum of 35*l.*

In support of the rule it was contended that the award could not be considered as final, as it did not determine the question which it was intended should be raised on the reference, as to the person in whom the property in the goods was.

Secondly, that he had not determined on a claim by the plaintiff on certain china and earthenware.

Thirdly, that the plaintiff could not be entitled to recover on the last count, as the assault upon the wife proved was committed during her husband's absence, without any proof of his losing her society or assistance. The plaintiff would, therefore, be still entitled to bring an action in the names of himself and his wife; and that difference had not been determined by the arbitrator. Rule *nisi* having been obtained—

Cause was now shown. It was contended that the award was final. As to the right of property in the goods, the arbitrator could only determine it as between the parties, and not as between third persons. By determining that the verdict should stand for 35*l.* the arbitrator had in fact determined the right of property between the parties. Secondly, it was sworn with respect to china and earthenware, that the plaintiff on discovering that no china or earthenware were mentioned in the declaration, he abandoned the claim. Thirdly, that the affidavits in answer to those produced in support of the rule showed that one assault only had been proved, and that it was left generally to the arbitrator to determine whether or not the plaintiff had a claim to damages. The arbitrator by awarding that the verdict should stand for 35*l.* generally, it was not necessary that he should specify particularly in his award the conclusion he had formed as to that part of the case. If he had formed a wrong conclusion no objection could be now taken to it, as it was a matter for the opinion of the arbitrator, and the objection did not appear on the face of the award.

In support of the rule, it was contended that the arbitrator should in his award have adjudicated on the question as to the property in the goods. Secondly, although there was no claim for china and earthenware in the declaration, yet as a claim was made before the arbitrator as a matter in difference, he should have determined on it. In one case the Court of King's Bench, when there was a reference of all matters in difference, and a claim was set up which was immediately admitted by the opposite party, but no evidence was given concerning it, nor was any adjudication required, and the Court there afterwards held that the award was bad because no notice was taken of the admitted claim as a matter in difference. Thirdly, that the question as to the assault should also have been noticed in the award, as in case of an action having been brought by the plaintiff in the name of himself and his wife, this award could not be pleaded in bar.

The Court was of opinion that the question as to the right of property in the goods was not properly a matter in difference between

the parties. With respect to the second objection concerning the earthenware and china, that claim was sworn to have been given up, and therefore differed from the case referred to in the Court of King's Bench, where the claim was not given up, but was admitted by the other side. With regard to the third point, the arbitrator had in fact settled the dispute concerning the assault. There would be no difficulty, in case of a second action being brought, in pleading this award as an answer to it. The present rule must therefore be discharged.

Rule discharged.—*Bird v. Cooper and others*. T. T. 1836. Excheq.

**COSTS.—COURT OF REQUESTS.—FINAL JUDGMENT.—SUGGESTION.—TAXATION.**

*Since the passing of the Speedy Judgment and Execution Act, a defendant may move to enter a suggestion on the record, under a Court of Requests Act, although final judgment may have been signed, but costs not taxed.*

This was a case which had been tried before the under-sheriff during term, and final judgment had been signed, but the costs not taxed, on the last day of term. The plaintiff only having recovered a very small sum, a rule *nisi* was obtained on the part of the defendant in the following term, for the purpose of depriving the plaintiff of his costs by entering a suggestion on the record.

On shewing cause against this rule it was contended that the application was too late, final judgment having been signed. It had been decided in a variety of cases, that if a defendant was desirous of availing himself of the suggestion provided by a Court of Requests Act, he must make his application before final judgment was signed. The fact of the costs not having been taxed could make no difference. Here the application was made in Trinity term, although final judgment was signed on the last day of Easter term. The present rule ought therefore to be discharged.

In support of the rule, it was contended that the application was sufficiently early. It was impossible in fact for the defendant to come sooner to the Court. The cases in question, wherein it had been decided that the application must be made before final judgment signed, were those in which the application might have been made earlier. From the time at which the trial took place, it precluded the possibility of applying for the present rule before final judgment was signed. At any rate there could be no objection to the present application, because the costs had not been taxed, and until they were taxed the defendant must be considered in time to make the application. The reason why the rule had arisen that the application must be made before the signing of final judgment was, that the taxation of costs generally took place before final judgment was signed, and the amount of costs formed a part of the sum for which the judg-

ment was signed. Here, however, the taxation had not taken place, and therefore in the present instance there could be no objection to the consideration of the amount of costs being now raised. Were it to be determined that the application for such a purpose as the present, must in all cases be made before signing final judgment, a defendant would in all cases be deprived of his right to apply to the Court, when the Judge in his discretion ordered speedy judgment and execution to issue in vacation. In those cases it would be impossible for a defendant to come to the Court before final judgment had been signed. It had, however, been determined, that an application might be made to vacate and arrest a judgment signed in vacation, if it were made in the following term. It had even been decided, in a case not yet reported, that a motion similar to the present might be entertained, although final judgment may have been signed and costs taxed.

The Court was of opinion that it was sufficiently shown by the affidavit, that the application could not be made earlier, and therefore, that the fact of final judgment having been signed was not of itself a sufficient reason for preventing the defendant making the present application. Here, moreover, the costs had not been taxed, and therefore the reason for applying before final judgment ceased. That reason was, that it would be absurd for the Court to admit a discussion as to the amount of costs, when the record shewed that the amount of them had already been settled by taxation. Under the circumstances the rule must be made absolute.

Rule absolute.—*Godson v. Lloyd*, T. T. 1835. Excheq.

**COSTS.—TROVER.—SEVERAL DEFENDANTS.—ACQUITTAL.—FINDING GUILTY.—TRESPASS.**

*If in an action of trespass there are several defendants, against some of whom a verdict is found, and some of whom are acquitted, the latter are entitled to full costs, and not to forty shillings merely.*

In this case an application was made to review the master's taxation, on the ground that he had allowed too much costs to certain of the defendants, in favor of whom a verdict in this case had been found.

It appeared from the affidavits, that the present was an action of trespass for an irregular distress. The declaration contained a count in trover. There were several defendants, to the number of four. One appeared by one attorney, and the other three by another. At the trial the jury found a verdict against the one appearing separately, and against one of the three appearing jointly, and in favor of the remaining two defendants. On taxation, the master allowed to the successful defendants their full costs.

The present application was therefore made for a rule to shew cause why the taxation should not be reviewed, it being suggested that

he ought only to have allowed the successful defendants a sum of forty shillings as costs only.

The Court was of opinion that the defendants who had obtained the verdict were entitled to their share of the full costs, which should be allowed on taxation, and not merely to a sum of forty shillings. The old course had undoubtedly been to allow only forty shillings to the defendant under such circumstances. The Judges had, however, considered the matter very maturely, and were of opinion that the old rule ought to be abolished, and therefore, that if two or three defendants were acquitted, they were entitled to two thirds of the full costs attending the defence. The master therefore, on the present occasion, had done right in allowing the two successful defendants in the present case the full costs of their defence. The rule now prayed, therefore, could not be granted.

Rule refused.—*Griffith v. Jones and three others*, T. T. 1835. Excheq.

## ANSWERS TO QUERIES.

### Law of Property and Conveyancing.

#### ESTATE TAIL GENERAL. P. 416.

The party who would be the protector depends in a great measure upon the time the settlement was made. Presuming it to have been prior to the 3 & 4 W. 4, the trustee, if the proper party to make the tenant to the writ of entry, would have been the protector. But if the settlement was made subsequent, the 27th section enacts that no bare trustee should be protector; and in that case, I should imagine, under the 22d section, the tenant by curtesy would be the protector. It is clear, that before the act, although the tenant in tail has the remainder, the former will not merge therein, but by fine. *Cruise's Dig.* 3d ed. b. 1, p. 85. So that it seems the consent of the protector is absolutely necessary before the tenant in tail can touch the fee. Sec. 15, 3 & 4 W. 4, c. 74. Perhaps he might mortgage by lease for years, to commence on the death of the tenant by curtesy. N. N.

#### REQUEST.—DISPOSAL OF REVERSIONARY INTEREST. P. 208.

It appears, first, that C. takes a vested interest, with the possession deferred, and subject to be divested in the event of his dying in the lifetime of B. without leaving issue. Secondly, that in the event of C.'s death in the lifetime of B., leaving issue, C.'s representatives would take his share. *Smither v. Willock*, 9 Ves. 234; *Blamire v. Gildart*, 16 Ves. 316. C.'s children cannot be implied; for in a gift by will there is no supposition that any person

can be intended to take, but those that are described as takers. *Tucker v. Harris*, 5 Sim. 538. R. B. W.

### Law of Attorneys.

#### SERVICE UNDER ARTICLES. P. 416.

1. The service may be either *actual* or *constructive*. And whether or not A.'s service, under the circumstances, would be deemed sufficient, must rest with his master; as if he chooses to certify, at the expiration of the five years, A. is entitled forthwith to be admitted; and no application to the Court is necessary. L. H.

2. During the period A. was absent from his master, some loss of time must necessarily have taken place, and during which there would be no legal service, and consequently the trouble and expense of new articles must be incurred. *Ex parte Rowle*, 2 Chitty's Rep. 61. It is imperatively required that there must be a service altogether of five years. 22 G. 2, c. 46, s. 8 & 10. Yet, provided the full number of days of service under articles have taken place, though at different times, that will suffice; for the service need not be absolutely continuous. *Vide Carter's case*, 2 Bla. R. 957. In the matter of *William Smith*, 1 Dowl. & R. 14; Chitty Col. Stat. p. 66, n. (a), such fresh articles must be for a further term, sufficient with the previous actual service to make up for such lost time, and not a mere assignment of the first articles; and such fresh articles must be stamped with the same duty as was payable on the original articles, though the stamp on the first articles would be allowed on delivery up of such original articles to the commissioners of stamps within six months after the execution of the new articles. *Vide* 55 G. 3, c. 184, Sched. 1, tit. Articles. W. S.

## QUERIES.

### Law of Property and Conveyancing.

#### TITLE.—TRUST.

A. B. gives an estate to trustees, upon trust for C. D. for life, and after the decease of the tenant for life, the testator gives the estate to the trustees, to the use of the first son of the body of the said C. D. lawfully begotten, and of the heirs male of the body of such first son lawfully issuing; and in default of such issue, to the second, third, and all and every other son and sons of the body of the said C. D. C. D. is still alive, and his eldest son is just arrived at the age of twenty-one years, but is not married. Can the tenant for life, the trustees, and the eldest son of the tenant for life, make a good title in fee to a purchaser? J. C.

## GIFT.—CONDITION.

*A.* bequeaths to *B.* a leasehold house, subject to a mortgage of 1800*l.* upon it, due to *C.* *C.* forgives the mortgage debt after *A.*'s death, and hands the deeds to *B.* (without any writing whatever), saying, as he delivers them, "I give it you, on condition that you pay 10*l.* per annum to *D.* for his life." *B.* accepts the gift, but does not perform the promise. What remedy has *D.* against *B.*? *D.*

## REQUEST TO WIFE.—CONDITION.

*A.* bequeaths to *his wife* a leasehold house, to become forfeited on *her marrying*; no words of limitation are used. Does the wife take a life, or what other interest, under such bequest? *D.*

## COVENANT AGAINST BUILDING.

Is a naked covenant, by a purchaser of freehold land not to build upon it, a valid and binding covenant upon the purchaser and all future owners of the property; the full value having been given for the freehold, the covenant entered into without any consideration, and no forfeiture or penalty attached in case of a breach? The covenant is by the purchaser, for himself, his heirs, executors, and administrators, with the vendor, his heirs and assigns. *C.*

## STATUTE OF LIMITATIONS.—SCOTLAND.

Will a party, who is the heir to property in Scotland, be barred from her right to the estate,—thirty years having elapsed since the death of her ancestor from whom she derives title; her right to the estate having only recently come to her knowledge? Some of your subscribers, conversant with the Scotch law, would perhaps oblige me with an answer.

INQUIRER.

## Common Law.

## CORPORATION ACT.

Sir William Blackstone, stating how corporations may be dissolved, says—"The body politic may also itself be dissolved in several ways, which dissolution is the civil death of the corporation; and in this case their lands and tenements shall revert to the person, or his heirs, who granted them to the corporation; for the law doth annex a condition to every grant, that if the corporation be dissolved, the grantor shall have the land again, because the grant of the land faileth. A corporation may be dissolved by act of parliament, which is boundless in its operations." Do not all lands devised for charitable uses revert to the heirs of the testator after the passing of the Corporation Act?

## RIGHT OF VOTING.—MORTGAGE.

*A.* and *B.* are tenants in common, and have a beneficial interest of one-fourth of the fee simple of a freehold in the city of London, which produces about 650*l.* per annum, clear of taxes, and which, with other property, is subject to a mortgage. A bill in Chancery has been filed by the mortgagee, who is also an executor, calling in his mortgage money, and to establish the trusts of the will. Have *A.* and *B.* a good qualification to entitle them to vote for the county of Middlesex? A claim has been sent in to the overseers in due time, but objected to, on the ground of their not being in the actual receipt of the rents.

A SUBSCRIBER.

## Practice.

## EXECUTION.

In an action brought against a defendant by a wrong Christian name, and the defendant having taken no advantage of the misnomer, the plaintiff proceeded to judgment and execution in that name. Will the plaintiff be justified in taking the defendant upon such execution? A citation of cases is requested.

J. H.

## THE EDITOR'S LETTER BOX.

The First Part of the *Commentaries on the New Statutes*, containing a full Digest of the Law and Practice of Corporations, as altered by the New Act, with the Act and Order in Council *verbatim*, is now published.

The *Legal Almanac, Remembrancer, and Diary*, for 1836, will be published before Michaelmas Term. The plan adopted last year will be somewhat altered. Particular attention will be paid to the preparation of an *Office Diary*. Several new Professional Lists will be added; and it is expected, that with the suggestions we have received, the work will be rendered particularly useful to the profession at large.

The Commissioners' Report on the Consolidation of the Statute Law, is now published, price 2*s.*

The letter on Mortgage Stamps shall be inserted.

Every possible attention shall be paid to the friendly suggestions we have received regarding the *Legal Almanac*.

The Queries and Answers of U. X.; F. W. S.; "An Early Subscriber;" G.; H. M.; and L. S., have been received.

We thank "Aspiro" for his further communication, which is acceptable.

The grievance mentioned by S. T. H., shall be noticed.

"A Country Barrister's" communication will be inserted early.

The practical improvement suggested by W. D. shall be noticed without delay.

We are obliged to E. W., and hope to make use of his paper.

# The Legal Observer.

Vol. X.

SATURDAY, OCTOBER 10, 1835.

No. CCXCV.

— "Quod magis ad nos  
Pertinet, et nescire malum est, agitamus.

HORAT.

## THE PROGRESS OF LAW REFORM.

We now resume our inquiries as to the general progress of Law Reform. The month of October has commenced, the "old familiar faces" begin once more to appear, the inns of court again resound with the busy tread of feet, every foreign steam-packet, and almost every mail contributes some returned lawyer to the general mass, which receiving accessions from all quarters, will soon be as numerous and busy as ever. We select this period therefore, briefly to glance at what was done in the last session of parliament.

According to the prophetic words of Lord Brougham, in one of his speeches in Scotland last autumn, "If we have done little this session, we shall do less the next." If the session in 1833-4 produced few important acts connected with the reform of the law, the session 1835 has produced even fewer; much of what was projected never went further than a bare notice of motion, and much which assumed the more substantial form of a bill, never reached maturity. Notice of a Local Courts bill was given by Sir Frederick Pollock when Attorney-General, but it was heard of no more; the General Register scheme did not this session get even thus far; no member in either house connected his name with it even on paper. The Imprisonment for Debt Bill, although it passed the House of Commons,—not however without the pains-taking, and we should be justified in saying, *nisi prius* management, of the learned Attorney-General—was discontinued by the House of Lords, and must be recommenced. We are well satisfied, and we have repeatedly stated our reasons, that this sweeping scheme, if passed, would be attended with much evil; and we must remark, that it has never been fairly debated in the House of Commons. We are only anxious that the country may be made fully acquainted with the object, nature, and

details of this bill. We shall be perfectly satisfied if its merit is not to be assumed by its friends; if it be not defended by barren generalities and appeals to popular feeling. We are willing that the law of debtor and creditor should be altered on a full consideration, but we may safely appeal to all persons acquainted with the real state of the facts, whether this bill in the last session was not carried through the house in a manner not suited to its importance. We trust that this mode of passing it may not be resorted to again.

We regret that the bill for giving counsel to prisoners was lost in the Lords. The more we reflect and inquire as to this measure, the more are we satisfied that it is founded on justice, and that few of the practical inconveniences which have been suggested as attendant upon it, would occur. We should think that in the next session it will pass into law, and we shall be glad to see its provisions extended to proceedings before magistrates on summary convictions.

The bills founded on the Fourth Report of the Real Property Commissioners, relating to the Execution of Wills, and the Law of Executors, which were of a more questionable character, being objected to by Lord Abinger, never found their way out of the doors of the Lords' Committee-room. Indeed the list of the bills postponed as well by the House of Commons as the House of Lords, which we gave at the close of the session<sup>a</sup>, is unusually large and important. To these bills is also to be added a long list<sup>b</sup> of additional notices for the next session of Parliament, many of which are important, and which we shall take another opportunity of considering.

The great act of the Session, as every one knows, was the Municipal Corporation Act (5 & 6 W. 4, c. 76). This is of consi-

<sup>a</sup> See *ante*, p. 399.

<sup>b</sup> See *ante*, p. 439.



derable importance to the lawyer, as well as to the country at large. We supported this measure from the first in all its important parts, and we have done what we could, and shall continue, to render its nature and details familiar to our readers. The minor acts of interest to the profession are the act for the more effectual Abolition of Oaths<sup>a</sup>, (5 and 6 W. 4, c. 8), which was repealed by a subsequent act (c. 62), on a doubt arising as to the time when it came into operation, its principal provisions being re-enacted. The Limitation<sup>b</sup> of Polls Act (5 and 6 W. 4, c. 36), which we think will have a desirable effect in preventing bribery at elections, is a useful measure. The Certiorari Act (5 and 6 W. 4, c. 33), which was brought in at the suggestion of the Duke of Richmond, is a remedy for a practical grievance. The Act for Consolidating the Laws relating to Highways (c. 50), is of considerable importance. The acts rendering certain Marriages valid, introduced by Lord Lyndhurst, (c. 54), and for preventing the Publication of Lectures without consent (c. 65); the act for the more easy Recovery of Tithes, (c. 74); the act for the alteration of the law as to the Tithing of Turnips (c. 75); the act for abolishing capital punishments in cases of Letter Stealing and Sacrilege (c. 81); and the act to amend the law touching Letters Patent for Inventions (c. 83), severally deserve attention. Such of these acts as we have not already given, we shall consider, and state the alteration in the law made by them. Besides these, there are several other acts, which will be found under the head of Abstracts of Statutes, and in the List printed *ante*, 454—457.

Here we close our brief sketch of what was done in the last Parliament, as far as the profession is concerned.

## PRACTICE OF ATTACHMENTS.

SOME time since we laid before our readers a statement of the present practice of Attachments, accompanied by some remarks. We conceived then that the profession might consider the practice as settled, and that henceforth nothing but personal service of the rule on the party would be sufficient to induce the Court to grant an attachment. We are sorry to observe, that by the recent decisions, the practice seems just as unsettled as it was after the decision of the case of *Green v. Prosser* (2 Dowl. Prac. Cas.

99.) There the determination of the Court of Exchequer was, that where a person keeps out of the way to avoid being served personally with a rule, preparatory to obtaining an attachment against him, and it is clearly made out to the satisfaction of the Court, the Court will dispense with personal service. This was soon followed by another infringement of the rule, requiring personal service in an application for an attachment before Mr. Justice *Patteson*. Here it was decided on the authority of *Green v. Prosser*, that a rule for an attachment for non-payment of costs may, under certain circumstances, be obtained without personal service. (*Allier v. Newton*, 2 Dowl. Prac. Cas. 682.) There his Lordship very justly observed, "I am afraid, however, it is a very dangerous precedent; as now it will be necessary to look into the special circumstances of every case, until at last any sort of service will suffice."

Various applications of the same sort were made, and with success. One decision of the Court of Exchequer had the power to overturn the long-established practice of the Courts. The consequences were probably not foreseen; but when after some time they were felt, that Court was determined to retrace its steps. In the case of *Stunell v. Tower* (2 Dowl. Prac. Cas. 673,) it was determined that an attachment for non-payment of costs can only be granted on an affidavit of personal service. There, Lord *Lyndhurst* said, "It is much better in cases of this kind to adhere to the general rule, that personal service should be required." His Lordship added, that the Court was more anxious to lay down this rule, as the case of *Green v. Prosser* might be supposed to authorise a less strict practice.

In accordance with this decision was the case *Albin v. Toomer* (3 Dowl. Prac. Cas. 563,) where it was held, that personal service of the rule for payment of costs is necessary, in order to obtain an attachment, although the defendant is an attorney.

On the authority of these decisions, one would have imagined that the old wholesome rule of requiring personal service, in order to obtain an attachment, was revived and enforced, and consequently that no future alteration would be made in it.

Yet, since these decisions, we find several others which are inconsistent with the strictness required by the former practice. Thus a rule for an attachment against an executor for not accounting, pursuant to a rule of Court, was made absolute, though the rule had not been personally served, upon an affidavit that the defendant kept out of the

<sup>a</sup> Printed *ante*, p. 161.

<sup>b</sup> Printed *ante*, p. 453.

way to avoid being served, and that a copy had been left at the house with the daughter of the defendant. (*In re Edward Barwick*, 3 Dowl. Prac. Cas. 703.)

Again, where the party against whom a rule *nisi* for an attachment was obtained, appeared, and objected that the rule *nisi* had not been personally served, the Court, notwithstanding, made the rule absolute, (*Levy v. Duncombe*, 3 Dowl. Prac. Cas. 447); and where it is clear that the copy of the rule and *allocatur* have come to the hands of the defendant, an attorney, the Court will grant a rule *nisi* for an attachment, although strict personal service has not been effected. (*Phillips v. Hutchinson*, 3 Dowl. Prac. Cas. 583.)

It is difficult to know what rule is to be extracted from the three following cases: A personal service of the rule of Court must be made to ground an attachment for non-payment of money pursuant to a Judge's order, which is afterwards made a rule of Court; and service of the order and *allocatur* are not sufficient, nor is service of the rule on the London agents of the attorney sufficient: and for this defect an attachment, issued at the end of January, and executed on the 12th of February, was set aside in Trinity term following. (*Woollison v. Hodgson*, 3 Dowl. Prac. Cas. 178. Where a rule of Court directs costs to be paid the party or his attorney, a demand not made by the attorney who had conducted the cause in London, but by the attorney in the country who employed him, is sufficient. (*Dennett v. Pass*, 3 Dowl. Prac. Cas. 632.)

An attorney's bill having been ordered to be taxed after the client had given a bill of exchange for the amount, it was found he had been overpaid, and he was ordered to refund the overpayment to the client; and also, by a subsequent order, to pay the costs of taxation, more than a sixth having been taken off. Upon the application of the attorney to be allowed to pay these sums to the holder of the bill of exchange (which had been dishonoured) instead of his client, he was ordered to do so within a week, or, in default, that an attachment should issue: Held, that no demand of these two sums was necessary to ground an attachment; but that it was his duty to seek the holder of the bill, and pay the money to him. (*Woollison v. Hodgson*, 3 Dowl. Prac. Cas. 178.)

The following case seems an approximation to the former strictness:—A Judge's order directed, that, on payment or tender of the debt and costs to the plaintiffs, their attorney or agent, the plaintiffs should de-

liver up to the defendant certain deeds held by the plaintiffs as security. An attachment was moved for, on affidavit that the money was tendered to the plaintiffs' attorney's agent, and the deeds demanded, but that they had not been delivered:—Held, that the affidavit was insufficient, and that notice should have been given to the plaintiffs, and a demand made personally of them. (*Evans and Wife v. Millard*, 3 Dowl. Prac. Cas. 661.)

Again, it has been decided, that in order to obtain an attachment, it is not sufficient that all the necessary steps are taken, partly at one time and partly at another. (*Rogers v. Twissel*, 3 Dowl. Prac. Cas. 572.)

And if a rule of Court requires a client to pay a certain sum of money, an attachment cannot be obtained against his attorney for its non-payment. (*Poole v. Watkins*, 4 Dowl. Prac. Cas. 11.)

So an attachment cannot be obtained for non-payment of costs pursuant to the master's *allocatur*, if there was no undertaking in the Judge's order for taxation, to pay what should be found due. (*Harrison v. Ward*, 3 Dowl. Prac. Cas. 541.)

But in one case, before Mr. Justice Coleridge, in Trinity term, it was decided, that if facts are stated in support of an application for an attachment, from which it may be presumed that the person sought to be served has received notice of the contents of the rule and *allocatur*, and of the demand thereon, and on shewing cause against the rule such knowledge is not denied, the Court will direct the attachment to issue. (*Bottomley v. Belchamber*, 4 Dowl. Prac. Cas. 26.)

Now it will be seen from this decision that the practice with respect to the personal service of the rule in order to obtain an attachment, is as uncertain as it was immediately after the determination of *Green v. Prosser*.

A rule *nisi* may now be obtained without personal service, and the service of it will operate as a sort of bill of discovery, and the defects of the prosecutor's case are to be supplied by the oath of the defendant. We cannot avoid thinking that this is rather severe upon defendants. If a party chooses to have recourse to the extraordinary remedy of attachment, he ought surely to come with all his materials ready for the purpose of obtaining the writ he desires.

We do not mean that if every particular wherein the improper conduct of the defendant may interfere with all the particulars connected with serving the attachment is not complied with, that therefore the writ ought not to issue. We do not therefore

object to the decision, that in serving a rule for the payment of costs, it is not necessary that the original rule should be placed in the hands of the defendant; if it is shewn to him, so that he can read its contents, it is sufficient (*Calvert v. Redfearn*, 2 Dowl. Prac. Cas. 505); or that in order to obtain an attachment for nonpayment of costs pursuant to the master's *allocatur*, it is not indispensably necessary that a copy of the rule and *allocatur* should be left on the person of the defendant (*Res v. Kooops*, 3 Dowl. Prac. Cas. 566); or that in order to obtain an attachment for non-payment of costs pursuant to the master's *allocatur*, a demand is not necessary, if the party sought to be served by his violence prevents the demand from being made (*Wenham v. Downes*, 3 Dowl. Prac. Cas. 573); but we think that the person applying for an attachment ought to shew clearly by his affidavit, that the rule has come to the actual personal knowledge of the defendant.

As the practice now stands, it should seem that it is enough to lay before the Court such facts as will raise a suspicion that the rule has come to the knowledge of the defendant, in order to obtain a rule *nisi*. Then, if on shewing cause the defendant does not swear that it has not come to his knowledge, the rule for the attachment will remain absolute. The applicant would thus be able to supply the deficiency of his own affidavit by the deficiency of the defendant's.

It may be a good rule in grammar, that two negatives should make an affirmative; or, in algebra, that the multiplication of negative quantities should make a positive quantity; but we fear, in the practice of attachments, it will not be productive of much benefit.

While we are on the subject of attachments, it may not be improper to remark, that a rule for an attachment for non-payment of costs pursuant to the master's *allocatur*, between attorney and client, is *nisi* in the first instance (*Green v. Light*, 3 Dowl. Prac. Cas. 578), although between party and party it is absolute in the first instance.

## CHANGES MADE IN THE LAW IN THE LAST SESSION OF PARLIAMENT.

### No. II.

#### THE MUNICIPAL CORPORATION ACT.

5 & 6 W. 4, c. 76.

(Continued from p. 419.)

WE now resume the statement of the principal heads of this act:—

#### THE COUNCIL, ITS OFFICERS, AND POWERS.

The mayor is to be a justice of the peace for the borough, and the returning officer at elections of members of parliament (s. 5). The sections as to the town-clerk and treasurer we shall give more fully.

The council of every borough, on the 1st day of Jan. 1836 (see Order in Council, *post*, p. 473), shall appoint a fit person, not being a member of the council, to be the town-clerk of such borough, who shall hold his office during pleasure, and in any borough may be an attorney of one of his Majesty's superior courts at Westminster, any law, statute, charter, or usage to the contrary notwithstanding; and the council of every borough shall in every year appoint another fit person, not being a member of the council, to be the treasurer of the borough, and also such other officers as have been usually appointed in such borough, or as they shall think necessary for enabling them to carry into execution the various powers and duties vested in them by virtue of this act, and may from time to time discontinue the appointment of such officers as shall appear to them not necessary to be re-appointed; and shall take such security for the due execution of his office by any such town-clerk, treasurer, or other officer, as the said council shall think proper; and shall order to be paid to the mayor, and to the town-clerk and treasurer, and to every such other officer to be employed as aforesaid, such salary or allowance as the said council shall think reasonable; and in case of a vacancy in any such office as aforesaid by death, resignation, removal, or otherwise, the council of such borough may appoint another fit person in the place of the person so making such vacancy; provided that the town-clerk and treasurer shall not be the same person (s. 53).

The treasurer of any borough shall pay no money on account of the mayor, aldermen, and burgesses of such borough, save only in such case as is provided by this act, or upon the order in writing of the council, signed by three or more members of the council, and countersigned by the town-clerk of such borough, or by order of the court of sessions of the peace for the borough, or of a justice of the peace acting for the borough in the discharge of his judicial duty, in such case as is provided by this act, or in such case as a court of sessions of the peace for any county, or a justice of the peace acting in and for a county in the discharge of his judicial duty, may make an order for the payment of money on the treasurer of such county, or for the payment of the salaries granted to any recorder or police magistrate as herein-after provided (s. 59).

Every town-clerk, treasurer, or other officer appointed by the council as aforesaid shall, at such times during the continuance of his office, or within three months after the expiration of his office, and in such manner as the said council shall direct, deliver to the council, or to such person as they shall authorize for that

purpose, a true account in writing of all matters committed to his charge by virtue of this act, and also of all monies which shall have been by him received by virtue or for the purposes of this act, and how much thereof shall have been paid and disbursed, and for what purposes, together with proper vouchers for such payments, and also a list of the names of all such persons as shall not have paid the monies due from them for the purposes of this act, and of the amount due from each of them; and every such officer shall pay all such monies as shall remain due from him to the treasurer for the time being, or to such person as the said council shall authorize to receive the same; and a summary remedy is given against officers for not accounting, &c. (s. 60.)

The councils of cities and towns which are counties are to name a sheriff (s. 61).

The council of every borough in which a separate court of quarter sessions of the peace shall be holden, shall, within ten days next after the grant of the said court shall have been signified to the council of such borough, appoint a fit person, not being an alderman or councillor, to be coroner of such borough so long as he shall well behave himself in his office of coroner, and shall fill up every vacancy of the office of coroner of the borough, by death, resignation, or removal, within ten days next after such vacancy shall have occurred, and none thereafter shall take any inquisition which belongs to the office of coroner within such borough save only the coroner so from time to time to be appointed; and every such coroner, for every inquisition which he shall duly take within such borough, shall be entitled to have the sum of twenty shillings, and also the sum of nine-pence for every mile exceeding two miles which he shall be compelled to travel from his usual place of abode to take such inquisition, to be paid by the treasurer out of the borough fund of such borough, by order of the court of quarter sessions for such borough (s. 62). The coroners are to make returns to secretary of state (s. 63). County coroners are to act in boroughs where no coroners can be appointed (s. 64).

The council elected under this act in any borough shall have power to remove from his office every bailiff, treasurer, or chamberlain, and every other ministerial or executive officer of such borough and body corporate, who shall be in office at the time of the first election of councillors under this act: and every such bailiff, treasurer, or chamberlain, and every other ministerial or executive officer in such borough, shall continue to act in the same capacity as heretofore, and to execute all the duties heretofore belonging to his office, and be entitled to have the same salaries, fees, and emoluments as he would have had if this act had not passed, until he shall be removed from his office, and no longer, unless he shall be re-appointed according to the provisions of this act; and every officer who shall be in possession or receipt of any monies, goods, valu-

able securities, books, and papers belonging to or concerning the body corporate whose officer he is, shall deliver up and account for the same to the council of such body corporate appointed under this act; and the council shall have the same remedy against such officer to recover the same as is herein-before provided in the case of officers appointed by such council: provided always, that all the charters, deeds, muniments, and records of every borough, or relating to the property thereof, shall be kept in such place as the council from time to time shall direct, and the town-clerk for the time being shall have the charge and custody of and be responsible for the same (s. 65).

Officers are to receive compensation on removal, and to deliver statement of claims (s. 66).

The compensation is to be secured by bond under the common seal (s. 67).

Certain pensions and allowances are reserved by the act (s. 68).

The acts of the council are to be decided by a majority of councillors present; one-third part of the whole number is to be a quorum: notice of meetings of council is to be given, except the four quarterly meetings for general business (s. 69). The council may appoint committees (s. 70).

The body corporate named in schedules A. and B. are to be trustees of any powers or trusts of which the body corporate were sole trustees before the election of councillors under this act, except the charitable trusts mentioned in s. 71, (s. 72). Where trustees were appointed before the passing of this act for any particular purpose, the council shall appoint similar trustees for such purposes (s. 73). Trustees at present existing of particular acts, are to continue for a definite time, and trustees are not to go out of office by reason of ceasing to be of the council, until the time prescribed by the terms of the trust (s. 74). The powers now vested in trustees appointed under sundry acts of parliament may be transferred to the body corporate of the new borough (s. 75).

The council has power to make bye-laws for the government of the borough, and the suppression of nuisances; but two-thirds of the whole number of the council are to be present at the making of such bye-laws, and they are not to be in force until 40 days after they have been sent to a secretary of state; and they may be disallowed or enlarged by the King in council (s. 90); and the provisions in the act as to summary convictions are to apply to offences against any bye-law (s. 91).

Where in a borough, before the passing of this act, any debt has been contracted chargeable on any tolls belonging to the body corporate, the council cannot alter or reduce the amount to be levied of such tolls, unless with consent of the creditors, until such debt is satisfied (s. 92).

The council is restrained from selling or mortgaging any real estate belonging to the body corporate, except in pursuance of some agreement entered into on or before the 6th

day of June 1835, by the body corporate, and from leasing, except in pursuance of some similar agreement, or as hereinafter is mentioned, that is to say, for any term exceeding 31 years; and in every lease there shall be reserved such rents as the council shall deem reasonable without taking any fine. But where the council shall deem it expedient to sell or demise for a longer period than 31 years, they may represent the case to the treasury, and with the approbation of three of the lords of the treasury, may sell or demise on such terms as the commissioners shall approve, but notice of the intended application must be given (s. 94).

Where any body corporate shall on the 5th of June 1835, have been bound by any covenant or usage to renew a lease, the council may renew it (s. 95); and building leases, or leases for making gardens, &c., may be made for 75 years (s. 96).

The section as to collusive purchases and sales, since the 5th of June 1835, is important.—The council may call in question all purchases, sales, leases, and demises not made in pursuance of some such *bona fide* covenant, contract, agreement, or resolution made or entered into as aforesaid before the said 5th day of June, and all contracts for the purchase, sale, lease, or demise of any lands, tenements, and hereditaments, and all divisions and appropriations of the monies, goods, and valuable securities, or any part of the real or personal estate, of which on or before the 5th day of June in this present year the body corporate of which they are the council, whether in their own right or as trustees for charitable or other purposes, was seised or possessed, which shall have been made or contracted between the said 5th day of June and the day of the declaration of their election; and for that purpose, if it shall appear to the said council that there is ground for believing that any such purchase, sale, lease, or demise, or such contract, or such division or appropriation of the premises, was collusively made for no consideration, or for an inadequate consideration, it shall be lawful for the council of such borough, at any time within six calendar months next after the first election of councillors under this act shall have been declared in such borough, upon notice of their intention being first given in the London Gazette, and also affixed on the outer door of the town hall, or in some public place within the borough, to cause the value of the lands, tenements, hereditaments, and premises in question to be inquired of and found by a jury of twelve indifferent men of the county in which, or adjoining to which in the case of Berwick-upon-Tweed, and of all counties of cities and towns corporate, such lands, tenements, hereditaments, or premises do lie; and in order thereto, the said council is empowered to summon and call before such jury all persons having the custody and possession of any deed or agreement concerning the said lands, tenements, hereditaments, and premises made or entered into since the said fifth day of June, and to cause all such deeds and agreements to

be produced before the said jury, and examined by them, and to examine upon oath every person who shall be thought necessary to be examined (which oath the mayor is hereby empowered to administer); and the council shall, by ordering a view or otherwise, use all lawful means for the information as well of themselves as of the said jury in the premises; and the jury shall find the value of the said lands, tenements, hereditaments, and premises, and the consideration which shall have been given, and also that which ought of right to have been given, for the purchase, sale, lease, demise, or appropriation thereof, according to the terms of such purchase, sale, lease, demise, contract, or appropriation, and taking into account all the circumstances under which the same shall have taken place; and if the jury by their oaths shall find that no consideration, or a consideration less than that which they shall have so found to be the value which ought therefore to have been given, shall have been collusively given or contracted to be given by the terms of any such purchase, sale, lease, demise, contract, or appropriation, the party to such purchase, sale, lease, demise, contract, or appropriation shall have his option either to re-convey and restore the lands, tenements, hereditaments, and premises in question, and to abandon the contract to which he shall have been party, upon receipt in each case of the consideration, if any, which he shall have given for the same, or to give therefore in each case such additional consideration so that the whole consideration given shall be that which ought of right to have been given, so found by the jury as aforesaid; and in every such case as last aforesaid, the additional consideration given or to be given shall be endorsed on the original deed or conveyance; and unless he shall so do within one calendar month next after the finding of the jury, every such purchase, sale, lease, demise, contract, and conveyance shall be absolutely void and of none effect as against the said body corporate and their successors; and in every case in which any such contract shall have been abandoned as aforesaid, or in which any such purchase, sale, lease, demise, contract, or conveyance shall become void and of none effect, under the provisions of this act, the party who would otherwise have had the benefit of the same shall be remitted to his former estate, title and interest (if any) in the premises as if no such contract, purchase, sale, lease, or demise had been made or entered into; and for summoning and returning such juries, and for imposing fines on the sheriff, his deputy, bailiff, or agent, and on the persons summoned and returned on the said jury, and on any person required to give evidence, who shall in this behalf contravene the provisions of this act; the council of every such borough shall have all the powers given in that behalf to the trustees or commissioners of any turnpike road by an act made in the third year of his late Majesty George the Third, intituled "An act, to amend the General Laws now in being for regulating Turnpike Roads in that part of

Great Britain called England; and all the costs of the said jury, and of all witnesses tendered by the said council to be examined before the said jury, shall in every case be borne by the council, and paid out of the borough fund: provided nevertheless, that it shall be lawful for his Majesty, if he shall think fit, by the advice of his privy council, upon petition to him setting forth the special circumstances under which any purchase, sale, lease, demise, contract, or appropriation of any of the said lands, tenements, hereditaments, and premises shall have been made since the said fifth day of June, to order that the same shall not be called in question under the provisions of this act; and in such case as last aforesaid the same shall not be called in question or set aside or affected under the provisions of this act: provided always, that in every case in which such petition shall have been presented it shall be lawful for his Majesty, if he shall think fit, to enlarge the time within which (in case his Majesty shall not think fit to make such order as aforesaid) the council may have power as aforesaid to call in question any purchase, sale, lease, demise, contract, or appropriation referred to in such petition. (s. 97.)

### ON MORTGAGE STAMPS.

SIR,—I am obliged by the further particulars furnished by your correspondent "J. C. G." in the No. of Sept. 19, p. 409; and although it hardly touches the question which is practically troublesome to the profession, I may, perhaps, be allowed to make a remark upon it. The term which comprised the first mortgage to Rowlands, not having been assigned to the second mortgagee, Worsley, but to Bartley as his trustee, the case is not a transfer of a mortgage, and with a further advance; because the mortgage was paid off by Worsley, and, as a mortgage, extinguished; the term assigned then was a satisfied term. The transaction was either an original mortgage, or it was not a mortgage at all. It appears to have been a mortgage from Carter to Worsley for 350*l.* of the reversion in fee. In form, it is an absolute conveyance in fee to Worsley, for sale, to repay himself 350*l.* and interest, in which there is contained a covenant by Carter to pay the sum; but although there is no proviso for redemption, there is no doubt equity would have considered it redeemable, interest being reserved, and therefore a mortgage. If it was not this mortgage, it was then an absolute sale by Carter to Worsley, at the amount due for principal and interest, when the trust for sale was exercised, with, in both cases, an assignment of a satisfied term of 1000 years to a trustee for the purchaser or mortgagee to attend the inheritance. What then should have been the stamp? 4*l.* *ad valorem* duty for the 350*l.* and 8*s.* for the assignment of the term on the first skin, as a mortgage transaction, and a

progressive duty either of 25*s.* or 20*s.* upon the followers, in all, 8*l.* 15*s.* or 9*l.* 10*s.*, whichever progressive duty would be the proper one. What are the stamps used in the case of J. C. G.? 1*l.* 15*s.* first skin, 2*l.* second, 2*l.* third, and 1*l.* fourth; in all, 6*l.* 15*s.*—clearly, not sufficient. The transaction was evidently treated as a transfer, and further advance, with reference to the stamping; as, 35*s.* for the transfer, 2*l.* for the *ad valorem* duty for the further advance, (viz. 200*l.*) and 1*l.* followers, under the words of the stamp act, page 1592. As on a sale the *ad valorem* duty was 3*l.* there is not enough duty on it for that purpose. If it be considered as a deed of trust for sale, it required no *ad valorem* duty, not being either a sale or mortgage; and then, the duty paid is too much: but this construction is inconsistent with the transaction. I submit the stamping is wrong, and that it should have been stamped as an original mortgage for 350*l.* with an assignment of a term to attend. G.

### DISPUTED DECISIONS.

AMONG the changes introduced into practice by the 11 G. 4, and 1 W. 4, c. 70, there is none which has been productive of more litigation and difficulty, than that provision of section 6, with respect to the alteration of the terms which affects the four days intervening between the Thursday next before and the Wednesday next after Easter day, when those days fall within Easter term. From the opinion of Mr. Justice Williams in the following case (3 Dowl. Prac. Cas.) on the subject of those four days, we beg humbly to dissent.

#### Charnock v. Smith.

Miller moved for a rule to shew cause why the verdict found for the plaintiff should not be set aside, and a new trial had, on the ground of a defect in the notice of trial before the sheriff. It had been given for Easter Tuesday, and afterwards continued till a subsequent day. On that day the trial came on, and a verdict was found for the plaintiff. According to the 3 & 4 W. 4, c. 42, s. 43, Easter Tuesday had become a *dies non*. The words of the section were, "none of the several holidays mentioned in 5 & 6 Ed. 6, c. 3, shall be observed or kept in the said Courts, or in the several offices belonging thereto, except Sundays, the day of the Nativity of our Lord and the three following days, and Monday and Tuesday in Easter week." The two last mentioned days, being thus in the situation of holidays, were *dies non*. No business of the Courts could be done on those days; and therefore a notice of trial for either of them could not be good. If the original notice was bad, the continuation of it would not cure the defect. The verdict, therefore, in pursuance of such notice, ought to be set aside.

Williams, J.—The 11 G. 4, and 1 W. 4, c. 70, s. 6, in making provisions for the duration

of the terms, contained this proviso, "that if the whole or any number of the days intervening between the Thursday next before and the Wednesday next after Easter day shall fall within Easter term, then such days shall be deemed and taken to be a part of such term, although there shall be no sittings in banc on any such intervening days." Last of all came the general rule, Hilary term, 2 W. 4, by which it was ordered, "that the days between the Thursday next before and the Wednesday next after Easter day, shall not be reckoned or included in any rules or notices of other proceedings, except notices of trial and notices of inquiry in any of the Courts of Law at Westminster." From this rule, which was promulgated by all the Courts, we may learn the construction which the Judges were of opinion ought to be put on the two acts of parliament to which I have referred; and in that rule is contained the exception as to notices of trial and inquiry. Although, therefore, for all other purposes, these two days would be unavailable, yet for notices of trial and inquiry they are available. The present case comes directly within the exception in the rule; and therefore the notice of trial, as it appears to me, was good. You will consequently take nothing by your motion.

Rule refused.

Now it has several times been decided, that the proceedings before the sheriff under the writ of trial are governed, as to the time at which trials are to take place, by the practice of the Superior Courts, from which the writ is obtained. Judgment as in case of a nonsuit can therefore be obtained for not proceeding to trial in due time before the sheriff. According to the language of the above cited statutes and rule, it is quite clear that those days must be considered as *dies non*; and if the first notice of trial had been given in the Superior Court, it would have been a bad one. A continuation of it would also have been bad. Under these circumstances, therefore, it should seem, that as a similar rule is to be adopted in the Sheriff's Court to that existing in the Superior Court, the notice of trial of the above case was insufficient.

## SELECTIONS FROM CORRESPONDENCE.

No. CXI.

### STAY OF PROCEEDINGS.

Sir,

I lately took out a summons to stay proceedings on payment of debt and costs, to be taxed. A consent was refused, on the ground that if an order was drawn up in that form the proceedings would be stayed till the end of October, as there was no officer to tax the

costs. Upon attendance at the Judges' chambers, at the return of the summons, I found that no Judge was in town, and that it was quite uncertain when there would be one at chambers. The rule to return the writ had expired, and on the morning of the return of the summons the plaintiff was entitled to a rule to bring in the body, which, as no order could be made to stay the proceedings, I apprehend he might have taken out and served, and there was no way of preventing the proceedings being continued but by paying the debt, and such costs as the plaintiff's attorney might choose to demand, and afterwards, in November, taking out a summons to tax the bill. Now, I would ask, is it right that a defendant should be placed in such a situation? Either proceedings should be stayed altogether during the holidays of the officers, or some of them should be constantly in attendance to transact the business. S. T. H.

## DOUBTS ON THE NEW STATUTES.

### LIMITATION OF ACTIONS.

I cannot help doubting the decision in *Doe d. Corby v. Branson*, ante, p. 411; and the reason is the difference of expression in the 16th and two following sections.

The 16th section has the expression "*shall have been under any of the disabilities*," &c. which refers as well to persons under disabilities before the act, as subsequently; whereas the corresponding expression in the 17th and 18th sections is—"shall be under any of the disabilities, &c." which of itself refers only to the future.

The latter expression is, it is true, connected with the expression "at the time at which his right shall have first accrued;" but to make the 17th and 18th sections consistent, either the words *shall be* must be construed *shall have been*, or the latter words must be construed *shall be*; and the question is, which construction must prevail?

This is an act to deprive persons of their rights, and should therefore be strictly construed; and as a retrospective operation given to the 17th and 18th sections would, in many cases, operate harshly by depriving persons of a possibility of asserting their claims, I contend that those sections should be held to apply solely to cases of rights accruing subsequently to the act; and that the plaintiff in the case referred to, ought to have had the full benefit of the 16th section.

The words *shall depart this life*, in the 18th section, seem to support this construction.

I have lately advised the non-acceptance of a title depending on such a construction as that of the court of King's Bench in the above case,

of which I was not then aware, for the reason above suggested.

A COUNTRY BARRISTER.

## SUGGESTIONS FOR IMPROVING THE LAW.

No. XI.

### ENTRY OF JUDGMENTS.—DEFENDANT'S RESIDENCE.

Sir,

Allow me to call your attention to a great defect in the entry on the rolls, and in the docket books, of judgments. I allude to the omission of the particulars as to the defendants' residence and occupation. I had lately to search for judgments against a person named John Parker, who had sold an estate to a client of mine. The name being a very common one, I found, during the last twenty years, some hundreds of judgments entered against persons bearing it. To ascertain if any relate to the vendor, I shall have to communicate with every attorney concerned in signing the judgments with which I have met; and the application will be expensive, and the delay in ascertaining the requisite information very great. All this expence and delay would be saved if the defendant's residence and occupation were entered in the docket books; and as the proceeding with which the suit now commences, namely, the writ of *capias* or summons, and the warrant of attorney, must describe the defendant fully, no inconvenience could arise to London agents if they were compelled to adopt the course which I recommend, for they would always have the necessary particulars ready, and the additional trouble to the clerk signing the judgments would be so slight as to be unworthy of consideration.

W. D.

### SECOND ORDER IN COUNCIL UNDER THE CORPORATION ACT.

THE following Order in Council has just been issued, extending the time for setting out the boundary lines by the barristers from six weeks to sixty days after the passing of the act, and for the election of the town clerks from the 9th of November to the 1st of January.

At the Court of St. James's, the 30th day of September, 1835. Present, the King's most excellent Majesty in Council.

5 & 6 W. 4, c. 76, s. 140.

Whereas by an act passed in the 5th and 6th year of his Majesty's reign, intituled "An Act to provide for the Regulation of Municipal Corporations in England and Wales," it was, among other things, enacted, that it should be lawful for his Majesty, if he should think fit, by the advice of his Privy Council, to order any days and times before the first day of February next, for doing the several matters required or authorized by the said act to be done, in lieu of the several days and times for the present year therein before specified, or any of them; and that in such cases all matters mentioned in such order should be done on and within such days and times as should be mentioned respectively in that behalf in such order, as if the days and times mentioned in such order had in every instance been mentioned in the said act, instead of the days and times therein before respectively mentioned in that behalf, and not otherwise; provided always, that nothing therein contained should authorize his Majesty to appoint any days and times other than were therein before specified for any matters required or authorized by the said act to be done, after the expiration of this present year:

His Majesty is thereupon pleased, by advice of his most Honorable Privy Council, in pursuance of the power vested in his Majesty by the said act, to order, and it is hereby ordered, as follows, that is to say:

Section 39. His Majesty, by the advice aforesaid, does hereby order, that it shall be lawful for the *barrister or barristers* appointed in pursuance of the provisions of the said act contained to determine and set out the extent, limits, and *boundary lines* of the wards into which it is provided by the said act that certain boroughs of large population shall be divided, and what portions of such boroughs shall be included therein respectively, within the space of *sixty days* next after the passing of the said act, instead of the space of *six weeks* next after the passing of the said act.

Section 58. And his Majesty, by the advice aforesaid, does hereby order, that the council of every borough named in either of the schedules (A.) or (B.) to the said act annexed, shall appoint a fit person, according to the provisions of the said act, to be *town clerk* of such borough, on the *first day of January* 1836, instead of the *ninth day of November* in this present year.

WM. L. BATHURST.



## SUPERIOR COURTS.

## Lords Commissioners' Court.

## CHARITY.—TRUST.

*A testator left a certain sum out of the rents and profits of his estates, to build a church and to maintain the rector, and he directed the residue of his estate to be applied to the better endowing poor livings and ministers preachers of the sacred word of God in this land for ever: Held by the Lords Commissioners, reversing a decree of the Vice Chancellor, that the church and rector first provided for had no peculiar claim on the residue.*

This was an appeal from a decision of the Vice Chancellor, upon an information filed by the parishioners of Christ's Church, Blackfriars Road, Surrey, to which the rector was not a party, praying that a further sum for a suitable residence and maintenance of the rector, and repairs of the church, might be allowed out of the residuary estate of Mr. John Marshall, who by his will in 1672, gave his estates in trust, and directed 700*l.* out of the rents and profits to be paid for building Christ's Church, and 40*l.* a year to maintain the rector, the residue to be applied to the better endowment of poor rectories and "preachers of the sacred word of God in this land for ever." By two acts of parliament, one of the 22 & 23 Charles 2; the other of Geo. 2; and by decrees of this Court in 1727, and subsequently, several sums were applied out of this residue to the better maintenance of the rector. The *Vice Chancellor*, on the hearing before him, directed an account to be taken of the surplus income of the trust fund, and also what would be a proper addition to the rector's maintenance, &c.

The arguments, and a more ample statement of the facts, together with his Honor's judgment, are reported in the 8th vol. of the Leg. Obs. p. 414. The arguments in the appeal did not differ much from those reported there.

Sir C. C. Pepys, giving judgment, said, that the relators must first shew that the trust was meant for the maintenance of their rector, before they could call for an increase of it. Suppose that there was a surplus for the increasing of the endowment of poor rectories, it must first be shewn that this parish is clothed with the character of a *cestui que trust*. There was nothing in the words of the will to exclude this parish from the benefits of the trust, and there was nothing in them to give this parish any privilege beyond others. The acts of parliament, and the decrees that were made, and that were cited in the argument, were encroachments on this trust. There was no title in this parish to authorize the Court to grant the application of the parishioners; and the information must be dismissed with costs.

*Attorney General v. Harris*, before the Lords Commissioners, at Lincoln's Inn, July—and August 24, 1835.

## PLEADING.—PARTIES.

*Held, that a plea to a bill for want of parties, is not good, in a case where a plaintiff who was security for a person who afterwards became bankrupt, files his bill for the purpose of discharging himself from his liability, without joining the bankrupt's assignees.*

This was an appeal from a decision of the Vice Chancellor, who had overruled the plea of the defendant, alleging that the suit was defective for want of parties. The facts and points on the arguments appear from the judgment.

Sir C. C. Pepys, delivering the opinion of the Court, said,—It appeared from the pleadings that a Mr. T. G. Musgrave had entered into a contract for the sale of an estate to the defendant, Mr. Newton, for the sum of 8000*l.* Before the completion of the purchase Mr. Musgrave became pressed for money, and applied to the defendant for an advance of 2000*l.* Newton agreed to advance this sum; but as a precaution against any defect in the title, required the plaintiff to be joined with Thomas G. Musgrave, the vendor, in a promissory note as a security, such note not to be enforced if the purchase of the estate was completed according to the contract. The vendor, Musgrave, shortly afterwards became bankrupt; but the estate was previously conveyed to trustees, in trust, to complete the contract for sale to the defendant. Some discussion having taken place on the title, and the defendant being advised that such title was defective, he ultimately declined to complete his contract, and brought an action against the plaintiff for the amount of the promissory note. The plaintiff conceiving that the title was good, and that the defendant should complete his purchase, filed a bill in this Court to stay the proceedings at law, and praying that the defendant might be ordered to complete his purchase, and go before the master in the usual manner to investigate the title, his own liability ceasing with the completion of the contract. To this bill the defendant put in a plea, that as Musgrave, the vendor, had become bankrupt, the estate was vested in the hands of assignees under that bankruptcy, and that therefore the bill could not be sustained, unless they were made parties to it. The *Vice Chancellor*, when this plea was argued in the Court below, expressed an opinion, that the assignees were not under such circumstances necessary parties to the suit, and accordingly overruled the plea. Against this decision the defendant appealed; but their Lordships, were of opinion, with the Vice Chancellor, that the plea could not be supported. The rules of practice, which required a plaintiff to bring before the Court, all the parties interested in a suit, could not be held to apply to the present case, for it was plain, that the relief to which the plaintiff stated himself to be entitled, might be afforded to him without subjecting the defendant to any other consequences than those which naturally flowed from his liability to complete the con-

tract, into which he had entered with Musgrave the vendor. The decision of the Vice Chancellor overruling the plea must be affirmed, and the appeal dismissed with costs.

*Musgrave v. Newton*, before the Lords Commissioners, at Lincoln's Inn Hall, July 30, 1835.

### King's Bench Practice Court.

#### EJECTMENT.—SPECIAL SERVICE OF DECLARATION.

##### *Special service in ejectment.*

This was a motion for judgment against a casual ejector, under the following circumstances:—The parties in possession were three sisters, but it did not appear that they were joint-tenants. A service of copies of the declaration had been made on two of the sisters on the premises, and a third copy was left for the third, but she had not acknowledged its receipt.

The Court granted a rule *nisi*. The service to be at the dwelling-house of the sisters.

Rule *nisi*.—*Doe d. Grimes v. Roe*, T. T. 1835. K. B. P. C.

#### JUDGE'S ORDER.—ATTACHMENT.—EXTENT OF MOTION.—DISOBEDIENCE.

*The Court will permit an application to make a Judge's order a rule of court, and for an attachment for disobedience to the same, to be included in the same motion.*

This was a motion for an attachment against a sheriff for neglecting to make a return to a writ, pursuant to a Judge's order made during the vacation. The order had not been made a rule of court, but a case was cited where it had been held that an attachment might be granted without such a step being taken.

The Court was of opinion that the case alluded to merely decided that the application to make the Judge's order a rule of court, and for an attachment, might be made on the same motion. It was necessary, however, to have a rule for each. Unless the order was made a rule of court the Court had not power to grant an attachment.

The nature of the application was now altered, and it was moved that the order might be made a rule of court, and that an attachment for disobedience might be granted.

Rule accordingly. — *Hunchliffe v. Jones*, T. T. 1835. K. B. P. C.

#### PLEA OF RELEASE.—SUSPICIOUS CONDUCT OF DEFENDANT.—FRAUD.

*The Court will set aside a plea of release given by one of several plaintiffs, suspicion having been thrown upon the conduct of the defendant, and the plaintiff by whom the release was given being indemnified against costs by his co-plaintiffs.*

A rule had been obtained by the plaintiffs calling on the defendant to shew cause why the plea of release from the plaintiff, George Holdsworth, should not be set aside, and why

the release should not be delivered up to be cancelled. It appeared, that Thomas Holdsworth became a bankrupt, and the three plaintiffs were appointed his assignees. A part of the estate of the bankrupt consisted of machinery and utensils connected with a mill, which the defendant desired to purchase. George Holdsworth was considered to be acquainted with the value of such goods, and he was therefore appointed to negotiate with the defendant. The sale was, however, subsequently effected by one of his co-assignees for 125*l.*, upon the representations made by him that their real value did not exceed 120*l.*, a private valuation having been made, however, when their worth was estimated at 180*l.* The assignees, notwithstanding this, did not refuse to complete the sale, but they brought the present action to recover the utensils, &c. which the defendant had also taken away, and which they contended could not be called machinery. The release, it also appeared, had been obtained from George Holdsworth by the defendant, and it was now pleaded to the declaration. As the action could not be continued while that plea remained upon record, the present application was made.

Cause was now shewn, when it was submitted, that the Court had no power to interfere with the release, and that until there were grounds shewn to justify the opinion that fraud had been exercised, the Court ought not to interfere with the plea.

In support of the rule, it was admitted, that no reason had been shewn to warrant the Court in ordering the release to be cancelled; but sufficient grounds existed for the plea to be set aside. This course, it was suggested, could do no injury to the defendant, who had pleaded other pleas upon which the question as to what was meant by the term machinery could be tried. Reference was then had to a case where the Court had set aside a plea *quia darrein continuance* of release by one of several plaintiffs, without costs, an indemnity against costs having been given to the plaintiff, who had released the action, although his consent had not been obtained before the suit was commenced. It appeared there, however, that no consideration had been given for the release, and that the action was brought by the plaintiffs, as trustees for the creditors of an insolvent. Upon this, it was submitted that the rule should be made absolute to set aside the plea.

The Court could not interfere to order the cancelling of the release, but directed the plea to be set aside. The affidavits shewed that the sale was effected upon the faith of a supposed valuation, which differed materially from the allegation made by the release. Some suspicion attached to the transaction, and the plaintiffs were entitled to try the question as to the extent of the meaning of the contract before a jury.

Rule accordingly. — *Johnson, Haigh, and George Holdsworth, assignees of Thomas Holdsworth, a bankrupt, v. Holdsworth*, T. T. 1835. K. B. P. C.

WRIT OF SUMMONS.—DATE.—SUNDAY.—OBJECTION.—LAPSE OF TIME.—JUDICIAL NOTICE OF THE COURT OF DAY OF THE WEEK.

*A writ of summons bearing date on a Sunday is a nullity, and although some time shall elapse before the objection is taken, that cannot act as a waiver. The Court is bound to take judicial notice of the day of the week on which a particular day of the month falls.*

A rule nisi had been obtained to set aside proceedings, on the ground that the writ of summons bore date on a Sunday; and—

Cause was now shewn, when it was submitted, that however irregular the writ might be, the objection could not now be taken, as a period of three weeks had elapsed since the service of the writ, and by the rule of court it was ordered that no application to set aside process or proceedings for irregularity, should be made unless within a reasonable period. A case was cited, where an application of a like character was made, where the writ had been served on the 25th of October. The application was not made until the 3d of November, the 2d being a Sunday, and it was then held that the parties were out of time, and that they should have applied on the 1st.

In support of the rule, it was urged, that the irregularity complained of in point of fact amounted to a nullity, which could not be waived. Besides, Sunday was a *dies non*, and a writ bearing date on that day had repeatedly been held to be void. Cases were now cited in support of the argument, where the whole of the proceedings, when any part bore date on a Sunday, were held to be void; and although an appearance should have been entered to a writ bearing such a date, that nevertheless did not cure the defect. The Uniformity of Process Act was also alluded to, by which it was provided that every writ issued by its authority should be tested in the name of the Lord Chief Justice, or in the name of the senior Puisne Judge of the Court under certain circumstances, and should bear date the day of its issue. Upon this it was submitted that any such writ bearing date on a Sunday would be a nullity, as the Court did not sit on that day. The rule therefore ought to be made absolute.

The Court inquired, whether the affidavit shewed the day of the date of the writ to be Sunday?

A reply was given in the negative; but it was stated that the writ was incorporated in the affidavit, and that the day of the month being given, it was the duty of the Court to take judicial notice on what day of the week that fell. The Almanac was part of the law of the land.

*Cur. adv. vult.*

It was afterwards decided, that the argument of the defendant was correct, and that it was the duty of the Court to notice the day of the week of the date of the writ. The writ being dated on a Sunday, was a nullity, and the time suffered to elapse by the defendant did not act as a waiver of the objection. The

rule must therefore be made absolute, but without costs.

Rule absolute.—*Hanson v. Shackleton*, T. T. 1835. K. B. P. C.

POVERTY OF DEFENDANT.—JUDGMENT AS IN CASE OF A NONSUIT.—PLAINTIFF'S KNOWLEDGE OF THAT FACT.—COMMENCEMENT OF SUIT.

*The poverty of the defendant will not be deemed a sufficient reason for the plaintiff not proceeding to trial, unless it shall be shewn that that was not made known until after the commencement of the suit.*

Cause was shewn against a rule obtained for judgment as in a case of nonsuit. The affidavit of the defendant stated his poverty as a reason; but it was not shewn whether that was made known to the plaintiff after the commencement of the suit. An affidavit of a more satisfactory character might have been obtained, but that the rule was not served until very late.

Some reasons having been urged in support of this rule,

The Court said that it ought to have been shewn, that the plaintiff was not aware of the defendant's poverty until the suit was commenced, in order to excuse him for not proceeding to trial. Some delay had been permitted in serving the rule, and it might therefore be enlarged.

Rule enlarged.—*Fielder v. Crow*. T. T., 1835. K. B. P. C.

DISTRINGAS.—RETURN OF NON EST INVENTUS.—ENTRY OF APPEARANCE.—NOTICE OF DECLARATION.

*If it shall appear that a defendant has left the country to avoid his creditors after the issue of a writ of distringas, the return to which was non est inventus and nulla bona, the Court will grant permission to enter an appearance for him; and upon a subsequent application, to stick up notice of declaration in the office, if it shall appear that a similar notice was served at his late residence.*

This was a motion to enter an appearance for the defendant, under the following circumstances:—

It appeared that a writ of *distringas* was issued, to which the sheriff returned *non est inventus* and *nulla bona*; and affidavit was now put in, setting forth that repeated enquiries had been made for the defendant at his last known place of abode; but that he could not be found; and from information there collected, it was supposed he had gone abroad for the purpose of avoiding his creditors. A copy of the writ of *distringas* was, however, left at his late residence.

It was now submitted, that leave should be granted to enter an appearance for the defendant, and to post up a notice of declaration in the office.

The Court granted the first part of the application, but said that the plaintiff could not thus be permitted to stick up the notice.

Rule accordingly.

On a subsequent application, it was stated on affidavit that further enquiry had been made for the defendant, but without success, and a copy of the notice of declaration had been left at his former place of abode.

The Court now complied with the desire of the plaintiff.

Rule granted.—*Copeland v. Nevill*. T. T., 1835. K. B. P. C.

ACT 19 G. 3, c. 70, s. 4.—REMOVAL OF RECORD OF JUDGMENT OBTAINED BY DEFENDANT BY CERTIORARI.

*The Act 19 G. 3, c. 70, s. 4, giving permission to plaintiffs to remove the record of judgment into a superior from an inferior Court, in order to sue out execution, does not also apply to defendants.*

This was an application for a *certiorari* to remove the record of judgment from an inferior Court to this Court, in order to sue out execution thereon. The application was made on the 19 G. 3, c. 70, s. 4, which provided, that in all cases, where final judgment had been obtained in any action or suit in any inferior court of record, it should be lawful for any of his Majesty's Courts of Record at Westminster to cause the record of the said judgment to be removed into such superior Court, and to issue writs and execution thereon against the defendant's person or effects, upon affidavit made and filed of such judgment being obtained in the inferior Court, and of due and diligent search having been made for the defendant and his effects within the jurisdiction of such lesser Court, but without success.

Upon this it was pointed out to the Court, that permission was only granted in cases where judgments had been obtained by plaintiffs; but in the present case the application was made by a defendant, by whom judgment had been obtained. His case, although not within the letter of the act, certainly appeared to come within its equity.

The Court was of opinion, that the words of the act should be strictly adhered to; and that the defendant therefore was not entitled to his rule. He was at liberty, however, to take a rule *nisi*.

Rule refused.—*Batten v. Squires*. T. T., 1835. K. B. P. C.

ADMISSION OF ATTORNEY WITHOUT THE USUAL NOTICES.—SPECIAL CIRCUMSTANCES.—COLONY.

*The Court, under particular circumstances, will admit an attorney to practise in New South Wales without the usual notices, provided means have been taken to make his intention to apply public.*

An application was made for the admission of a clerk to practise as an attorney, without

the usual term's notice, under the following circumstances:—The father of the applicant, it appeared, had received an official appointment in New South Wales, and the applicant was desirous of accompanying him to practise in that colony as an attorney, which could not be permitted, unless he was first admitted by one of the Superior Courts at home. He had served his time regularly, but had not had time to give the usual notices of his intention to apply for admission. He had, however, stuck up notices of the special application he now made at the commencement of the first term, and had also given notice to the Secretary of the Incorporated Law Society.

The Court, under the special circumstances of the case, ordered the applicant to be admitted at the end of the term, but directed his notices to continue up until that period.

Admitted accordingly.—*Es parte Hulme*. T. T., 1835. K. B. P. C.

### Common Pleas.

AMOUNT OF SHERIFF'S FEE FROM THE PERSON ARRESTED.

*The sheriff can only legally demand the fee of 4d. from the party arrested.*

This was an action against a sheriff's officer for extortion, under the 32 G. 2, c. 28, s. 1, by which it was provided that no sheriff, under-sheriff, bailiff, &c. should demand, take, or cause to be demanded or taken, for any arresting or taking, or for waiting until the person arrested should enter an appearance, any greater sum than that allowed by law. The sum taken on the plaintiff's arrest it appeared was 1*l.*; but, on the part of the defendant, a master of the Court of King's Bench was called, who had formerly been an attorney in considerable practice, and who proved that he had paid 1*l.* many times, and had had that sum allowed on taxation. On the part of the plaintiff it was contended, that 4*d.* was the full amount allowed by law; and a verdict was found for the plaintiff.

A rule *nisi* was now applied for to enter a nonsuit, or for a new trial, on the ground that the verdict was contrary to evidence. A case was cited where it had been held that the act 32 G. 2, c. 28, did not apply to a sheriff's fees for an arrest. By that act the penalty of 50*l.* was made recoverable by an action if a greater fee than allowed by law was taken; the evidence of what the law allowed should be taken from what was allowed by the master. Another case was also now cited, where it had been held to be the duty of the plaintiff to shew what was the amount allowed by law, on an action of the present description.

It was now suggested that a similar point had been argued in another Court during the present term.

*Cur. adv. vult.*

The Court upon a subsequent day delivered their opinion, when they said that the case alluded to was not exactly in point. In another case, where an action was brought under

similar circumstances to those of the present case, the Court said that the sheriff was only entitled to 4*d.* for each warrant, and although the charge made might be reasonable in amount, yet, as it was contrary to law, it could not be allowed. The only act by which the proper amount of fees was settled was by the 23 Hen. 6, c. 9, whereby the fee was fixed at 4*d.*, and unless some other enactment could be pointed out by which the sheriff could claim a larger amount, he could make no further demand, as no usage could prevail against the positive enactment. In another case the Court had said that the prohibition against taking more than the fees pointed out by the act before alluded to was confined to the fees taken from those who were arrested, and did not restrain the sheriff from proceeding against those by whom he was employed for reasonable compensation for work and labour. On the authority of these cases the Court thought that the rule could not be granted, except on the ground that the verdict was contrary to evidence.

Rule accordingly.—*Innes v. Levy*, T. T. 1835. C. P.

### Exchequer of Pleas.

NON PROS. AMENDMENT.—APPEARANCE.—DECLARATION.—LACHES.—IRREGULARITY.

*If a defendant undertakes to amend an appearance, he must amend, and has no right to enter a new appearance.*

On shewing cause against a rule for setting aside a judgment of *non pros.*, it appeared that when the defendant entered an appearance to the writ of summons issued in the present case, he made a mistake in the names. Notice being given to him of the fact by the plaintiff, he promised to amend; but instead of doing so, entered a new appearance. He then demanded a declaration, and the plaintiff not declaring within the following term, he signed judgment of *non pros.* It was to set aside this judgment that this rule had been obtained.

It was contended in support of the rule, that the defendant had deceived the plaintiff by not amending the appearance, as he had promised. He ought to have amended, and not entered a fresh appearance. Under those circumstances, the plaintiff had not been required regularly to declare, and therefore the judgment of *non pros.* could not be sustained.

The Court was of opinion that the defendant had been irregular in not amending the appearance, and therefore directed the judgment to be set aside. Rule absolute.—*Bate v. Bolton*, T. T. 1835. Excheq.

DECLARING DE BENE ESSE.—BAIL-BOND STANDING AS SECURITY.—LACHES.—BAIL.—CAPIAS.

*If an action is commenced by a bailable capias, the plaintiff has a right to declare de bene esse after the time for appearing, and before bail is perfected.*

In this case, a rule nisi had been obtained

for staying proceedings on the bail-bond on payment of costs. There was no objection to the rule being made absolute in its terms; and the very question between the parties was, whether the bail-bond should stand as a security. The plaintiff had declared after the time for appearing to the writ of *capias*, and before bail had been perfected.

It was contended on the one hand, in support of the rule, that the plaintiff had not entitled himself to have the bail-bond to stand as a security, he having allowed the time for appearing to pass without declaring. After such laches, he had no right to call on the Court to order the bail-bond to stand as a security.

On shewing cause, it was contended, that the plaintiff had a right, by the words of the rule of M. T. 3 W. 4, to declare at any time between the time of the bail being put in and their being perfected. The fact of the eight days having expired could make no difference. If he was not to declare after they expired, he could never declare *de bene esse* at all.

*Cur. adv. vult.*

The Court having taken time to consider, stated that they had consulted with the other Judges, and they were all of opinion that the plaintiff was at liberty now to declare *de bene esse* at any time after the eight days mentioned in the writ of *capias* had expired, before the perfecting of bail. The plaintiff having declared in that manner, was entitled to have the bail-bond stand as a security. The present rule must be made absolute on those terms.

Rule absolute accordingly.—*Bailey v. Newbold*, T. T., 1835. Excheq.

## ANSWERS TO QUERIES.

### Law of Property and Conveyancing.

ESTATE TAIL GENERAL.—P. 416.

Section 15 of the Fines and Recovery Act, seems to apply to the case of an entail created before the passing of the act: the consent of the protector, therefore, is necessary. The tenant by curtesy is the protector, see sec. 22, last clause. Without the consent of the protector he can only create a base fee which shall be binding on himself, and all claiming through or under him, and these never include the protector, see sec. 34. He cannot mortgage either without such consent, to any greater extent; see sec. 21: and equity will only assist so as to protect the mortgagee. *Idem*. G.

BEQUEST.—PROPERTY. P. 416.

No word has a more comprehensive meaning than the word "Property;" for every description of interest might be conveyed by a general bequest of property; and, generally speaking, the words "estate and property" will extend to realty. *Farrell v. Page*, 1 Ch. Cas. 262; *Fletcher v. Smilton*, 2 T. R. 656,

*Doe v. Gilbert*, 3 Brod. & Bing. 85; *Dunnage v. White*, 1 Jac. & W. 583. And in *Arnold v. Arnold*, 9 Leg. Obs. 346, the Master of the Rolls said that he had to decide whether the words "property in England" were to be confined to a particular description. There were no authorities to support such a conclusion, and consequently he should decide that the widow should take under the bequest all the property enumerated in the master's report." Upon the authority of those cases, I think that *K. D.* takes every thing (of whatever kind it may be) that might be found in the dwelling-house of the testatrix at the time of her decease.

F. W. S.

### Practice.

UNIFORMITY OF PROCESS ACT AND GENERAL RULES. P. 345 & 431.

I think that it should be always considered in practice, that in case the time for pleading to any declaration, or for answering any pleadings, should expire on the 10th of August, or between the 10th and the 24th of October, the party intending to plead or reply may act just as if the declaration or pleading had been delivered or filed on the 24th of October. See Rule 12 M. T. 3 W. 4, and stat. 2 W. 4, c. 39, s. 11. The word "preceding," in the latter part of the rule, means the same as "before mentioned." If a defendant be served with a writ of summons on the 8th of August, he has not until the 30th of October to enter an appearance; but appearance may be entered by plaintiff at the expiration of eight days, *sec. stat.* sect. 11.

L. S.

### QUERIES.

#### Estate of Property and Conveyancing.

##### LEGACY.—INTEREST.

*A.* by his will gives to his widow the rents of a leasehold estate for her life, and an annuity of 100*l.* for life charged on real estate, the first payment to be made on the quarter day next after his decease, and also 4000*l.* sterling absolutely. Is the widow entitled to interest on the legacy of 4000*l.* from the time of the testator's death, or only from a year afterwards, the will being entirely silent on the point?

H. M.

##### AGREEMENT FOR LEASE.

*A.* and *B.* execute and exchange agreements for a lease of a house for the term of seven years. Amongst other stipulations the agreement contains one on the part of *B.* (the lessee) to pay seven guineas towards the lease and counterpart. After one year's possession a draft lease is forwarded to *B.*, but he refuses to execute a lease, on account, as alleged, of the expense. What course is the best to pursue; either to compel the execution of the

lease, or the abandonment of the premises? And, in the event of an ejectment being necessary, can *A.*, under the agreement, recover his solicitor's charges for the draft lease, &c. from *B.*, although the lease has not been executed?

AN EARLY SUBSCRIBER.

##### MORTGAGE.—COSTS.

A mortgage deed contains the usual power of sale, and a covenant on behalf of the mortgagor to join in an assignment. Such joining of the mortgagor is declared unnecessary, by a declaration to that effect in the deed, being only for the satisfaction of the purchaser, if he should require it. Is the mortgagee, who sells by auction, and has not provided in his conditions that the purchaser shall not require it, bound to obtain the mortgagor's signature to the deed? I am aware of the case *Clay v. Sharpe*, cited in Sug. Vend. & Pur. 327, 7th ed.; but it seems there the purchaser filed the bill, and although a specific performance was decreed, it was declared that the defendants (the mortgagee and his trustee) should pay the plaintiff his costs, so far as the bills were not dismissed (the assignees of the mortgagor, who had been made a bankrupt, having been made parties to the suit, and as regards them the bill was dismissed with costs): Sir E. Sugden afterwards adds, that it is now an established rule. In a suit instituted for that purpose by a purchaser, although a specific performance might be decreed, is the vendor to be fixed with costs?

B.

#### Estate of Landlord and Tenant.

##### LEASE.—SURRENDER.—DILAPIDATIONS.

A lease is granted to *B.* for fourteen years; at the expiration of eight years of the term, *B.* prevails on the landlord to accept a surrender of his lease, which is acceded to, and the usual instrument is accordingly prepared, indorsed, and signed, by which *B.*, "of his own free will and consent," engages to deliver up possession at Michaelmas. The surrender in question is dated in the preceding month. In the mean time a new tenant offers himself, and is accepted. On the 16th of October, in consequence of the representation of the incoming tenant as to the state and extent of the repairs, and his refusal to execute his lease until they are made good, the premises are, therefore, regularly surveyed, and the surveyor, by his report, adjudges "the repairs requisite to be done by an outgoing tenant" to amount to a considerable sum. Under these circumstances it is required to be known, what remedy (if any), either at law or in equity, can the landlord resort to, in order to obtain compensation from *B.*, the outgoing tenant? It is to be observed, the repairs under consideration have been completed by the landlord. A reference to cases is requested.

ASPIRO.

## RENT.—DISTRESS.—POSSESSION.

*A.* let a house to *B.* for a term of years; *B.* underlet to *C.*, as a yearly tenant. *B.*'s term expired, and the house reverted to *A.*, who twelve months afterwards leased to *D.* for a term of years, commencing at the expiration of *B.*'s term. *C.* having remained, and being still in possession, *D.* requests *C.* to quit, but which *C.* refuses. What are *D.*'s remedies against *C.* to obtain possession? and can *D.* either maintain an action against *C.* for use and occupation, or distrain his goods for rent? And can *D.* claim rent from *C.* from the commencement of *D.*'s term, or from the date of his lease? E. R.

## RE-ENTRY.—FI. FA.

Judgment is obtained against a defendant; a writ of *fi. fa.* is placed in the hands of a sheriff's officer, who by virtue thereof enters upon the goods of the defendant, and retains possession for some days: finding, however, that the year's rent, due by the defendant for the premises, by far exceeds the value of the goods, the officer withdraws from the possession, taking nothing. The *fi. fa.* is not returned, and the rent being paid, there is now a probability of levying the amount. Can the sheriff enter again under the same writ, or is it necessary to issue another writ of *fi. fa.*? and if so, is it necessary that the first writ should be previously returned? GENUS.

## ACTION FOR RENT.

Under a lease an accumulation of rent has taken place: Is the lessor bound to bring his action thereon within twenty years after cause of action, under 3 & 4 W. 4, c. 42; or within the shorter term of six years, under the 42d sect. of 3 & 4 W. 4, c. 2? J. B. W.

## Practice.

## WRIT OF SUMMONS.

Can a defendant who has been served with a writ of summons (debt under 20*l.*), adopt the same method to ascertain from the plaintiff's attorney, whether the writ was issued by him; and also a demand of the plaintiff's residence, occupation, &c., as if he had been arrested? Upon referring to Arch. Prac. and Chitty's Forms, I find the writ of *capias* only mentioned, no provision being made for a writ of summons. Y. C.

## ELECTION LAW.

*A.* devised a freehold estate to *B.* and *C.*, upon trust to sell, and divide the monies between *A.*'s four brothers. *B.* and *C.* are two of *A.*'s brothers. The estate has not yet been sold, nor is it likely to be sold, as an adequate price cannot be obtained; but *B.* and *C.*, upon making up the accounts of *A.*, as executors, valued the estate at *l.*, and paid the duty upon that sum. The estate is now let, and the yearly rents are divided between *B.*, *C.*, and

the children of their other two brothers (the latter being dead). Who is entitled to vote in respect of the said estate—each share being of the value of 40*s.* and upwards? Can *B.* and *C.*, and the children of age of the other two brothers, *each* vote in respect of their share? Or can *B.* and *C.*, as trustees, *only*, vote in respect thereof? See sec. 23 of the Reform Act. A CONSTANT SUBSCRIBER.

## Rate of Attorneys.

## ARREARS OF CERTIFICATE DUTY.

Is an attorney, who has discontinued voluntarily to take out his certificate, compelled in the event of his requiring to resume practice at the end of 20 years, obliged to pay the 20 years arrears? If in the affirmative, are the arrears computed after the rate of duty which the certificate bears, or would bear, if the party practised in London, as that is the largest duty?—or after the rate the certificate bears which the party discontinuing practice had previously taken out? G.

## THE EDITOR'S LETTER BOX.

The First Part of the *Commentaries on the New Statutes*, containing a full Digest of the Law and Practice of Corporations, as altered by the New Act, with the Act and Order in Council *verbatim*, is now published, price 3*s.* 6*d.*

The *Legal Almanac, Remembrancer, and Diary*, for 1836, will be published before Michaelmas Term. The plan adopted last year will be somewhat altered. Particular attention will be paid to the preparation of an *Office Diary*. Several new Professional Lists will be added; and it is expected, that with the suggestions we have received, the work will be rendered particularly useful to the profession at large.

The Commissioners' Report on the Consolidation of the Statute Law is now published, price 2*s.*

We thank "Lex" and Z. for their suggestions.

We are obliged by the Case and Opinions of the late Lord Tenterden and Baron Wood.

The Queries and Answers of N. G.; T. H.; "Scrutur;" "Gradus;" W. S.; "Jus;" S.; "A Constant Reader;" C. H. I.; J. N.; and Y. Z., have been received.

The communication of J. S., according to our first impression, will be inserted.

The letter of "Anti-Shark," or its substance, shall be published.

A correspondent observes, on the subject of International Law, stated at p. 390, that the case of *Doe d. Birtwistle v. Vardell*, has not yet been decided by the House of Lords, but postponed till next Session, when it is to be re-heard and adjudicated. The Lords, he says, appear to be in favor of the claimant, and against the decision of the Court of King's Bench.

# The Legal Observer.

Vol. X.

SATURDAY, OCTOBER 17, 1835. No. CCXCVI.

— "Quod magis ad nos  
Pertinet, et nescire malum est, agitamus.

HORAT.

## THE BAR IN THE UNITED STATES.

We have for some time had no opportunity of endeavouring to amuse our readers—all has been dry law and matter of fact. We gladly avail ourselves, therefore, of a book which has only lately fallen in our way,\* to shew that the zest for enlivenment has not left us when we can get legitimate matter. The work before us naturally treats of many things which it is not our business to notice; the author's opinions on any other subjects than those relating to our own profession, are not within our province. However we may deplore some of them, we certainly shall not attempt to correct them: but the two chapters relating to "the Administration of Justice" and "the Laws," enable us to give some account of the bar in the United States.

And first, we must make known to our readers that the "ci-devant Prince" found in America, in his own words "a country, which Europe refused him;" that he became a citizen of the United States, and afterwards "a lawyer, a planter, an officer of militia" (p. xxxviii). His mode of becoming a lawyer he thus narrates:

"My life has been one of agitation. Placed by fate in many singular and contradictory positions, I have been always submissive to its decrees, and curious to observe where the current on which I have been borne would carry me; and truly I have never had much cause to complain; on shores to which I have been carried, I hardly know how, I have gathered many flowers; and often the region I have expected to find most barren, has turned out the most fertile in agreeable sensations. I will give you an instance. Settled in a

new country like that which I have described to you, some reverses of fortune rendered my financial position embarrassing. At the age of twenty-six I became a lawyer. One of my neighbours quitting practice, I purchased of him his professional library for a couple of oxen and a bill at a long date; and thus provided, I sat down to study law during the dead season of winter, at the same time giving due attention to my plantation. I extricated myself from my difficulties." pp. 145, 146.

Here we cannot but pause to felicitate our Prince on his happiness at being able to carry his good resolution into so rapid a consummation. It is evident, from his account, that in the happy land which he had made his own, to select a profession is all that is necessary to become qualified to attain eminence in it. At twenty-six we find that he "became a lawyer." This would seem to have been effected before even the purchase of the law library; but, at any rate, a perfect knowledge of the law was attained in the "dead season of the winter," notwithstanding the distraction of his attention to the plantation. Alas! how may the English student, condemned by the prejudices of his country to many years preliminary labour, regret the rapid transformation from the officer-planter to the planter-lawyer! Not a little also may he envy the Prince the price which he paid for his library. It is to be regretted how few English law books can be acquired for "a couple of oxen and a bill at a long date!"

We at first thought that the Prince had found out a royal road to the study of the law; but the secret of the easy transmutation of the citizen-anything to the citizen-lawyer, is thus explained in a subsequent page:

"But however well constituted the Court may be, its walls would remain mute and deserted without the lawyers. Tribunals and litigants have certainly been invented

\* "A Moral and Political Sketch of the United States of North America, by Achille Murat, ci-devant Prince of the two Sicilies, and Citizen of the United States. E. Wilson. 1833."



for them, *for they are the parties who most profit by them.* There is in the United States but one class of lawyers, who perform the functions of conveyancers, attorneys, notaries, &c.; their legal title is Counsellor at Law. They are officers of the Court, and, as such, take the oath of good conduct, and are subject to a disciplinary system. They may be suspended or even broken by the Court. They are admitted upon an examination, which takes place in full Court, *without any previous course of study being necessary.*" p. 187.

The remark that tribunals and litigants have certainly been invented for lawyers, "for they are the parties who most profit by them," is worthy of a place in the Beggar's Opera. Lord Brougham has said, that King, Lords, and Commons, are only to be maintained for the purpose of bringing twelve men into a jury box; but the Prince goes a step further. He considers that the whole machinery of government is only important as giving subsistence to the Profession. The swarm of lawyers created by this happy system, is, of course, immense. Speaking of a new settlement, he says,

"The lawyers of every description, from the juriconsult to the notary, also swarm. Our country abounds in poor devils without any pecuniary means, who, however, have received a sort of education. They study the law without external assistance, engaged at the same time in some trade, or in the army, or counting-house, or a tavern; and as soon as they can sustain an examination, get themselves admitted, and live by it. I need not tell you how many of them spring from nothing. Being generally pettifoggers, the greater part seek to sow dissensions among the poor ignorant people, and involve them in law proceedings during five or six sessions, solely to extract a few dollars." p. 72.

This, however, is in a new settlement. Of the respectability and talent of the bar in the old states, the author speaks in glowing terms:

"With us the lawyer is the first man in the state, the true aristocracy of the country; and besides the moral and political influence he enjoys, his life is a continual succession of interesting occupations, in which he is at once an actor and a spectator."

And he goes on in a lively vein.—"To me indeed, nothing is comparable to the interior of a law court; I could pass my life in one with pleasure, even if doomed to be silent. Talk of the theatre!—it is but a very feeble and awkward imitation of a

court of justice; there we have the thing itself. Tragedy, farce, melo-drama, comedy, all are there, with the advantage too of much better actors, because they represent passions they really feel: I speak of interested parties and witnesses. It is necessary to have practised, to know the pleasure there is in pursuing an idea, in dislodging a law which seems to avoid you, through twenty volumes, forcing it from one intrenchment to another: and when at last you hold it, after having verified a *thousand* [!] citations, what a triumph! Is not this a much better thing than entrapping a red fox after a chase of twenty miles? You proceed to the hearing: how keenly you enjoy the surprise your discovery produces in the adverse party. He wishes to postpone the cause;—you do not permit him, he must plead *instante*. The examination of witnesses begins: all are for him—until you cross-examine them. I know nothing more amusing than to examine before a good jury, a witness, half fool, half knave, and well tutored by the opposite party. What skill is necessary to make him contradict himself, and with what facility afterwards do you demolish the edifice which your adversary's reasoning has been building. The pleadings follow: the counsel is then an actor, and in his finest part; and if he acquit himself handsomely, whether he lose or gain the cause, he feels conscious of having done every thing possible to do, *and even his client, though a loser, concurs in the unanimous approbation of the assembly and the Court.*"

If this description be true, whatever admiration we may have of the lawyers, we cannot but express our envy of the American suitor. To contribute to the general effect, he cheerfully sacrifices his own feelings. The Strasburg goose, who we are assured allows his liver to be made as large as himself, in order to be immortalised in a *paté*, is but a type of this amiable person. Clients in England, alas! generally prefer winning their cause to the grand effect of its going off well.

The sketch which the author gives of the administration of justice, and of the laws, would contain but little novelty to our readers, and that little, after the candid confessions of the Prince as to his own rapid acquirement of legal lore, and his writing at Brussels without books, is rendered suspicious.\*

\* To such of our readers as wish for accurate information on these subjects, we can recommend M. Tocqueville's "Democracy in America," which has just been translated.

We gladly, however, extract the following eulogium on the bar, properly so called, of the United States.

"The Bar of the United States is a very distinguished body; it is even the first body in the state in the consideration of the people. There are three professions which are called learned, and which confer degrees; these are the faculties of law, medicine, and divinity; but whilst the latter lead to nothing, the bar leads to every thing. It is the real nursery of every statesman, and it is in it that the people seek their legislators and governors. In a theocracy, the government is in the hands of the priests; in a military despotism, in that of the generals; in a country governed by laws, it is just that their interpreters and ministers govern. Thus are we well governed, and I regard this influence of the lawyers upon the government as the best guarantee of our liberties. It is to this point that Europe will come in proportion as liberty shall be better understood there." p. 251.

Here we leave the Prince of the Two Sicilies, wishing him all success as a lawyer, a planter, and an officer of the militia.

## THE RIGHTS OF FRENCHMEN IN ENGLAND.

BY A FRENCH ADVOCATE.

No. III.

I CANNOT commence the present letter on the subject of English Law, without first congratulating you on the great accession of property which I understand from your brother you are likely to obtain under the will of your mother's brother. He, I understand, was an *Englishman*, and at the time of his death domiciled in *France*. A great portion of his property, your brother also informs me, was situate in *England*. In your next letter, which I trust will be soon, let me know whether his will was executed according to the forms of the *French* or *English* law, and I will as early as possible write you word how far it would have effect in *England*.

I now resume the account of the commercial rights of *Frenchmen* in *England*.

You may, perhaps, remember that I concluded my last with a statement of the illiberal policy of James I. From that period policy equally illiberal seems to have been adopted down to the accession of William and Mary. Then and subsequently, the true principles of commerce and govern-

ment were better understood, and the writings of several eminent political economists shewed the country, that it could not be for its interest to treat foreigners, merely because they were foreigners, like enemies; and I believe I may now safely say, that all the provisions of the statutes imposing harsh regulations upon foreigners, have either been repealed, modified, or have fallen into disuse. I do not mean by this, to say that all restrictions whatever are removed from foreigners, but that only such restraints remain as are customary according to the policy usually adopted by modern commercial nations. Of these I shall hereafter speak when I come to write on treaties, navigation, shipping, and customs.

I will now concisely consider in a due and practical order, the different legislative restraints which affect the freedom of trade of the subjects of a foreign state in this country, and the constructions upon them. These exceptions or limitations are of two descriptions; comprising, *first*, the regulations with respect to *residence*, liability to search, &c. which attach upon an alien merchant or artificer on his very establishment in the country, and independently of any actual exercise of his occupation; and, *secondly*, the regulations under which an alien merchant or artificer is placed in his actual traffic with his customers. We will begin by considering the first class of regulations, under which an alien merchant or artificer is placed on his establishment in this country, and independently of any actual exercise of his occupation; and the clearest way of viewing these regulations will be, to examine them, *first*, with relation to the alien traders *themselves*; and, *secondly*, with relation to the *alien apprentices, journeymen, and servants*, who may or may not be retained in the service of alien traders, or of the King's own subjects.

*First, then, as to the alien traders themselves*: the act of 27 Edw. 3, stat. 2, called the Statute of the Staple, has several provisions relating to alien merchants. In the 2d chapter it adopts them into the King's especial protection; and in the 17th it exempts their goods from being seized for debts of one another, where they are not sureties, saving the law of marque and reprisals. The same spirit of liberality is shown to merchant strangers by the stat. 14 Ric. 2, c. 9. Then comes the stat. 5 Hen. 4, c. 7, by which it is enacted, "that all merchant strangers, of what estate or condition that they be, coming, dwelling, or repairing within the realm of *England*,

shall be entreated or demeaned within the same realm, in the manner, form, and condition as the merchants denizens be, or shall be entreated or demeaned in the parts beyond the sea." The stat. 5 Hen. 4, c. 9, among other things, enacts, "that in every city, town, and port of the sea in England, the customers and comptrollers of our lord the King in all the ports of *England*, shall take sufficient sureties for all manner of merchandizes brought by the merchants, aliens, and strangers coming and repairing to the said ports, to the intent that the money taken for the said merchandize shall be employed upon the commodities of the realm, saving their reasonable costs, as in the same statutes more fully is contained. And, moreover, it is ordained and established, that the said merchants, aliens, and strangers, shall sell their said merchandizes, so brought within the said realm, within a quarter of a year next after their coming into the same; and also that the money which shall be delivered by exchange in *England*, be employed upon the commodities of the realm within the said realm, upon pain of forfeiture of the same money; and that no merchant, alien, nor stranger, shall sell any manner of merchandize to any other merchant, alien, or stranger, upon pain of forfeiture of the same merchandize; and also it is ordained and established, that in every city, town and port of the sea in *England*, where the said merchants, aliens, or strangers be, or shall be repairing, sufficient hosts shall be assigned to the same merchants, by the mayor, sheriffs, or bailiffs of the said cities, towns, or ports of the sea; and that the said merchants, aliens, and strangers shall dwell in no other place, but with their said hosts so to be assigned; and that the same hosts so to be assigned, shall take for their travel in the manner as was accustomed in old time." The two last-mentioned acts are confirmed by that of 4 Hen. 5, c. 5.

The 17 Edw. 4, c. 1, provides that aliens and strangers, workers in gold and silver, inhabiting in the city of London, shall inhabit in the open streets of the same city, where there is the best and most open publicity of their art. The 14 & 15 Hen. 8, c. 2, contains several regulations as to aliens, enacting among other things, "that all aliens born, whether denizens or not, who inhabit in London, Westminster, Southwark, and the environs, shall be under the search and reformation of the wardens and fellowships of handicrafts within the city of London, with one substantial stranger; that

the wardens, with such stranger as aforesaid, shall appoint a proper mark, by which the alien merchandizes may be known; and have full power to search and reform all manner of wares of workmanships made by such alien handicraftsmen; and that no alien using the occupation of smith, joiner, or cooper, shall make any wares without putting such mark to them before they are sold or used." A similar power of search and reformation is given to other officers in other towns. But the act does not extend to aliens dwelling in the universities of Oxford, or Cambridge, or within the sanctuary of St. Martin's Le Grand in London. If the officers in London or elsewhere refuse to mark the wares, the aliens may sell them without mark; and as to the marking, it is declared, that the act extends only to the trades of joiners, pouchmakers, coopers, and blacksmiths. By 21 Hen. 8, c. 16, the last-mentioned regulation was confirmed; and it was further provided, that alien artificers and others being housekeepers, should pay the same charges as the King's subjects of the same trade, or on refusal should no longer occupy any handicraft; that they should take certain oaths: that no stranger, artificer, or handicraftsmen, who were not householders at a time therein mentioned, should set up or keep any house, shop, or chamber, wherein they could exercise any handicraft or mystery; and that they should not assemble but in the common-hall of their crafts; and that foreign artificers, being denizens and householders, and inhabiting and occupying any craft in or within two miles of London, should go with the wardens to make search, according to the last-mentioned statute of 14 & 15 Hen. 8, c. 2. The act confirms the exemptions enjoyed by the universities of Oxford and Cambridge, providing commission of certain persons to make search and view for particular purposes in St. Martin's Le Grand.

The 13 & 14 Car. 2, c. 11, s. 10, enacts, "that for preventing of frauds in colouring of strangers' goods, and otherwise, every merchant or other passing any goods, wares, or merchandizes inwards or outwards, shall, by himself or his known servant, factor, or agent, subscribe one of his bills of every entry with the mark, number, and contents of every parcel of such goods as are rated to pay by the piece or measure, and weight of the whole parcel of such goods as are rated to pay by the weight; without which the officers of the customs shall not suffer any entry to pass; and that no children of aliens, under the age of

twenty-one years, be permitted to be traders, or any goods or merchandizes to be entered in their names."

By the 33 Geo. 3, c. 4, the 38 Geo. 3, c. 50, and the 56 Geo. 3, c. 86, certain police regulations were introduced with respect to aliens. The last of these acts, after being continued from time to time, was ultimately repealed and superseded by the 7 Geo. 4, c. 54. All the law as to the police of aliens is to be found in that act. I shall reserve its provisions, and the mode of its operation, for a future letter.

I will next consider the distinctions between aliens and natural born subjects which prevail in the law of apprentices, journeymen, and servants. The statute 1 Ric. 3, c. 9, s. 11, enacts, "that no person not born under the King's obeisance, inhabiting, dwelling, or holding any great house or chamber in this realm, and occupying any handicraft, or being artificer, or handicraftsman, shall take any apprentice, servant, or any other person, to work with him or to his use, unless it be his son or his daughter; other than at the feast therein mentioned, shall he keep apprentices or servants with him, except that the same apprentices or servants with him so to be taken be the King's subjects born. The 14 & 15 Hen. 8, c. 2, enacts to the same effect, and provides, that no alien handicraftsmen shall keep more than two alien journeymen or covenant servants; but that it should be lawful to any lord of the parliament, and every other of the King's subjects, having lands and tenements to the yearly value of one hundred pounds, to take and retain strangers joiners and glaziers in their service from time to time, to and for the exercising with them their crafts, this act notwithstanding." This regulation, however, does not extend to aliens inhabitants of Oxford, Cambridge, or the Sanctuary of St. Martin's le Grand. This act also prohibits any *alien* or *denizen* from taking an apprentice upon pain of forfeiting 10*l.*, half to the King and half to the informer; but this does not seem to invalidate the indenture. See Moore, 411; Chit. App. 24. The 21 Hen. 8, c. 16, enacts, that no stranger artificer shall keep more than two alien servants; and after confirming the statute last mentioned, it proceeds to enact, that the inhabitants of Oxford, Cambridge, or the Sanctuary of St. Martin's le Grand, may keep ten journeymen or apprentices: this privilege of these places however was taken away by the 32 Hen. 8, c. 16, which restricts the inhabitants of them to two alien

apprentices, journeymen, or servants; and by the statute 25 Hen. 8, c. 9, s. 3, pewterers are forbidden to take any alien apprentice or journeyman at all.

We will now proceed to the *second* great class of regulations; those under which an alien merchant or artificer is placed in his *actual traffic* with his customers. This class subdivides itself into five heads: as it relates *first*, to the description of persons with whom an alien merchant or artificer may trade; *secondly*, to the period within which his commercial transactions must be negotiated; *thirdly*, to the places where he is permitted to exercise his occupation; *fourthly*, to the description of goods or employment, about which he is permitted to occupy himself for the purposes of foreign or domestic commerce, and whether by retail or by wholesale only; and, *fifthly*, to the extra duties which are imposed upon him.

And, *first*, as to the description of persons with whom alien merchants may traffic. Under the act of 9 Edw. 3. st. 1, c. 1, they were authorized in selling their goods to what person it should please them, as well to foreigners as denizens, except the King's enemies; and the same permission was confirmed by the acts of the 25 Edw. 3, st. 4, c. 2, the 2 Ric. 2, st. 1, c. 1, and the 11 Ric. 2, c. 7; but this freedom was at length restricted by the 16 Ric. 2, c. 1, which enacts, that no strange merchant alien shall sell, nor buy, nor merchandize within the realm with another strange merchant alien to sell again. This act extends only to sales for the purpose of selling again; but the statute 5 Hen. 4, c. 9, carried the same principle still farther, by ordaining that no merchant alien nor stranger should sell any manner of merchandize to any *other alien* or stranger merchant, upon pain of forfeiture of the same merchandize. Even the most indirect communication between alien merchants has been strongly discouraged; for the 6 Hen. 4, c. 4, provides that merchants alien and strangers shall not carry, or cause to be carried out of the realm, any merchandizes brought within the realm by the merchants aliens and strangers aforesaid.

*Secondly*, as to the period or time within which the commercial transactions of an alien merchant must be negotiated. The stat. 5 Hen. 4, c. 9, enacts, that merchants aliens shall sell their merchandizes brought within the realm within a quarter of a year next after their coming into the same; but this ordinance was repealed by 6 Hen. 4, c. 4. The stat. of 8 Hen. 6, c. 24, provides, that

no Englishmen shall sell merchandizes to any alien but only for ready payment in hand, or else in merchandizes for merchandizes, to be paid and held in hand. But this was altered by 9 Hen. 6, c. 2, which permitted English merchants to sell their merchandizes to aliens, giving six months' credit.

*Thirdly*, we are to inquire in what places an alien merchant is permitted to exercise his occupation. And here the principal impediment which aliens have experienced, has been thrown in their way by the franchises of particular towns, I will take a short historical view of the statutes on this subject. The 11 Edw. 3, c. 5, so far from encouraging these franchises to the detriment of aliens, invited foreign cloth-workers into the kingdom, with a promise of franchises to themselves. But the act of 14 Edw. 3, st. 2, c. 3, was not so indulgent: after reciting the before-mentioned provisions of Magna Charta, it declares that all merchants, denizens, and foreigners, except those which be of the king's enmity, may without let safely come into the said realm of England with their goods and merchandizes, and safely tarry and safely return, paying the customs, subsidies, and other profits reasonably thereof due; so always, that franchises and free customs reasonably granted by us and our ancestors to the city of London, and other cities, boroughs, and good towns of our realm of England, be to them saved. The act of 18 Edw. 3, st. 2, c. 3, enacted, that the sea should be open to all manner of merchants to pass with their merchandizes where it should please them; and the act of 25 Edw. 3, st. 4, c. 2, established the same facilities on the land, by restoring the freedom of trade, in spite of the franchises of particular places. By the statute of 28 Edw. 3, c. 13, it was enacted, that no ship shall be compelled to come to or stay in England; and that if ships come of their own will or by misfortune, and those on board be desirous of selling their merchandize, it may be bought, though it be not landed, so there be no forestalling; that the masters, mariners, and merchants having sold what they please, and paid the customs, may depart with their ships and the remnant of their goods without custom; and that none shall distress them by driving them to any particular port, or meddling with their sale after they have arrived. This act is confirmed by 20 Rich. 2, c. 4. The 38 Edw. 3, st. 1, c. 2, declares, that all merchants, as well aliens as denizens, may sell and buy all manner of merchandize, and freely carry them out of

the realm, paying the subsidies and customs thereof due; except that the English merchants shall not pass out of the realm. The freedom of trade, which had been restored to alien merchants by the before-mentioned statute of 25 Edw. 3, notwithstanding the franchises of particular places, was confirmed by the act of 2 Rich. 2, st. 1, c. 1, saving to the prelates and lords of the realm their rights of purveyance of victuals, which was a privilege (now no longer in existence) of buying up provisions at an appraised value in preference to all other persons, and even without the consent of the owner (1 Bla. Com. 287). The 5 Rich. 2, st. 2, c. 1, enacts, that merchants strangers shall be welcome, as well within franchises as without, to merchandize and tarry as long as they list. The 11 Rich. 2, c. 7, confirms the before-mentioned statutes of 9 Edw. 3, st. 1, c. 1, and 25 Edw. 3, st. 4, c. 2, by which the freedom of trade is insured to alien merchants, in spite of particular franchises. Some restrictions, which we have noticed in other parts of this chapter, were imposed by the stat. 16 Rich. 2, c. 1; but in the main the freedom of trade was confirmed, notwithstanding the franchises of the towns. The last statute that refers to the place where the trade of an alien in Great Britain must be carried on, is 1 Rich. 3, c. 9, s. 11, which enacts, that all persons not born under the king's obedience, being artificers or handicraftsmen dwelling in this realm, who shall use, exercise, or occupy the feat of merchandize of any manner of wares within this realm, shall deal, sell, or barter the same in the port, town, or place where the same artificers be or shall be dwelling, and in no other place, upon pain of forfeiture of all the value of all the goods sold contrary to the act. This provision has now fallen into desuetude.

And, *fourthly*, what are the kinds of goods which may not be sold indiscriminately by wholesale or retail.

And, 1st, of those kinds of goods in which an alien merchant is prohibited from dealing freely *within* the realm. By the 38 Edw. 3, st. 1, c. 2, it was enacted, that all merchants, as well aliens as denizens, might buy and sell all manner of merchandize. The 27 Edw. 3, called the Statute of the Staple, even gives to alien merchants the privilege of exporting wool, which it denies to natural born subjects. The 6 Rich. 2, st. 1, c. 10, expressly permits aliens in amity with the king to bring in victuals and sell them. This act is confirmed by 1 Hen. 4, c. 17, and 14 Hen. 6, c. 6; but many following statutes contracted the liberty of fo-

reign merchants to deal in all manner of merchandize. That of 4 Edw. 4, c. 8, enacts, that no manner of stranger nor alien, by himself or by any other, shall buy any English horns, unwrought, of any tanners, butchers, or of any other person, gathered or growing, within the city of London, and twenty-four miles on every side thereof; and that no Englishman, nor other person, sell any English horns unwrought to any stranger, or cause them to be sent over the sea, so that the said horners will buy the said horns at like price as they be at the time of the making of this act, upon pain of forfeiture of all such horns so bought, sold, or sent. 'This was enacted for the benefit of English dealers in horns, or horners; and there is a provision, "that after that men of the said occupation within this land have taken out and chosen such and as many horns as shall be needful to their occupations, that then it shall be lawful to them, all and every of them, and other persons of this realm of England, to sell and deliver all the horns refused, which be not able to be occupied in their mystery, to any stranger or other person, to send or carry beyond the sea, or elsewhere, as shall please them."

*Fourthly*, I am to inquire in what description of goods or employment an alien merchant may deal or occupy himself. And here I will examine, *first*, what are the kinds of goods in which an alien merchant is prohibited from dealing within the realm; whether such prohibition be absolute, or subject to relaxations on certain conditions. *Secondly*, what are the kinds of goods which he is prohibited from exporting out of England; whether such prohibition be absolute, or subject to relaxations on certain conditions. *Thirdly*, what are the kinds of goods in which certain statutes have required him to invest the whole or any part of his capital.

When you read this prohibition of aliens to buy "horns, unwrought, gathered, or growing, within the city of London, and twenty-four miles on every side thereof," and you remember the amatory history of the King in whose reign the statute passed, you may perhaps imagine that something like satire was intended: but I have been assured by a respectable citizen that nothing jocular was intended, and that the act owed its origin to the prevalent jealousy of all foreigners. The provision I have remarked on, will perhaps remind you of the witticism passed on our own Henry IV., who as you know was equally affectionate with the English Edward IV., "that he had more

than royal claims to be called the father of his people."\*

The 1 Ric. 3, c. 9, required aliens handicraftsmen either to depart the realm, or else to enter the service of some of the King's subjects; and forbade the making of woollen cloth by such persons. In one section, however, in that act, aliens were allowed to import and trade in books. This right was however taken from them by the 25 Hen. 8, c. 15. By the 1 Ric. 3, c. 12, the importation of certain hardware by aliens is forbidden. The 25 Hen. 8, c. 9, prohibited aliens to follow the craft of a pewterer. Mr. Justice Blackstone, in the first volume of his Commentaries (p. 372), observes, "there are some absolute statutes of Henry 8, prohibiting alien artificers to work for themselves in this kingdom, but it is generally held that they were virtually repealed by the 5 Eliz. c. 7. It has been remarked, however (1 Woodeson, 373), that there is no authority to that effect. By the 15 Car. 2, c. 15, aliens are expressly encouraged to carry on the trades connected with hemp and flax; and the 33 Geo. 3, c. 4, s. 6, recognizes their right to deal in weapons, arms, gunpowder, and ammunition.

*Secondly*, there are certain kinds of occupations, the exercise of which by aliens is confined to this country alone, either absolutely, or with certain conditional exceptions: these form the next branch of our inquiry. The 9 Edw. 3, st. 1, c. 1, prohibited merchants alien from carrying wine out of the realm. The great Statute of the Staple, 27 Edw. 3, st. 2, c. 1, contains, in the first chapter, a requisition that alien merchants shall be sworn to hold no staple beyond the sea, of wool, woollens, hides, and lead; but the same chapter gives them the privilege of exporting wool, which it denies to a natural born subject.

Some prohibitory statutes were passed in the 27 Hen. 8, c. 14, s. 4; the 33 Hen. 8, c. 9, s. 9, and 35 Eliz. c. 11, s. 2, with respect to leather, bows and arrows, class-board, and beer; but it does now seem that they are practically in force.

I shall here conclude; and after I have in my next considered the validity of wills made in foreign countries, with respect to property in England, I shall resume the subject of commercial rights of Frenchmen.

I remain your's &c.

\* Our "French Advocate" writes here with a national pleasantry, of which we cannot altogether approve; but for once we let it pass. Ed.

## REVIEW.

*The Mechanics of Law-making, intended for the Use of Legislators, and all other persons, concerned in the making and understanding of English Law.* By Arthur Symonds, Esq. London: Edward Churton.

THIS is a valuable and ably written work. It contains a masterly analysis of the defects of the present method of law-making, and points out the proper remedy. "The work is intended," says the author, "to explain the uses of the different parts of the machinery of a law, and to exhibit so much of the principles of legislation as shall entitle the work to be styled *The Mechanics of Law-making*. It is intended for the use of the legislator as well as for the professional law-maker."

It is in the latter view—in its usefulness to the legal practitioner—that we shall principally notice the work. Mr. Symonds states his plan to be as follows:—

"It does not, in the usual method of treatises of this nature, begin by laying down general principles, founded on arbitrary analysis, and afterwards proceed to test the subject by them. However suitable such a method may be in other cases, in the present it has not the same recommendations. It would want the advantage of practicalness, which is the first object of the undertaking. It has been thought better not to proceed from the author's side of the matter, but at the other end—the reader's; and, by carrying him through the same process of examination which the author has pursued, to unfold the necessity as well as the force of the views which are urged in the course of the following observations. The reader is supposed to have before him an act of parliament—not unlike a piece of statuary, whose value is unknown from being encrusted with mud and other foreign substances. The first step is to remove, carefully, this incrustation, until the figure shall appear in all its naked beauty." \* \* \*

"To those reformers who prefer to advance slowly and with caution, the plan of proceeding offers a mode of gradual reforming. Nor will they be without opportunities. Few, if any acts of parliament offer no room for fair criticism. To other men, who would cling to the present system, and yet would introduce all improvements compatible with it, the same means of indulging their inclinations are afforded; while to the more comprehensive-minded, and yet more practical reformer, who would make the laws as brief, as clear, and as sim-

ple as laws might be made, this book will furnish some useful helps.

"In the spirit of the proverbial saying, that 'what is every body's business is nobody's,' it may be asked, of whom may we expect the adoption of these improvements? Every member of the legislature is, indeed, individually responsible for all the absurdity and nonsense which may come forth as the act of the legislature, without question or remonstrance on his part; but the member who is the author of the measure is, in an especial manner, responsible to his own reputation for suffering himself to be regarded as the reputed author of such results. To the government, however, there is most reason to look—for nearly two-thirds of the acts of a session are introduced under its auspices. It has, moreover, the assistance of legal agents, and the means of purchasing the services of competent ones: but individual members may, by their example and assistance, induce the government to adopt a better plan; and then its example would, in time, lead the legislature to the general adoption of the same improvement."

The work commences with a description of "The Art of Reading an Act of Parliament as at present written;" and doubtless to read and *understand* many of our statutes, requires the exercise of no small share of skill and experience. The author investigates the structure of an act with considerable acumen, criticising, in succession, its separate words, phrases, clauses, and the act generally. He then proceeds to "The Art of Making a Law;" in which he treats of its form and constituent parts; the general character of a law; its more common constituent provisions; and the characteristics of the leading divisions of the law.

As a specimen of this part of the work, we may extract the following, on the title and preamble of an act:—

"The title is not always regarded as a part of the act. Yet in cases of emergency, where the doubt as to the construction cannot be determined by any other means, it has been held that recourse may be had to it for assistance, as to the title of a book. It is not safe, therefore, to pay no regard to it, especially as it may be made very serviceable in simplifying the body of the law.

"The first care here should be that the title express the whole scope of the act. This is a test of its unity. If the statute be one of that class which may be regarded rather as appendages or codicils to former statutes than independent laws,—such as the amending and the explaining statutes, it should be so expressed in the title, which should be confined to the points to be amended or explained; and in

the body of the statute there should be no new matter having no relation to that which is the subject of amendment. If also the act be temporary, that should be expressed in the title."

"To simplify the title it might be better to separate these particulars—to state, first the object, then its local application, and finally its temporary duration."

"Montesquieu says, in his excellent work on the spirit of laws, that when a legislator condescends to give a reason for his law, it should be worthy of its majesty. There are few preambles of this character. They are generally defective in two points: wholeness and truth. The true reason is not always given; and, if it be true, it is seldom the whole one. Preambles ought never, indeed, to be made, except on great occasions; when not only the law, but its policy is to be changed:—it is absurd to usher in every small change by a pompous, formal mode of reasoning. It is enough that the legislature enacts: as it may be presumed that the legislature, if fairly representative of the people, was duly informed of sufficient reasons. But when great constitutional changes are to be made, or the policy of any branch of the law is to be changed, it is befitting both the dignity of the occasion and the importance of the subject matter to state explicitly, fully, and truly the principle of the change. The appeal to reason on such high matters becomes a sanction in behalf of the law: it bespeaks behalf to what appears to be founded not on the success of party, or interest conflicts, but on the higher principles of justice."

The author then discusses the body of an enactment, its provisos, exceptions, and schedules, and proposes that each act should be preceded by an analysis, and followed by an index. The leading divisions of the law he considers under the heads of 1, Constitutional Laws; 2, Official Laws; 3, Municipal or Police Laws; 4, Civil Law; and 5, Criminal Law. All these subjects are severally treated of; and from the disquisition on the improvement of the civil branch of the law, we extract the following:—

"The objection to the predominance of the lawyers, is not so great here. This branch of the law is necessarily so bound up with the abstruseness of the real property law, resulting from its origin in the bygone feudal system, and the ancient fictioncraft of our old judicature, that none but lawyers could satisfactorily grapple with it. At all events, to them must be entrusted the work of preparing the way; for the rule, that the general tone and true spirit of the law must be borne in mind in every single enactment, applies here with especial force. It requires the greatest caution, to prevent a new enactment, becoming a mere isolated law, separated from the general system of jurisprudence, or worse, clashing with it.

"But be the merit of these laws what it may,

it is incumbent on all legislators to understand them; and, if they do not, they may fairly presume that the body of the people will be in no better condition.

"This is not difficult, if a little of the formality of the law be got rid of. An example of this sort is given in the case of the act for the apportionment of rents, annuities, and other periodical payments, of last session.

"The state of the laws as to assurances of all kinds, and the want of a general registration, with the diversities in the jurisdiction of the Courts, and the various natures of property which is called real, under different tenures, and the various sorts of personal property, with the manifold characters which the holders of it may have, render the task of reform, in this direction, more complicated than it might be, if it were proceeded in, in an orderly manner, and the proceeding begun at the right end.

"Much, however, of the complication may be removed by a good glossary of terms, connected with this department; the selection of words, which shall have a generic character;—showing what they include, and what they do not.

"In the act of last session, amending the law relating to the escheat and forfeiture of trust property, to which we have already referred, an illustration may be found.

"The law relates 'to all property capable, under the existing law, of being escheated or forfeited by reason of the trustee or mortgagee dying without an heir, or being convicted of some crime.' It might be supposed that the description quoted, which is not in the act, would have been sufficient; but that is not so. In an over elaborate construction clause, which explains more than arises under the act 'Land,' is construed to refer to 'any manor, messuage, tenement, hereditament, or real property, whether freehold, customary, copyhold, or any tenure whatever;' 'Chattels'—to 'personal property of every description, capable of being transferred or disposed of otherwise than in books kept by any company or society, or to any share thereof, or interest therein;' 'Stock'—to 'any fund, annuity, or security, transferable in books kept by any company or society established, or to be established; or to any money payable for the discharge or redemption thereof, or to any share or interest therein.' And then in the body of the act, 'lands, chattels and stock' are used over and over again to represent the aggregate of these.

"This is but an instance. It would be worth while to inquire whether this might not be obviated. Gather together all the varieties of property of which we have knowledge. Let them be classed according to their nature. Gather together all the characters of persons by which such property may be held, and arrange them. The task is a limited one—and not only limited, but more or less done in law books. Find the largest term that will include every genus and species of person and property:—and then, strictly use these terms where they are intended to apply:—if to all kinds, the largest term; if to a species, its appropriate term; if to one or more individuals of a



species, then their individual names; but surely there should be an end of marshalling, rank and file, all the sorts of things that may be, as field-marsals, generals, lieutenant-generals, colonels, lieutenant-colonels, majors, captains, lieutenants, ensigns, cornets, serjeants, corporals, privates, and all other persons, of whatever rank or degree. Such a plan might do once in a way, but to repeat it in every clause, and, sometimes, in every sentence of a clause, until one almost grows giddy with the going round and round with the same set of people, —there is nothing like unto it, but the trooping of soldiers at the theatres; they march right and left, hither and thither, and then all round, before they stand still, or make their way out: but, however dramatically well done, it is always ridiculous; and so are most of our acts of parliament, for the same reason."

Mr. Symonds next enters on the classification and consolidation of the statutes, which we shall examine at another opportunity, in connexion with the Report of the Commissioners, which has appeared since the author's work, and been published as an Appendix to the Legal Observer.

The next important part of the author's book, is that which he terms "Institutional Reforms connected with Law-making," namely, the preparation of a law, the making a law, the promulgating the law, the enforcing it, the superintendence of its operation, and the amending it. We think there are many very valuable suggestions contained in this part of the work, to which we shall take an early opportunity of advertng.

The practical conclusion of the author's labours is, that there should be a proper establishment of agents for perfecting the law, and superintending its operations. The author has illustrated his views by analyzing several recent statutes, and given critical notices from the acts of the two last sessions of parliament. He also suggests a statute of directions and constructions, which should guide the legislator in framing the law, as well as the judge in construing it. To all this is added a glossary of proscribed words and phrases. We can strongly recommend the book, as well worthy of attention by all who are engaged in the making or altering Laws.

## CHANGES MADE IN THE LAW DURING THE LAST SESSION OF PARLIAMENT.

### No. IV.

#### THE MUNICIPAL CORPORATION ACT.

5 & 6 W. 4, c. 76.

(Concluded from p. 471.)

#### THE MAGISTRATES, RECORDER, AND ADMINISTRATION OF JUSTICE.

The King may issue his commission for certain persons to act as justices in any boroughs in schedule A. and certain boroughs in schedule B. (s. 98); and the council may make bye-laws, on which the crown may appoint salaried justices (s. 99); and the council is thereupon to provide a fitting police office (s. 100). The justices need not be qualified by estate (s. 101).

The justices are to appoint a clerk, who shall not be clerk of the peace, or an alderman or councillor, nor be concerned in the prosecution of offenders committed by the borough justices (s. 102). His Majesty may grant a separate court of quarter sessions, and appoint a recorder, in certain boroughs (s. 103).

The recorder is to be a justice of the peace for the borough; but not a member of parliament for the borough, alderman, councillor, or police magistrate; but he may be a revising barrister under 2 W. 4, c. 45 (s. 103).

The recorder and justices are to make declaration before acting (s. 104).

The sessions of the peace are to be held for the borough, of which the recorder is to be the sole judge. The recorder is not to make or levy county rate, or grant licenses (s. 105). The mayor, in the absence of the recorder and deputy recorder, may open and adjourn the court (s. 106). The capital jurisdictions, and all other criminal jurisdictions in boroughs, other than are specified in this act, are abolished (s. 107). The chartered admiralty jurisdictions are abolished (s. 108). Certain exceptions in 38 G. 3, c. 52, are repealed. Berwick-upon-Tweed is to be a county of a town (s. 109).

Offenders committed to borough sessions, whose jurisdiction is taken away, are to be tried in the adjoining county (s. 110).

The county justices are to have jurisdiction in all boroughs which have not a separate court of quarter sessions of the peace under this act (s. 111).

Certain boroughs are not to be assessed to county rates (s. 112).

The boroughs are to pay the expences of prosecutions at the assizes (s. 113).

The treasurers of counties are to keep an account of expences of prosecution of offenders sent by such boroughs for trial at the assizes, and make order on them for payment thereof. In case of difference respecting such account, the same to be referred to arbitration, as provided in 5 G. 4, c. 85 (s. 114).

The council may contract for committing prisoners to the gaol of another borough, if

sufficient (s. 115). The council of certain boroughs are to have the same powers under the acts 4 G. 4, c. 64, and 5 G. 4, c. 85, as justices of the peace have at their sessions in counties (s. 116). Boroughs are to pay a proportion of the other county expenditure (s. 117).

The borough courts of record are to be holden as heretofore, but in certain cases with extended jurisdiction (s. 118).

The council are to appoint a registrar and other necessary officers of the court (s. 119). Existing suits are not to abate by reason of the change of jurisdiction (s. 120).

Every person, being a burgess of any borough wherein there shall be a separate court of sessions of the peace, or a court of record for the trial of civil actions, (unless he shall be exempt or disqualified otherwise than in respect of property from serving on juries by virtue of an act passed in the sixth year of the reign of King George the Fourth, intituled "An Act for consolidating and amending the Laws relative to Jurors and Juries"), shall be qualified and liable to serve on grand juries in such borough, and also upon juries for the trial of all issues joined in any court of quarter sessions of the peace, and in any court of record for the trial of civil actions triable within the borough of which such person shall be a burgess; and the clerk of the peace of every such borough shall give public notice of the time and place of holding every such quarter sessions of the peace, ten days at least before the holding thereof, and shall, seven days at the least before the holding thereof, cause to be summoned a sufficient number of persons, being qualified and liable as aforesaid, to serve as grand jurors at such sessions; and the clerk of the peace and registrar of the court of record respectively shall also cause to be summoned not less than thirty-six nor more than sixty persons so qualified and liable as aforesaid to serve as jurors at every such sessions, and at the holding of every such court of record for the trial of causes, in case there shall be any cause then to be tried; and such summons shall be made by showing to the person to be summoned, or in case he shall be absent from the usual place of his abode by leaving with some person therein inhabiting, notice under the hand of such clerk of the peace or registrar respectively containing the substance of such summons; and such clerk of the peace shall make out a list of the names of such persons so summoned as grand jurors, and the clerk of the peace and registrar respectively shall also make out a panel of such persons so summoned other than grand jurors, and such list and panel shall respectively contain therein the christian names and surnames, places of abode, and descriptions of the several persons therein named; and if any person, having been duly summoned to attend on any jury, shall not attend in pursuance of such summons, or, being thrice called, shall not answer to his name, or after his appearance wilfully withdraw himself from the presence of the Court, the Court shall impose such fine upon every person so making

default (unless some reasonable excuse shall be proved to the satisfaction of the Court) as the court shall think meet; and if any person on whom such fine shall be imposed shall refuse to pay the same to the person who shall be authorized by the court to receive the same, it shall be lawful for the court, then or at its next sitting, by order of the court, signed by the clerk of the peace or registrar respectively, to cause to be levied, by distress and sale of the goods of the person on whom such fine shall have been imposed, every such fine, and the reasonable charges of such distress and sale; and every fine so received shall be paid to the treasurer of the borough, to be by him carried to the account of the borough fund hereinbefore mentioned: provided nevertheless, that no person shall be summoned to serve as a juror at such sessions or court of record oftener than once in one year (s. 121).

The members of the council are exempt from serving on juries; burgesses of boroughs which have quarter sessions exempt from juries of county quarter sessions (s. 122).

All chartered exemptions from serving on juries are abolished (s. 123).

The fees payable to the clerk of the peace, clerk to the magistrates, and registrar and officers of the court of record are regulated by s. 124.

The table of fees is to be hung up (s. 125).

The prosecution of every offence punishable upon summary conviction, shall be commenced within three calendar months after the commission of the offence, and shall be prosecuted as mentioned in s. 127. Power is given to any justice of the peace to summon witnesses, under penalty for disobedience of summons; and no witness or justice is to be incompetent on the ground of rateability (s. 128). The payment of penalties is to be enforced by summary conviction, and may be levied by distress, or the offender may be imprisoned (s. 129). The form of conviction is given in s. 130. The appeal against convictions under this act is regulated by s. 131. No *certiorari* lies against any such conviction, and no defects of form shall ever invalidate any proceeding under it (s. 132). All actions for anything done in pursuance of this act shall be laid in the county where the fact was committed, and shall be commenced six months after the fact committed, and notice in writing of such action shall be given to the defendant one calendar month before the commencement of the action; and in any such action the general issue may be pleaded, and tender of amends may be made, and if the defendant shall recover, he shall have full costs (s. 133).

#### CONSTABLES AND LIGHTING.

A watch committee is to be appointed, to consist of the mayor and councilmen; such committee to appoint constables for the borough. Constable to be for the county, &c. as well as borough (s. 76). The watch committee is to make regulations for the management of the constables (s. 77).

Power is given to constables to apprehend disorderly persons, &c. The constables at-

tending at the watch-houses in the night may take bail by recognizance from persons brought before them for petty misdemeanors, such recognizance to be conditioned for the appearance of the parties before a magistrate. In default of appearance recognizance to be forfeited. Time of hearing may be postponed (s. 79).

Penalties on constables for neglect of duty (s. 80). Penalty for assaults on constables (s. 81). Regulation and payment of expences. Rewards for activity, &c. (s. 82). Magistrates are to appoint annually a certain number of persons to act as special constables (s. 83).

On notice of appointment of constables, the present provisions in local acts as to watching, &c. to cease. Watch-boxes, arms, &c. to be given up for the use of constables appointed under this act. Penalty for not giving them up (s. 84).

Proviso as to rates in arrear, and as to debts (s. 85). Watch committee to transmit a report quarterly to the secretary of state, and also a copy of their rules, &c. (s. 86). Power for council to order parts of a borough not within a local act as to lighting, to be included in such act. Proviso as to amount of rate for lighting (s. 87).

Council may assume the powers of inspectors under 3 and 4 W. 4, c. 90, for lighting any part of the borough not within a local act for lighting the same (s. 88). Act not to interfere with the regulations for the government, &c. of dock-yards, arsenals, &c. (s. 89).

#### BOROUGH FUND AND ACCOUNTS.

After the election of a treasurer, the rents and dividends of all real and personal property belonging to the corporate body, and all fines and penalties, are to be paid to such treasurer, to the account of a fund, called "the Borough Fund," and subject to the payment of all debts; the recorder, town clerk, treasurer, and other officers, and all election and other expenses, are to be paid out of this fund; and the surplus, if any, is to be applied for the public benefit of the inhabitants and the improvement of the borough. And if the borough fund be deficient, the council is to order a rate in addition to the fund, to make up the deficiency; and the necessary powers are given to it for that purpose (ss. 92. s. 126.)

The accounts of the receipts and disbursements of the borough are to be kept by the treasurer, and shall be open to the inspection of the aldermen or councillors, and shall, every March and September, be submitted with the vouchers to the auditors, and to such member as the mayor shall appoint, and, if the accounts be correct, the auditors shall sign them; and every September the treasurer shall give a printed abstract of such accounts so audited, a copy whereof shall be open to the inspection of the rate-payers (s. 93.)

#### CHARITABLE TRUSTEES.

When any body corporate now existing, or one or more of its members in his or their corporate capacity, now stand seised or possessed

of any real or personal estate, in whole or in part in trust for charitable purposes, the estate, interest, and powers of such corporate body or its members shall continue in them until the 1st day of August, 1836, or until Parliament shall otherwise order, and shall then cease; and any vacancy among such charitable trustees, may be filled up on petition to the Lord Chancellor; and if Parliament shall not otherwise direct, on or before the 1st day of August, 1836, the Lord Chancellor may make such orders as he shall see fit for the administration of such trust estates (s. 71.)

#### THE FREEMEN.

In many of the cities and towns affected by this act, the citizens and freemen, and their kindred and apprentices, have enjoyed certain rights of property and other privileges, or certain exemptions. These are reserved them by the act, as fully and effectually, and for such time, and in such manner as they, by any statute, charter, bye-law, or custom in force at the time of passing the act, could have enjoyed the same if the act had not passed; but the total amount to be divided among these persons is not to exceed the surplus which shall remain after the discharge of the lawful borough charges, which were chargeable on the 5th day of June on it, are satisfied; nor shall the exemptions extend to any tolls or dues levied wholly or in part by any corporate body, except such persons were exempted, or had a right to be exempted, from the payment thereof, on the 5th of June last, by any statute, charter, or bye-law in force on the 5th of June last. In order, however, to entitle the freemen to the privileges thus reserved, they must pay all fees and fines due to the borough fund, and fulfil every condition precedent to their being entitled to their rights (s. 2). But it is enacted, that no person, from and after the passing of this act, shall be elected a Burgess or freeman of any borough by gift or purchase (s. 3).

The right of voting in the election of members of Parliament, which was reserved to the freemen by the Reform Act (2 Wil. 4, c. 45), is also reserved to them by this act (s. 4).

The town-clerk of every borough, on or before the 1st day of December, is to make out a list to be called "the Freeman's Roll," of all persons who at the passing of the act shall have been admitted a freeman, or who shall afterwards have been admitted, as provided by the act (s. 5).

#### BOUNDARIES.

The boundaries of the boroughs named in the 1st section of the schedules A. and B. are to be the same as those settled by the 2 and 3 Wil. 4, c. 64. The boundaries of the boroughs named in the 2d section of these schedules, shall remain the same as now, until altered by Parliament (s. 7). Every place included within the bounds of a borough is to be part of such borough; and the parts cut off from the borough are to be declared part of the adjoining county (s. 8).

## ADVOUSONS.

When a body corporate in such capacity, and not as a charitable trustee, is seized of any advowson or right of nomination, the same may be sold, as the ecclesiastical commissioners may direct, and the proceeds are to be paid to the treasurer of the borough, and shall be invested by him in government securities for the use of the body corporate, and the annual interest carried to the borough fund; and any vacancy arising before sale is to be supplied by the bishop of the diocese (s. 139).

## MISCELLANEOUS MATTERS.

All acts, charters, and customs inconsistent with the provisions of the act are repealed (ss. 1, 38, 107, and 123). All exclusive rights of trading within cities and boroughs as being free of any company and the like, are abolished (s. 14).

Wherever an oath is required by this act, an affirmation may be made (s. 21).

The expenses of the overseers in carrying the act into effect, are to be defrayed out of the borough fund (s. 24).

The jurisdiction of the Cinque Ports is preserved (s. 134 and 135).

The act is not to affect the letters patent founding a grammar school at Louth (s. 136).

The rights of the universities of Oxford and Cambridge are saved (s. 137).

The jurisdiction over precincts of cathedrals, and the rights of the university of Durham, are saved (s. 138).

The periods connected with the first registration and election under the act, may be deferred by order in council (s. 140). This has been done accordingly. See *post*, Order in Council.

The king is empowered to grant charters of incorporation, if the inhabitants of any town or borough not incorporated shall petition for the same (s. 141).

For the interpretation of the act, see s. 142.

## SUPERIOR COURTS.

## Rolls Court.

## TRUST. — PARENT AND CHILD. — MAINTENANCE.

*The Court, in allowing a sum for the maintenance and education of an infant out of a fund left to her independent of her parents, has no jurisdiction to separate the infant from the parent, on the ground of the latter's embarrassed circumstances, and in the absence of all misconduct.*

This was a petition on the part of a female ward of the Court, praying that it might be referred back to the Master to review his report. That report was made in an order of reference to inquire whether her father was of ability to maintain her; and, if not, what would be a proper allowance for her maintenance and education. The Master found that the

father was not of ability suitably to maintain her, and that if she were sent as a parlour boarder to an establishment for young ladies, which he named, the sum of 480*l.* would be a proper allowance out of her fortune for her maintenance and education, 200*l.* out of that sum to be allowed to the father if the young lady passed her vacations with him; but if she should not be placed at the establishment mentioned, or some similar respectable establishment, then the Master was of opinion that no regular or certain allowance should be made out of her fortune for her maintenance and education, but that the trustees ought, from time to time, to be permitted to use their discretion as to the sums to be paid out of the trust-money in respect of maintenance and education, until some satisfactory scheme for that purpose should be proposed and settled.

Mr. Pemberton and Mr. Bickersteth, in support of the petition.—The Master, in making the report complained of, had exceeded the authority given to him by the Court, which was merely to find whether the father was of ability to maintain his child, and if not, what would be a proper allowance to be made out of her fortune for her maintenance and education. The Master, instead of confining himself to those objects of inquiry, had taken upon himself to exercise a jurisdiction which the Court itself never exercised, except under circumstances of the most urgent necessity. There were but three cases where the Court would interfere to separate a father from his child—first, when the party from whom the child derived its fortune required that the father should not superintend its education, and the father had acquiesced in that condition of the gift; secondly, where the father had been guilty of cruelty towards his child; and thirdly, where the moral conduct of the father was such as to render the interposition of the Court necessary. In this case nothing whatever of misconduct could be imputed to the father, who was a respectable clergyman; and the only pretence for the Master's report was, that the father had fallen into embarrassments, and that the profits of his living had been sequestered for the payment of his debts. There was evidence to shew that the state of the young lady's health rendered it improper that she should be sent to a boarding-school, and she herself, who was now between 16 and 17 years of age, was desirous to remain under the protection of her father.

Sir C. Wetherell and Mr. Spence, for the trustees, argued that no just exception could, under the circumstances, be taken to the Master's report. The only object of the trustees was, to have the money allowed for the infant's maintenance and education properly applied; and that object would be defeated if the father of the petitioner, under embarrassed circumstances, were to be allowed to have the disposition of the fund which had been found by the Master to be a proper allowance, upon condition only that the young lady should be sent to an establishment where her education might be attended to.

**The Master of the Rolls.**—It is clear that the Master had done what the Court had not authorized him to do, and that he had made a report upon which it was impossible for the Court to act. The daughter was living with her father, and there was nothing whatever before the Court to authorize it to interfere between the father and his child. The Master thinking it advisable that the daughter should be put to a school, had approved of a scheme for her maintenance and education, which never could take effect so long as the father insisted that the child should remain with him, for the Court had no power whatever under the existing circumstances to put her to school. The Master had made no report as to what would be a proper allowance if the daughter were not put to school, and there must therefore be a reference back to him to review his report. No case had been attempted to be made here which would justify the Court in separating the child from the father. In no case, when a father came to that Court for the purpose of having an allowance made out of his child's fortune for the purposes of its maintenance and education, on the ground of his not being himself of ability, had the Court any jurisdiction to separate the child from the father, in the absence of any acts to shew the propriety of such separation. If the father applied the money allowed for the maintenance and education of his child to the payment of his debts, or any purposes of his own, the Court would take special care, without going the length of separating the child from the parent, that what he took only on the trusts and conditions imposed upon him by the Court, should not be applied to other purposes.

*Wetherall v. Wilson*, at the Rolls, July 27, 1835.

### King's Bench Practice Court.

WRIT OF HAB. CORP. AD TEST.—DEFENDANT CHARGED WITH FELONY.—RULE NISI.

*A rule for a writ of habeas corpus ad test. for bringing up a defendant in custody, on a criminal charge, must be nisi in the first instance.*

An application was made for a writ of *habeas corpus ad testificandum*, to bring up the body of the defendant from custody on a charge of felony, to give evidence before an election committee. A case was alluded to as a precedent for the application; and it was submitted that the only question for the Court was, whether or not the rule should be granted *nisi* at first.

The Court said the rule could not be absolute at first, but granted a rule *nisi*.

Rule *nisi* accordingly.—*Rev. Pilgrim*, T.T., 1835. K. B.

PEREMPTORY UNDERTAKING TO TRY.—PARTIES UNPREPARED.—COSTS OF THE DAY.

*If a plaintiff shall give a peremptory undertaking to try at a particular sittings, and neither party shall then be prepared, the*

*original fault will be held to be that of the plaintiff, and the defendant will be entitled to the costs of the day.*

A rule *nisi* had been obtained for enlarging a peremptory undertaking, against which cause was now shewn. It appeared, that judgment as in a case of nonsuit had been obtained, and the rule discharged, on the plaintiff's giving a peremptory undertaking to try on a particular day. A number of causes which stood in the list before the present on the day appointed were unexpectedly deferred, and on the plaintiff being called on to try, his witnesses were not in attendance, although his counsel were. The defendant's witnesses and his attorney were present, but his counsel was absent; and as the plaintiff refused to withdraw his record, the cause was erased from the list. The plaintiff subsequently obtained the rule for enlarging the undertaking without paying the costs of the day; but to this latter proposition the defendant objected. It was now contended, that the plaintiff having undertaken to try on a specific day, it was his duty to be ready, however unprepared the defendant might be, to go to trial.

In support of the rule, it was submitted, that the cause having been struck out, both parties must be considered to be equally in fault, and the plaintiff could not therefore be called upon to pay the costs. The plaintiff having gone to the sittings to try, no doubt could exist of his intention to proceed, and he was therefore still entitled to try the cause; and the only question to be decided was, upon what terms he might be permitted to do so.

The Court was of opinion that the plaintiff was clearly entitled to try, as his appearance at the sittings shewed it was his intention to fulfil his undertaking. A rule ought to be laid down, excluding the consideration of all minute particulars of blame to be attached to either party, and upon this principle the defendant was entitled to his costs. Because, supposing that the defendant had been prepared to go on, while the plaintiff was not ready, the latter would then have withdrawn his record, or would have obtained a delay on proper terms. But the defendant being also unprepared, the plaintiff contended that they were equally to blame, and he could not therefore be called upon to pay the costs. The plaintiff not having fulfilled his undertaking, was clearly liable for the costs of the day. The rule must therefore be made absolute, upon payment of the costs of the day and of the present application.

Rule accordingly.—*Saxon v. Swabey*, T. T. 1835. K. B. P. C.

ACTION FOR COSTS OF ATTORNEY.—NONSUIT.—DELIVERY OF DOCUMENTS.—SUMMARY JURISDICTION.

*The Court will not order the delivery of certain documents in the possession of an attorney, upon a motion, after an action brought by the latter for costs in the cause in which the papers came into his possession.*

*sion, shall have been successfully resisted, on the ground that he was not employed.*

This was a motion for a rule to shew cause why an attorney should not deliver up certain documents and papers which had come into his possession, under the following circumstances:—It appeared, that Mrs. Maxwell, the applicant, had had some business transacted in the office of the attorney, and she demanded that his bill of costs should be taxed. At the appointment before the master the attorney was not present, and she in consequence refused to go on with the taxation. The attorney subsequently brought his action for the amount of the bill of costs, but was nonsuited, on the ground that the business had not been done by him, but by his clerk. The documents alluded to had been handed over to him in the course of the business, and it was to recover these that the present application was made.

The Court thought, that after treating the attorney in a light as not employed by the applicant, she could not now turn round and contend that he was so employed, and by that means summarily obtain the papers.

Rule refused.—*Ex parte Maxwell*, T. T. 1835. K. B. P. C.

**INTERPLEADER ACT. — CAUSE REFERRED TO THE MASTER.—SHERIFF.—COSTS OF POSSESSION.**

*A cause having been referred to the master, and the sheriff keeping possession of the property in dispute by consent of the parties, he will be entitled to his costs after applying to the Court.*

This was a sheriff's interpleader rule. The goods in dispute were of the value of 40*l.*, and the case had been referred to the master, for the purpose of ascertaining who was the proper owner of them, at the suggestion of the Judge. No report had yet been made by the master, and the sheriff had been in possession according to the directions given by the parties.

The sheriff now applied for his costs of keeping possession; and it was submitted, that he was entitled to them until the master made his report, as, but for the directions of the parties, he should have proceeded to sell the goods.

The Court directed that the sheriff should have his costs for keeping possession after a week, provided the master did not previously make his report.

Rule accordingly.—*Underden v. Burgess*, T. T. 1835. K. B. P. C.

**EJECTMENT.—LONDON CAUSE.—SERVICE OF DECLARATION. — SIGNING JUDGMENT. — TERM FOR ENTRY OF APPEARANCE SUFFERED TO PASS.**

*The Court will not allow judgment to be signed in a subsequent term against a casual ejector in a London cause, where the term has been suffered to pass in which*

*the appearance was required to be entered, and before which the service was effected, such practice applying only to country causes.*

This was a motion for judgment against a casual ejector. It appeared, that the declaration was served in Hilary term, and by the notice at its foot an appearance was required to be entered in Easter term. The whole of that term, however, was suffered to pass without any application against the casual ejector being made. But it was contended, that there could be no objection to the motion being now made, as only one term had elapsed since the service. Cases were cited where such a course had been permitted, in which, however, it did not appear whether the cause was a London or a country cause. The present came under the former denomination.

The Court said, that notwithstanding the cases alluded to were not expressly pointed out as country causes, yet they must be held to be such, as the practice allowed in them only applied to country causes. The rule could not be granted.

Rule refused.—*Doe d. Greaves v. Roe*, T. T. 1835. K. B. P. C.

**ATTORNEY AND CLIENT.—AGREEMENT.—BILL OF COSTS.—CHARTER PARTY.**

*The Court held that an agreement alleged to be made between the attorney and his client, that the former should receive one-half of the amount recovered in an action, was no answer to an application to tax his bill of costs.*

A rule nisi had been obtained under the following circumstances, to which cause was now shewn. It appeared from the affidavits, that in consequence of some information given by an attorney to the applicants, that a certain person had in his possession a sum of money to which they were entitled; it was agreed, that he should commence a suit for the recovery of the money, and that, in the event of success, he should receive one-half the amount recovered. A writ was accordingly sued out in the name of Mr. Hasell, the executor of the will under which the money was claimed, and a sum of 88*l.* was eventually recovered by the proceedings taken thereon. Application was then made to the attorney for the proceeds of the action, and for his bill of costs; but he refused to give up more than 44*l.*, the moiety of the amount recovered. This rule was then applied for, which called upon him to shew cause why he refused to give an account of all monies received by him in the cause, and why he should not deliver a bill of costs to be taxed by the master in the case of *Hasell, executor, v. Welch*, which was the title of the cause. Cause was shewn against the rule, and it was urged, that the attorney could not be considered as the attorney of the applicants, for the action was not brought in their name, but in that of Mr. Hasell, who must be regarded as the client, and to whom alone the attorney

was answerable. Although the conduct of the attorney, as shewn in the affidavits, might not be exactly regular, yet it was unjust, that now, after having succeeded in the cause, he should be deprived of the advantages, which it was agreed by the parties he should enjoy.

In support of the rule it was suggested, that the Court could not tolerate such conduct as that of the attorney. Such an agreement as that shewn by the affidavits could not be binding on the client, nor on the master in taxing the costs. A case was cited, where it was held that an agreement, as to amount of costs, was not binding on the master in taxation.

The Court said, that there were two points for consideration; first, whether the applicants were the clients of the attorney; and, secondly, whether as such, and as an officer of the Court, he could not be compelled to give an account of all monies received into his hands. The first point, although unexplained, appeared to be clear enough, as it was essential merely to use Mr. *Hasell's* name in bringing the action for the benefit of the applicants. With regard to the second point, the defence urged was, that an agreement existed. That agreement, however, was not proved; and if it had been, it was of such a description as could not be countenanced by the Court. It was unnecessary, however, to inquire more fully into this second point, after the decision on the first; and the rule must, in consequence, be made absolute. The bill must go before the master for taxation, who would obtain assistance from the officers of the Court of Chancery in the event of his finding that any thing had been done in equity.

Rule absolute.—*In re Elisabeth Masters, James Masters, and George Harria Masters*, T. T. 1835. K. B. P. C.

a pleading preceding to the declaration, for the declaration is itself the first step in the pleadings; but it means any pleading subsequent to the declaration, but preceding that which the plaintiff or defendant is called upon to answer. J. S. H. has also expressed an opinion, that no appearance can be entered between the 10th August and 24th October; but if he had looked to the 11th section of the Uniformity of Process Act, he would have seen that such opinion was uncalled for, as that section distinctly enacts the contrary.

GRADUS.

#### LORDS' ACT.—ACTION OF DEBT. P. 432.

The Act 48 Geo. 3, c. 123, s. 1, is so clear, that there can be no difficulty in the absence of any authority of the Courts, in determining that *l.s.* damages would not be considered to increase the amount of the real debt, so as to prevent the operation of the statute. But *l.s.* damages for detention, it is submitted, is only in the nature of *costs*, and does not in fact alter the true amount of the debt for which the plaintiff's judgment must be entered on the roll. It is quite plain, however, that the plaintiff has not thought proper to tack on the *l.s.* damages to his debt, in computing the amount to be placed in the *ca. sa.*—It will not be forgotten, that the Lords' Act has been suspended, so far as persons petitioning for their own discharge are concerned, by 11 Geo. 4, and 1 W. 4, c. 38, and 2 and 3 W. 4, c. 44, s. 5, until the end of the last session of Parliament. It had better be seen whether the suspension has been continued by a new Act of Parliament during the last Session. N. G.

### ANSWERS TO QUERIES.

#### Practice.

#### PLEADINGS.—UNIFORMITY OF PROCESS ACT, PP. 345—431.

J. S. H. says, in his answer to this query, that in practice it is *always* considered that a defendant has the same number of days to deliver any pleading after the 24th of October, as he had left to plead on the 10th of August. Such can *never* be considered the case by those who have read the General Rules, M. T. 3 W. 4; for it is provided by Rule 1, sec. 12, "that in case the time for pleading to any declaration, or for answering any pleadings, shall not have expired before the 10th day of August, the party called upon to plead, reply, &c. shall have the same number of days for that purpose, after the 24th of October, as if the declaration or preceding pleading had been delivered or filed on the 24th of October." By "preceding pleading" must not be understood

### THE EDITOR'S LETTER BOX.

The First Part of the *Commentaries on the New Statutes*, containing a full Digest of the Law and Practice of Corporations, as altered by the New Act, with the Act and Order in Council *verbatim*, is now published, price 3s. 6d.

The *Legal Almanac, Remembrancer, and Diary*, for 1836, will be published before Michaelmas Term. The plan adopted last year will be somewhat altered. Particular attention will be paid to the preparation of an *Office Diary*. Several new Professional Lists will be added; and it is expected, that with the suggestions we have received, the work will be rendered particularly useful to the profession at large.

The Commissioners' Report on the Consolidation of the Statute Law is now published, price 2s.

The Queries and Answers of H. P. J.; G. H. K.; Omega; D. H. S.; Verus; B. N. J.; N. G.; Amicus; and "Spes," have been received.

# The Legal Observer.

Vol. X.

SATURDAY, OCTOBER 24, 1835. No. CCXCVII.

— "Quod magis ad nos  
Pertinet, et nescire malum est, agitamus.

HORAT.

## "THE PRINCIPLES OF LAW REFORM."

WE are always willing to seek in any quarter\* any views which may throw light on the great object which we have before us,—the improvement of the theory and practice of the law. We have turned therefore to the present pamphlet, which has been reprinted from a Review,—which is intended to be a periodical, but whose numbers, unless they very greatly improve, we should say, are destined to be few; and we are really surprised to find a writer who deals out his opinions with the most self-satisfied authority, so totally ignorant of all that has been done for the Reform of the Law within the last four or five years. It may be, that this article was written many years ago, and, rejected by others, has been now raked into existence; but if it be taken as applied to the present state of legislation, the writer has either ignorantly recommended many alterations which have been already effected, or purposely concealed his knowledge of the fact that they have been effected. Let it not be supposed that these recommendations have any novelty, they are made in the shape of extracts from familiar sources—the *Armata* of Lord Erskine—the article of Sir Samuel Romilly on Codification, in the 57th No. of the Edinburgh Review—the Speech of Lord (then Mr.) Brougham in the House of Commons on the 7th of February, 1828,—and the Second Report of the Common Law Commissioners. Without the slightest allusion to any speech, report, or act, made since these opinions have been before the public, the writer takes occasion from them to represent the existing state of the law as wholly deplorable. Indeed, these omissions, and the closing sentence of the article, are pretty good evidence that it must

have been written many years ago, although given to the public as the *crack* views on Law Reform at the present moment.

Speaking of a Code, the writer says, "The work will certainly be performed whenever we have a House of Commons *which truly represents the people, not nominally as, to a great degree, it is at present, but actually and in truth.*"

Now this sentence could hardly have been written by a reformer, of a Reformed House of Commons; and we believe therefore that the preceding pages of the pamphlet contain the stale suggestions of some law reformer of 1829. This perhaps should prevent us from proceeding any further in their examination; but as the Pamphlet may be more circulated than the Review, we shall give two or three further specimens, of either the ignorance or the wilful suppression of what has been really done in the matters on which the author discourses so confidently.

The first great thing to be obtained, according to the writer, is a Code, which is simply intended to express the law better. "When we speak of expressing the law better, we mean nothing else: we mean not to alter the law a tittle." And the author dwells on this topic, and returns to it again and again, without adverting to the fact that there have been two Reports from Commissioners appointed for this purpose on the very subject;—one on the codifying the Criminal Law, with a specimen of a Code, and the other more recently, on the Consolidation of the Statute Law.

The writer then proceeds to another part of his subject. "We deem it," he says, "of importance to give an idea of the dreadful state we are in with respect to Courts, *as matters are at present arranged* in the best governed country in the world." He then makes a long extract for this purpose from Lord (then Mr.) Brougham's speech, in 1828, which, as our readers well know, was delivered before the issuing of the Law

\* "The Principles of Law Reform." From the London Review. Simpkin and Marshall.  
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Commissions, and which, however well founded in fact at that time, is quite inapplicable to the present day.

Thus, Mr. Brougham complained that "clients and their attorneys are induced not to carry causes into the Court of Common Pleas, by the strict monopoly that exists in the advocates of that Court." The monopoly is now abolished. Mr. Brougham, speaking of the Court of Exchequer, said that it had no business, and that suitors, "seeing the business done in so many different ways, came to the conclusion that it is not well done in any." Of late, the Exchequer has been more resorted to by suitors than any other Common Law Court. Mr. Brougham said, that the King's Bench was overwhelmed with business. It is now no longer so. Mr. Brougham pointed out at great length the defects of the Privy Council: they have since been remedied by act of parliament, constituting the Judicial Committee, which act was brought in by Mr. Brougham himself. Yet all these charges are brought forward as existing in full force at the present moment.

In the same way the writer, wishing to point out the defects of the present system of special pleading, makes some considerable extracts from the Second Report of the Common Law Commissioners, which very remarks were the ground work of the alterations in pleading which have been effected two years ago. Indeed throughout, the author could not have shewn more complete ignorance of what he was writing about, had he, mentioning existing political grievances, deplored the returns for Old Sarum, or the barbarities of the Slave Trade.

We might continue our examination of the article; but we think we have done enough to show it to be unworthy of attention. When persons talk of law reform, they should know what has already been done. Within the last four years, the most extensive alterations and improvements have been made, as well in the theory as the practice of the law. We do not say that we are to pause in the good work; but let us at least comprehend our real position. Let us understand how much has been effected—how many real grievances have been redressed. Do not let us blunder on blindfolded, shouting for what we have already, and complaining most loudly of the maladies which have been effectually cured.

## CHANGES MADE IN THE LAW DURING THE LAST SESSION OF PARLIAMENT.

No. V.

### THE VOIDABLE MARRIAGE ACT, 5 & 6 W. 4, c. 54.

THIS act will make an important alteration in the situation of the persons affected by it. By the previous law, marriages between persons within the prohibited degrees of affinity, are voidable only by sentences of the Ecclesiastical Courts, pronounced during the life-time of both the parties. By this act it is enacted, that all marriages which shall have been celebrated before the passing of this act between persons being within the prohibited degrees of affinity, shall not hereafter be annulled for that cause by any sentence of the Ecclesiastical Court, unless pronounced in a suit which shall be depending at the time of the passing of this act: provided that nothing hereinbefore enacted shall affect marriages between persons being within the prohibited degrees of consanguinity. (s. 1.)

But henceforward all such marriages will be not voidable only, but positively null and void; it being enacted, that all marriages which shall hereafter be celebrated between persons within the prohibited degrees of consanguinity or affinity, shall be absolutely null and void to all intents and purposes whatsoever (s. 2).

Nothing in this act, however, shall be construed to extend to that part of the United Kingdom called Scotland (s. 3.)

The effect of this act is to legitimize the children of parents who are within the prohibited degrees, whose marriage was solemnized before the passing of this act (31st of August, 1835); but it will bastardize the issue of all such marriages, solemnized after that time.

### MUNICIPAL CORPORATION ACT.— GOVERNMENT CIRCULAR.

THE following letter, dated "Whitehall, October 1st, 1835," has been addressed by Mr. Phillips, the Under-Secretary of State, to the Mayor and Sheriffs of Municipal Corporations.

"I have already, in conformity to the directions of Lord John Russell, transmitted to you a copy of the Municipal Corporation Act, and of the Order in Council of the 11th of Septem-

ber (see *ante*, p. 406). I now transmit a copy of the Supplementary Order of the 30th September (see *ante*, p. 473).

"I am likewise directed to forward to you a copy of Instructions which have been addressed to overseers, framed upon the provisions of the act.

"You will observe, that by section 38, the existing mayor and members of the council, or governing body, are to go out of office after the declaration of the first election of councillors under this act.

"You will likewise observe, that where, by any statute, charter, bye-law, or custom, any election is to take place between the time of the passing of the act, and the 1st day of May next, no such election shall take place; but every person holding office at the time of the passing of this act, shall continue to hold such office till the time appointed by the act for him to go out of office. You will perceive that, by the Order in Council issued in pursuance of the powers given by the act, some of the days mentioned in the act are changed to other days; but, with this alteration, the directions contained in the act are to be strictly observed.

"With respect to any vacancy by death, where, by any statute or charter, it is necessary to proceed to a new election, there is no express provision in the act which would make such election illegal, and the governing body of the corporation will take that course, which the urgency of the case, or the positive directions of the charter, may seem in their judgment to require.

"The provision in section 30 of the act, that, wherever any day appointed for any purpose shall happen on a Sunday, the business shall be done on the Monday following, must be construed as equally applicable to any days appointed by the Order in Council of the 11th ult.

"I am directed to request, that so soon as the declaration of councillors has been made, you will signify to the new councillors, that within five days they must make and sign the declaration mentioned in section 50. You will likewise take the precaution to call their attention to section 51, whereby the fine for non-acceptance of office is made in some degree discretionary with the council.

"I am likewise to request, that in case your borough is in schedule A of the act, you will make it known publicly to the new council, that any recommendation which they may think fit to make of persons qualified to be intrusted by his Majesty with the commission of the peace for the borough of which they are the governing body, will have its due weight with the advisers of the crown."

## NOTICES OF NEW BOOKS.

*The Legal Almanac, Remembrancer, and Diary, for 1836, being Bissextile or Leap Year: containing a Law Calendar, adapted peculiarly for the use of the Profession; including the Times of Legal Proceedings, Terms, Returns, Sittings, and Sessions; Elections and Proceedings under the Reform, Jury, Corporation, Vestry and Highway Acts, &c.; Lists of the Judges and Officers of all the Courts; Holidays at the Law Offices, and Times of Attendance; Magistrates and Commissioners; Courts of Request; Precedence of the Bar, and Barristers called in 1835, with Dates of Call; Plan and List of Members of the Incorporated Law Society; Provincial Law Societies; Recorders, Town Clerks, Clerks of the Peace, Clerks of Magistrates; and Perpetual Commissioners; Colonial Judges and Law Officers; ad Valorem Stamps, &c.: with a Diary for 1836, containing all Useful Intelligence for each Day throughout the Year.* London: Richards and Co.

THE plan of the last year's Legal Almanac has been somewhat altered and extended. To the Calendar and Lists of Judges, Officers, Holidays, Terms, Sessions, Magistrates, &c., have been added the Lists of Recorders, Town Clerks, Clerks of the Peace, Clerks of Magistrates, and other useful information. The *Diary* for 1836 will be found to contain all useful intelligence for each day throughout the year, collected from the several statutes relating to Legal Proceedings—to Elections both for Parliamentary and Municipal Corporations—to Juries, Vestries, Highways, &c., with other dates important in practice.

The Regulations of the Inns of Court, Lists of Counsel, Circuits, &c., have not been reprinted. They form a separate Publication (price 2s.); but a Table of the Precedence of the Bar, and a List of Barristers called in 1835, with the dates of their call, is included in this publication, and will be added to the separate Lists of the Bar, or the whole may be bound in one Volume.

The work being principally designed for the office of the Legal Practitioner, the Lists of Members of Parliament, and other information usually found in the ordinary Pocket Books, have not been inserted.

The following are the Contents:

THE CALENDAR.—THE SUPERIOR COURTS: Chancery, King's Bench, Common Pleas, Exchequer, Judicial Committee of the Privy Council, Admiralty, Ecclesiastical, Bankruptcy, Central Criminal, Insolvent Debtors.—

Patent Office, Record Offices, Registries of Deeds, First Fruits Office, Tenth's Office, Commissioners for taking Affidavits.—HOLIDAYS: Chancery Offices, Common Law Offices.—TERMS AND RETURNS.—LAW OFFICES AND TIMES OF ATTENDANCE: Chancery, King's Bench, Common Pleas, Exchequer, Admiralty and Ecclesiastical, Inferior Courts, Offices connected with the Law, Sheriffs' Offices.—TRANSFER OF STOCK DAYS.—POST-OFFICE REGULATIONS.—QUARTER SESSIONS.—LOCAL COURTS: Durham, Lancaster, Marshalsea and Palace, Lord Mayor's Court, Sheriffs' Courts.—MAGISTRATES AND LAW OFFICERS OF THE CITY OF LONDON.—POLICE MAGISTRATES AND COMMISSIONERS.—POOR LAW COMMISSIONERS.—COURTS OF REQUEST.—OFFICERS OF THE HOUSES OF PARLIAMENT: Lords, Commons.—TABLE OF PRECEDENCE OF THE BAR.—KING'S COUNSEL AND SERJEANTS.—BARRISTERS CALLED IN 1835.—INCORPORATED LAW SOCIETY.—PROVINCIAL LAW SOCIETIES.—RECORDERS.—TOWN CLERKS.—CLERKS OF PEACE.—CLERKS OF MAGISTRATES.—PERPETUAL COMMISSIONERS.—COLONIAL JUDGES AND LAW OFFICERS.—TABLES OF RATES OF INSURANCE, &c.—AD VALOREM STAMPS—DIARY FOR 1836.

## LAW OF SET-OFF.

### FREIGHT.—DAMAGE TO CARGO.

A cargo of provisions was shipped in Ireland on board the *Friendship*, consigned to Messrs. A. & Co., London, and the captain signed the usual bill of lading to deliver them in good order and condition (the dangers of the sea and fire excepted). When the cargo was delivered in London, the consignees found it had received considerable damage, and the captain's protest (which stated the damage to have arisen from the seas) being by no means satisfactory to the consignees, who had no doubt it was occasioned by bad stowage, they refused to pay the freight, which amounted to about 260*l*. The captain, who was a part owner, brought an action for the freight; and the consignees wished, if possible, to set off the damage against it, and intended to have the cargo inspected by captains in the trade, and people who were judges of the article; and then to sell, by public auction, in order to ascertain the damage, which they supposed exceeded the amount of the freight.

The opinions of Mr. Abbott and Mr. George Wood were desired on the question, whether the consignees could set off the damage the cargo had sustained, and pay the difference, if any, into court; and if it should exceed the amount of the freight, whether they could make a good defence to the action, supposing the damage arose from improper stowage; and to advise them how to act?

The following was the opinion of Mr. Abbott:

"I think Messrs. A. & Co. cannot safely defend the action brought against them for freight, either as to the whole or in part, by

setting off or deducting the damage arising from improper stowage, but must bring a cross action for such damage. Debts only which may be ascertained by mere computation, and not unliquidated damages which required to be ascertained by a jury, fall within the statutes of set-off. And although by the terms of the bill of lading, the master engages to deliver the goods in good order and condition, yet this is no more than he is bound to do in every charter party or contract, where these words are not used. And in the case of *Cole v. Shallett*, 1 Lev. 41, it was determined that the merchant could not plead in bar to an action for freight, that the goods were spoiled by deviation from the destined course of the voyage, but must recover compensation for the injury sustained by a cross action."

Mr. Wood's opinion was as follows:

"I apprehend the consignees, under the statutes of set-off, cannot set off the damage the cargo has sustained against the freight for which the action is brought, because such damage is not a mutual debt, but is merely uncertain; yet I conceive, by the maritime laws and usages, the consignees have a right to deduct such damage from the freight. I think, therefore, it would be advisable to ascertain, whether the damage did arise from improper stowage, and what it amounts to; and if less than the freight, to pay the difference into court; if more, not to pay any thing; and to plead the general issue, with a special plea of set off. It may be advisable, at the same time, to bring an action against the captain for the damage, and get judgment therein, if possible, as soon as the captain, should he succeed, would be entitled to judgment: in which case the court, on motion, would set off one judgment against the other *pro tanto*."

[Communicated by "ASPIRO."] ]

## PROGRESS OF THE LAW SINCE 1660. No. III.

The reports and records of the Common Law are not fully appreciated—they are much under-valued—they have hitherto been almost wholly over-looked both by the political economist and by the investigator of ancient manners. It has been seen that great light is thrown upon English history by the statute book: and the records of the Criminal Law have been analysed and applied in the elucidation of questions of jurisprudential economy; and from such analysis many useful conclusions, as to the state of crime in the nation and the causes of it, have been obtained. But the Common Law has never, as far as I am aware, been considered in a statistical point of view. A little attention to the subject, however, will show that its reports and records form one of the most fertile and most perfect sources for discovering the private, domestic, social, and economical condition, as well of the common and middle classes as of the higher and nobler ones. Of all the private transactions of any

nation, an average number are found to become subjects of litigation: by analyzing the records of the courts of Common Law, which still exist, we should obtain, or nearly so, this average, and we should thus be able to discover the general nature of all the private transactions of the country. Thus, to give an instance of a general nature: in early times we should find the courts of law chiefly occupied with questions of real property; from whence a conclusion may be drawn, that the proportion which personal property bore to realty was very small; a conclusion supported by other sources of information, such as grants to the King of a tax of the eighth part of all moveables. Later records show the increase of personal property by the increased attention and regard it demanded of the courts; and those of this day show the immense value of such property. Such is the nature of one of the most general conclusions, as to the nation at large, drawn from such sources: but details less known and more interesting, but of nearly the same general nature, may be obtained by a closer analysis.

Thus to give an instance from modern cases, which will be obvious to all: the details given in actions for breaches of promise of marriage would discover to us (supposing for an instant that we did not know it from other sources) the manner of making these contracts in this country at this day. We do not find the rite of purchase to exist here, as it did at one time among the Romans, Greeks, and Hebrews; nor do we find the suitor bargaining with the superior lord for the marriage of the ward, or the ward outbidding the suitor for leave to marry whom she likes; nor do we, as in France at this day, leave the matter to the entire arrangement of mutual friends and relations: but the parties are found making their own compacts as their affections lead them, with or without the intervention of friends to settle pecuniary matters. We have taken this subject because it is one of the most familiar and obvious, in order to shew that the same process of examination is applicable to past times: and the results would be more interesting and instructive, because less known. The relations of husband and wife after marriage, and those of parent and child, master and servants, would be clearly displayed by the details of actions for criminal conversation, on settlements, by or against the parties jointly or not, for abduction, battery, &c. &c. And to extend the examination to all kinds of cases, would not only disclose all the domestic, social and commercial relations of life, but would also partly shew the origin of such relations, and the gradual changes they have undergone; for of all actions brought, though some relate to old established usages, those which come before the courts for this decision chiefly consist of such as are governed by new or undeveloped laws. Until a new relation or a new connexion in life, or a new species of contract or commercial undertaking, comes into being, no question relating to such could be brought before the courts, nor is it likely

that such would be matter of judicial consideration until they had become generally prevalent: and as there is no reason why any one class of cases should be omitted in our law Reports more than another, they, from the year books to those of this day, furnish an index to the actual state of society in this country, and of its gradual advancement, besides the ample materials they afford to the jurist in a strictly legal point of view.

The principal reports immediately after the restoration are Levinz in the King's Bench; Siderfin, T. Raymond, and Modern Reports in the King's Bench, Common Pleas, and Exchequer conjointly; Hardres in the Exchequer alone; and the Chancery Reports and Cases in Chancery. The following is an imperfect analysis of the first part of Levinz's Reports, including a period of about 11 years, from 12 to 23 Car. 2. There are there reported four hundred and eighteen cases, of which one hundred and twelve, or about one-fourth, relate to real property, corporeal or incorporeal, including marriage settlements: eleven cases are on questions affecting the domestic relation of husband and wife; seven, that of parent, guardian, and child; five, master and servant, including apprentices; thirteen, relate to bankrupt law; fourteen, to the practice of awards; ten, to criminal law; sixteen, to special customs; twenty-one, to the construction of the words of bonds, contracts, &c.; four, to shipping; twenty-six, to the law of executors; thirty, to cases of libel and slander; one hundred and nineteen, to practice, pleadings, and the law of evidence; and the remainder, constituting about one-tenth part, to miscellaneous questions.

In comparing this analysis with other periods, we find more than three-fourths of the cases in the year books concern real property; from our analysis it would appear that (leaving out cases of practice) about one third of the cases requiring judicial argument in the King's Bench related to real estate; and from a cursory inspection of Harrison and Wollaston's King's Bench Reports for Hilary term 1835, it would seem that out of the cases there reported, (omitting practice and pauper settlement cases,) not one-eighth are as to realty. These calculations have been made in so hasty a manner that they require verification before any positive conclusion should be drawn from them, though they undoubtedly suggest many.

From the cases in Levinz on the subject, it is evident that the condition of man and wife was nearly the same in those days as in these; and indeed in this country there never existed any very great difference as to the marriage state. Among the Asiatic nations, women have generally been regarded as mere instruments of man's luxury. In civilised and polite Athens, and indeed in the Ionic Greeks, generally, oriental manners extensively prevailed, and women were regarded in a sensual and inferior light. Young wives lived secluded in the interior of the house, and, even when mothers, they were usually attended to the women's market by aged women. Among the

Doric Greeks, there existed a much greater degree of equality. At Rome, by the judgment or caprice of the husband, says Gibbon, the wife's behaviour was approved, or censured, or chastised; he exercised the jurisdiction of life and death. She acquired and inherited for the sole profit of her lord; and so clearly was woman defined, not as a person, but as a thing, that if the original title were deficient, she might be claimed, like other moveables, by the use and occupation of an entire year. Our Saxon ancestors, in common with the rest of the German nations, held woman in higher esteem; and although the feudal system threw its restraints over the sex, yet the same chivalric spirit, which made the young knight consecrate his arm to the service of the weaker sex, contributed to place females of all classes in a dignified and respectable rank. Moreover, the peculiarities of feudalism little restricted the citizen and burger classes; and as early as the fifteenth century, we find, from reported cases, that the wife had sufficient independence and authority, in the eyes of the world, to induce tradesmen to supply her with provision and necessities for her household, without her having the express authority of her husband: and that in the seventeenth century, she stood in that respect on precisely the same footing as at present, is evident from the cases above referred to. It would seem too, that elopement, notwithstanding the greater strictness of morals during the Commonwealth, was not considered as so great a crime as to forfeit the assistance of all honest men, for we find credit given to a woman who had eloped, against the express order of her husband.

In the cases reported or referred to respecting infants, we see an evident desire to stretch the strict letter of the law as much in favor of the real benefit of minors as possible, so as to enable them to bind themselves in order to obtain, on credit, necessities suitable to their rank and fortune.

In perusing the analysis before given, the reader must have been struck with the large proportion of cases of slander; and one is compelled to conclude, either that a greater degree of tenacity or sensitiveness, as to character, existed in those days, or else, that people were more inclined to defame each other than in previous or subsequent periods. A majority of those cases relate to imputations against the chastity of the party; and one or two of them are accusations of sorcery and witchcraft—a species of defamation which would now only be laughed at, but which, as late as the eighteenth century, might have led to serious results.

The number of the questions respecting awards shows how common the practice of referring to arbitration was in those days; and the cases relating to bankruptcy are as important to the political economist, as shewing the state of credit, as to the lawyer. Several of the miscellaneous cases are actions of *assumpsit*, and one or two turn on whether forbearance is a sufficient consideration for a promise to pay. After these general remarks,

which perhaps may be thought by some to be rather beside the question, we shall proceed to the more strictly legal details of some of these cases.

During the first twenty-nine years, after the restoration, viz. until the time of Sir John Holt, in 1689, there were no less than nine new Lord Chief Justices in the King's Bench; which only allows each, on an average, to have presided over the bench about three years. Sir John Kelynge, who succeeded Sir R. Hide, was Chief Justice for six years; and that eminent judge, Sir Matthew Hale, who succeeded him, for five years. This extraordinary rapidity in the succession of Chief Justices was not owing to political causes, although the judicial commissions were at that time only *durantis beneplacito*, but was caused by deaths and voluntary resignations. In the Common Pleas, the change was not so rapid, nor in Chancery. And the celebrated Sir Harbottle Grimston continued, undisturbed, Master of the Rolls until 1689, when he died at the age of 82, having held his office about twenty-nine years.

In May, 1665, the great plague of London broke out with violence, and both parliament and the courts of law were assembled at Oxford. In Michaelmas term, one judge of each court came the first day to Westminster, and held the *Essoigns*, and read the writ for adjournment to Oxford; and by proclamation, all judicial hearings in equity were stayed; and at Common Law there were no trials by jury. And in Hilary term, the courts were adjourned from Oxford to Windsor, and from thence to Westminster for the two last returus, as the plague had decreased.

The questions and distinctions as to privity of contract, and privity of estate, are very important, and an acquaintance with them is continually called for in practice. Several of such cases are reported in *Levinz*: one (*Helier v. Casebert*, in Hilary term, 15 & 16 Car. 2.) appears to have decided one of such questions for the first time. An action of debt was brought for rent by the lessor against the administrator of the lessee, who pleaded that he had assigned the term before the rent became due. But it was held that the privity of contract continued between the lessor and the administrator of the lessee, the same as between the lessor and lessee himself; but the heir of the lessor could not maintain debt against the executor of the lessee after assignment, because there was no privity of contract, but only privity of estate, descended to him. 1 Lev. 127. A case of a similar nature (*Coghill v. Fructon*) occurred in Michaelmas term, 2 W. & M., and was decided in the same way.

Devises of land and real property to executors to sell and pay the testator's debts, are said to have originated from the custom mentioned by Littleton (s. 169), of devising lands to be sold for a certain sum, to distribute for the testator's soul. In the case of *Feltham v. executors of Harleston* in Hilary term, 18 & 19 Car. 2. it was said to

have been resolved, that if a man devised lands for payment of his debts, and appointed an executor, and also left personal estate, that no part of the personal estate should go towards payment of the debts, because by appointing an executor the testator's intention appeared to be that the executor should have the goods, for the testator had made other provision for the payment of his debts. But if a man disposed of lands for the payment of his debts, and then died intestate, the personal estate should be chargeable in the hands of the administrator, for there was no intention apparent that the administrator should have anything. 1 Lev. 203. In some of the early cases, however, it was laid down that express words were necessary to exempt the personal estate from payment of debts. But it is now settled, that the personal fund will be exempted, if such an intention of the testator can be collected from a sound interpretation put upon the whole will. *Bottle v. Blundell*, 1 Meriv. 230. In another case, *Dethicke v. Caravan*, Michaelmas term, 19 Car. 2, where a man devised his lands to his executors to be sold, to pay debts, on a question whether the money produced by the sale was assets at Common Law in the executor's hands to make them chargeable in debt, Justice Twinden said, that he had known it to be adjudged that they were assets in their hands at Common Law without going into Chancery. 1 Lev. 224. But it may now be considered a settled rule, that where lands are devised to executors to be sold for the payment of debts and legacies, the money arising from the sale is to be considered equitable, and not legal assets. *Clay v. Willis*, 1 B. & C. 364. *Barker v. May*, 9 B. & C. 489.

The following cases are interesting, as disclosing the state of manufactures and commerce, and the restraints and monopolies allowed in those days. In Hilary term, a case (*Freemantle v. Silk Throwster's Company*) came before the court on a reference by the Privy Council, to try whether a by-law made by the Company of Silk Throwsters,—that none of the company should have more than a certain number of spindles in a week, was a good by-law or not. After verdict for the plaintiff on a trial of the fact, it was moved in arrest of judgment, that this, being a by-law in restraint of trade, and founded on their charter of incorporation with power to make by-laws, and not on any other custom, was a monopoly, and void. To which it was replied on the other side, and resolved by all the Court, that this was not a monopoly, but a restraint of a monopoly, that none should engross the whole trade, and to provide for equality in the trade, and therefore good. 1 Lev. 229. This decision shews how little the real interests of commerce were understood in those days; and such a by-law would not for one instant be allowed in these days. There are two cases reported in this part of Levinz, p. 14, and p. 262, which throw some light on the condition of foreigners trading in this country. By the first (*Mayor & Commonalty of London v. Bernardiston*), it appears that there was in the city

of London an ancient weighing beam to which all foreigners were accustomed to take all such of their goods as were sold by weight to be weighed, under a penalty of 13s. 4d. for every 500lbs. The other (*Wilnot v. Nison*, Hilary term, 20 & 21 Car. 2.) was a case of a foreigner using a trade in a market town without being a freeman, or having served an apprenticeship, and judgment was given in favour of the foreigner.

## SELECTIONS FROM CORRESPONDENCE.

### No. CXII.

#### OBJECTIONS TO AFFIDAVITS OF DEBT.

Mr. Editor,

I request the favour of a corner in the friendly pages of your Journal, to give a hint to my professional brethren on the subject of *Affidavits of Debt*.

The sharp practising and pettifogging tribes of the profession, are now busily engaged in taking frivolous objections to affidavits of debt, in order to get rid of the bail-bond. Their first chance is, that the plaintiff's attorney may be out of town, and some incompetent clerk appear to support the affidavit. They next rely on a disposition latterly shewn by the Judges to entertain objections to affidavits, and to give a defendant his liberty when they can.

I will not venture an opinion upon this latter point, but will merely observe, that as long as the legislature allows arrests for debts, plaintiffs will avail themselves of it; and however unpalatable to respectable attorneys, the nauseous task of inquiring into bail, opposing them, breathing the sweet atmosphere of the Judges' chambers for six hours and a half, in juxtaposition with some of the sweetest flavoured personages of the profession, for the enormous fee of sixpences per hour, to oppose objections to affidavits of debt,—oftentimes on account of a word or a letter being omitted—I say, however repulsive all this, attorneys must arrest when instructed so to do; but the judges have lately held that the (20 years) old form of affidavits on bills of exchange will not do; that *duties must be stated*; and in addition to the words at the outset, "*is justly indebted*," it must be sworn, that "*no part has been paid, but the whole remains due*." Also it must be shewn *what is due for principal, and what for interest* (if any).

It would be prudent for the practitioner to attend to these hints, or (if time will not allow), to instruct a pleader to prepare his affidavit; for it may happen that after all his care he may be turned round upon some contemptible quibble—so much a game of hazard has Common Law now become, and (since the days of Lord Mansfield), so little does the honest zeal of the respectable practitioner avail him.

The practice of following the Judges all

over the country, to get them to take bail; is a most unjust infliction on the attorney, and a monstrous expence to the client. Either bail ought never to be required in the long vacation (as before the Uniformity of Process Act it never was, and I believe even by the framers of it, never contemplated), or one of the fifteen Judges, or a commissioner, ought to be in the way to take it.

A. S.

## SUPERIOR COURTS.

### Lords Commissioners' Court.

#### BANKRUPTCY.—PETITION TO SUPERSEDE.—ACQUIESCENCE.

*Held, that a bankrupt's surrender to the Commissioners, and his interference in the choice of assignees, and his co-operation in realizing the estate, and his assistance in settling the bankruptcy accounts, and his application for an allowance from the estate, all taken together, did not amount to such acquiescence in the commission as would preclude the bankrupt from disputing its validity.*

This was a petition to supersede a commission of bankruptcy, issued in 1825, and disputed in nearly all the courts of law and equity, with various success, ever since 1826. The petition alleged that there was no act of bankruptcy, no good petitioning creditor's debt, and stated other grounds for setting the commission aside. The Lords Commissioners heard the arguments of counsel on 22d, 23d, 24th, and 25th of June; and on the 10th, 11th, 12th, 13th, 14th, 15th, and 17th of August, *pro and con*.

Sir Wm. Follett, Mr. Temple, Mr. Alexander, Mr. Montagu, and Mr. Bethell were counsel for the petitioners (the bankrupt); Mr. Knight, Mr. Swanston, Mr. Jacob, Mr. Kelly, Mr. Richards, Mr. Arnold, Sir William Horne, Mr. Wakefield, and Mr. —, were counsel for the assignees, the petitioning creditors, and other parties opposing the petition to supersede.

The Court being of opinion that the alleged act of bankruptcy was the main question, and the only one of which the Court had doubt, directed an issue to a Court of Law, to try that. The only reportable point decided by the Court was the question of the bankrupt's alleged acquiescence in the commission, by which it was contended he was now estopped from disputing the validity of the commission. The arguments of counsel on that question were, in substance, these: there were six objections to the petition on this ground: the first was, that by his surrender to the commission, and his subsequent acquiescence, he was estopped from disputing its validity. The doctrine of acquiescence was most difficult to be defined; but clearly the bankrupt's surrender was no acquiescence, nor estoppel to this petition;

for it would be perilous to him not to surrender; *Flower v. Herbert*,<sup>a</sup> and a dictum, per Lord Ellenborough, in *Goldie v. Gulston*.<sup>b</sup> A surrender and petition to enlarge the time for surrendering was held to be no estoppel, *Mercer v. Wise*.<sup>c</sup> The bankrupt could not petition to supersede the commission, nor be heard at all, until he surrendered himself to the Commissioners, and submitted to their jurisdiction. That was the law and the practice to which every bankrupt was bound to conform himself in the first instance, although it might afterwards turn out that there was no foundation for the commission. Mr. Chambers' interference in the choice of assignees was urged as another proof of acquiescence in the commission, and was a second objection against his being now heard to shew its invalidity; but acquiescence could not be inferred from the bankrupt's desire to have all his property committed to the care of proper persons, until he could in due course procure its restoration to himself. The learned counsel cited cases upon that head also, some of them shewing that even the proving of a debt by a creditor under a commission did not amount to acquiescence in the commission; as in *Ranken v. Horner*,<sup>d</sup> where proof of debt under a commission by an execution creditor, before taking out execution for his debt against the party declared bankrupt, was held not to preclude him from disputing the commission. The third objection and ground of alleged acquiescence was, that Mr. Chambers assisted in the realization of the estate. It was the duty of the bankrupt to assist the assignees in the realization of the property for the benefit of his creditors, if the commission should be supported, or for his own benefit, if it should be declared void; and no exertion to get in the estate could be an estoppel against a subsequent proceeding to avoid the commission. Against this was cited *Clarke v. Clarke*,<sup>e</sup> where Lord Kenyon held that a person who was declared bankrupt and assisted in the sale of his goods, was thereby estopped from disputing the commission: on the other side, *Hearne v. Rogers*,<sup>f</sup> where it was held by Mr. Justice Bayley, that such a person's interference in the sale of his goods, with a view to take care of them, or make the most of them, did not amount to an assent to the sale, nor estop the bankrupt from disputing afterwards the commission. A fourth ground of alleged acquiescence was the bankrupt's alleged application for an accountant to get in the estate. Mr. Chambers denied in his affidavits that he made such application; and even if he did, that was no proof of acquiescence: some of the before-mentioned cases were cited on this point. It was next objected to the petitioner, that he applied for allowance from the estate. Such an application was quite reasonable, when it was considered that this gentleman, who had

<sup>a</sup> 2 Ves. 326.

<sup>b</sup> 4 Camp. 382.

<sup>c</sup> 3 Esp. 216.

<sup>d</sup> 16 East, 191.

<sup>e</sup> 6 Esp. 61.

<sup>f</sup> 9 Barn. & C. 577.

a family accustomed to the comforts of life, was deprived of all control over his property, which was vested in the assignees. Was it not just that some allowance should be made to him out of it, while he was exerting himself to assist the assignees in the realization of the estate? All this was far from proving his acquiescence in the commission. It appeared from the case, *ex parte Giles*,<sup>s</sup> that even receiving an allowance would not preclude the petitioner from disputing the commission. The last objection was, that he applied for his certificate under the commission; but Mr. Chambers swore, in his affidavit, that he never did apply; even if he did, such application was no estoppel against disputing the commission. *Ex parte Lewis*.<sup>h</sup>

Sir C. C. Pepys, in giving the judgment of the Court on the whole case, said, in reference to these preliminary objections, that the main question in respect to them was, what length of time before objecting to the commission amounts to acquiescence in it? It appeared that in 1826, little more than a year from the issuing of the commission, Mr. Chambers gave the assignees notice of an application to supersede it; and he did accordingly present a petition for that purpose, which was heard before the Vice-Chancellor and dismissed, because the petitioner was not entitled, on equitable grounds, to a *supersedeas*, but he was left to his remedy by a trial at law for that purpose. Up to the month of April, 1827, there was no acquiescence in the commission, as appeared from the petitioner's proceedings in these courts. There is another reason for holding that the petitioner was not precluded from questioning the commission, and that is, that the law was not known, or not declared, until 1827 or 1828; and it is a maxim, that a person ought not to be concluded by any thing he did in ignorance of the law. It was declared for the first time, in *Swire v. Ellison*,<sup>i</sup> that evidence of a trading which ceased before the passing of the act 6 G. 4, c. 16, (May 2, 1825) would not support a commission issued after that act came into operation (Sept. 1, 1825). Lord Tenterden remarking, in the case last cited, on the extraordinary oversight of the Legislature on the passing of that act, said, "the Legislature was not to be taken, like a testator, *inops consilii*, but *magnas inter opes inops*." That was the first case that discovered the state of the law; and it was followed immediately by several others, as the case of *Hewson v. Heard*,<sup>j</sup> *Maggs v. Hunt*,<sup>k</sup> and *Palmer v. Moore*,<sup>l</sup> in which last it was held, that evidence of an act of bankruptcy committed after the passing of the 6 G. 4, c. 16, on the 2d May, 1825, did not support a commission issued after the 1st of Sept. 1825, when

that act came into full operation. The law was not known; and Mr. Justice Bayley said, in *Heurne v. Rogers*,<sup>m</sup> that a man was not bound by what he did in ignorance of the law. It was argued, that the verdict in *Chambers v. Bernescone*, in the Exchequer, was conclusive; but that was not so: of all the trials in this matter—seven altogether—four verdicts were against three, and three of the four were set aside, so that the fourth, which stood, was in favour of the petitioner. Even a person who failed of his opportunity at law, was not precluded thereby from applying to an equitable jurisdiction; but always, when a party has established his legal right, this Court gives him consequential relief. The opinion of the Court was, that the petitioner is not precluded from still questioning the validity of the commission.

*Ex parte Chambers*, in the matter of *Chambers*, before the Lords Commissioners, at Lincoln's Inn Hall, August 24, 1835.

**Note.**—See, with respect to the above last cited cases, the opinion of the Judges in *Baillie v. Grant*, in the House of Lords, said there to be a case of great importance, (1 Clark and Finnelly, 238) where *A.*, not a trader, became indebted to *B.* to the amount of 100*l.* *A.* afterwards became a trader, and ceased to be a trader, never having paid the debt to *B.*; and after ceasing to be a trader he committed an act of bankruptcy: Held, that a commission was sustained upon that debt and act of bankruptcy.

### King's Bench Practice Court.

POWER OF THE COURT TO COMPEL THE APPEARANCE OF A WITNESS BEFORE THE MASTER.

*The Court cannot compel a witness to appear to give evidence before a master.*

An application was made for a rule to shew cause why an attorney should not be compelled to appear before the master, where it was alleged he could give evidence of importance, and without which the inquiry could not properly proceed. He had been called upon to appear, but refused; and the present application was, in consequence, made.

The Court said it had no power to grant the application.

Rule refused.—*M<sup>r</sup> Dougall v. Nicholls*, T. T. 1835. K. B. P. C.

ISSUE OF COMMISSION.—EXAMINATION OF WITNESSES ABROAD.—COSTS DUE FROM PLAINTIFF IN EQUITY.

*The Court will not stay the issuing of a commission to examine witnesses abroad,*

<sup>s</sup> 1 Dea. & Chit. 548.

<sup>h</sup> 2 Glynn & Jam. 208.

<sup>i</sup> 9 Barn. & Cress. 760.

<sup>j</sup> 9 B. & C. 754.

<sup>l</sup> 9 B. & C. 754.

<sup>k</sup> 4 Bing. 212.

<sup>m</sup> 9 B. & C. 557.



*merely on the ground that some costs are due from the plaintiff to the defendant in equity.*

A rule nisi had been obtained to issue a commission to examine witnesses abroad, to which cause was now shewn. It was submitted that the commission should not be issued, unless upon certain terms, which were, that a sum due from the plaintiff to the defendant for costs in an unsuccessful suit in a court of equity on the same matter, should be immediately paid, or should be properly secured to the defendant.

In support of the rule it was contended, that the Court could not take cognizance of the matter. The defendant, if the costs were incurred, had a proper means of securing their payment.

The Court was also of this opinion, and made the rule absolute.—Rule absolute.—*Oughgan v. Parish*, T. T., 1835. K. B. P. C.

**ATTACHMENT FOR CONTEMPT.—PROMPT APPLICATION.—CALLING OF WITNESS ON SUBPOENA.—HEADING OF AFFIDAVITS IN ORIGINAL PROCEEDINGS.**

*The Court will not grant an attachment for contempt in not attending on a subpoena, unless the application for it be prompt.*

*It is not necessary that a witness should be called on his subpoena to make him answerable for a contempt.*

*The heading of affidavits in answer to an application for an attachment in a criminal case should be in the Court only, unless the record of the case be also in the Court.*

Cause was shewn against a rule nisi which had been obtained, for an attachment against a person for contempt, in neglecting to attend at the Middlesex sessions on a subpoena, on the trial of the defendant for keeping a gaming house.

It appeared, that the affidavits on which the rule had been obtained, were dated the 23d April, while the trial of the defendant took place on the 11th December previously. The rule was in consequence objected to on the ground of its being too late; and a case was referred to where the Court had refused to issue an attachment under similar circumstances which was applied for in Hilary Term, the alleged contempt having taken place at the previous Summer Assizes. The present application might have been made at a much earlier period. Besides, the affidavits of the person against whom the attachment was sought, would shew that he was not called on his subpoena by the officer of the Court, and cases were cited in support of this objection.

In support of the rule, an objection was taken to these affidavits, which it was alleged were improperly headed. Their title it appeared was, "In the King's Bench," which it was contended should have been "the King v. Stretch."

The Court, however, was of opinion, that as

the record of the case of "the King v. Stretch" was not in that Court, the heading was correct.

It was then further urged, that the alleged delay could not be held to be a sufficient cause for the application being refused, as the contempt complained of was a neglect in attending on a subpoena. As to the party's not having been called by the officer of the Court, a case was cited where the Court had held, that if it appeared by the affidavit that the witness had been called three times in open Court, and he did not answer, that was sufficient, without alleging that he was called on the subpoena.

The Court said that a sufficient ground existed for refusing the attachment in the length of time which had elapsed since the alleged contempt had been committed, without going into the question respecting the calling on the subpoena, which, however, appeared to be unnecessary. If the application had been made at an earlier period, a sufficient reason might have been given by the person for not attending, which he might now be unable to do.—Rule discharged with costs.—*Rees v. Stretch*, T. T., 1835. K. B. P. C.

**ATTORNEY'S BILL.—REFERENCE FOR TAXATION.—POWER OF THE COURT.—ATTORNEY'S ATTENDANCE BEFORE THE MASTER.—OBJECTION TO THE JURISDICTION OF COURT.—CLIENT'S UNDERTAKING.—MONEY OVERPAID.—LIABILITY OF ATTORNEY.**

*The Court can only refer an attorney's bill for taxation under the 2 Geo. 2. c. 23, s. 23.*

*The attorney, notwithstanding his having attended the taxation of his bill before the Master, can object to the jurisdiction of the Court, to refer his bill for taxation, provided the client has not given his undertaking to pay the costs taxed to him.*

*If any sum shall be found overpaid, however, the attorney may be called upon to refund.*

A rule had been obtained, calling upon the defendant's late attorney to shew cause why it should not be referred to tax the costs of the taxation of his bill of costs, pursuant to an order of the Court; and why he should not pay the amount thereof, together with 1*l*. 10*s*. 2*d*. found to be due from him to the defendant, and why he should not deliver up all books, papers, &c. which had come into his possession belonging to the said defendant, particularly the mortgage deed mentioned in the bill of costs, and why he should not pay the costs of the present application. It appeared, that the defendant was in custody at the suit of the plaintiff for debt, and that the defendant's attorney in question became acquainted with him, and was employed as his attorney in various matters. In the course of this employment the defendant, as he alleged, became indebted to him in the sum of 36*l*. 8*s*. 2*d*., but on taxation the Master took off 15*l*. 8*s*. 4*d*., but allowed 22*l*. 10*s*., which the defendant had previously paid on account, thus leaving a balance of 1*l*. 10*s*. 2*d*.,

to be refunded by the attorney, more than one-sixth also being taxed off the bill.

Cause was now shewn, when it was contended, that the defendant was not, under the 2 Geo. 2, c. 23, s. 23, in a position to refer the costs of taxation to the Master to tax, not having given the usual undertaking to pay costs taxed to him. A case was pointed out where this principle had been upheld, the Court having refused to grant an attachment for non-payment of costs pursuant to the Master's *allocatur*, as there was no undertaking to pay what should be declared due. With regard to the repayment of 1*l.* 10*s.* 2*d.*, it was contended that that sum could not be claimed, as it depended on the taxation of the Master, which was not authorized under the circumstances before alluded to. It was not shewn what papers were in the possession of the attorney, or that the mortgage deed, &c. had been demanded; the rule therefore ought to be discharged.

In support of the rule, it was contended, that the case alluded to was different from the present. That was an application for an attachment; and although the Court refused to interfere in such a case as that, yet the present case might be held to come within their jurisdiction. It was necessary that an order should have been made in conformity with the terms of the statute to obtain an attachment, but such an order need not be made to refer it to the master to tax the costs in the present case; because the Court might make such an order by its common law jurisdiction over its own officers. But the attorney had waived any objection to the want of jurisdiction by his attending the taxation. He had also thus consented to the order. The statute did not direct that the order for the taxation should be made in any particular form, and it was made according to the terms agreed on by the parties in this case. Besides, if the Court in making the order, had no jurisdiction except on the statute, the order must be taken to be well made upon that authority; and after parties had proceeded upon it, they could not turn round and contend that it was not binding upon them. The master's *allocatur* had ordered the 1*l.* 10*s.* 2*d.* to be repaid, and the Court would not therefore depart from that. The papers had been generally demanded, and although the mortgage deed was not particularly alluded to, yet the attorney was bound to deliver that up with the rest.

The Court thought that the jurisdiction of the Court to order the taxation of costs, was only given by the act 2 Geo. 2, cap. 23, by which the conditions on which taxation should take place were shewn. One of the conditions, on compliance with which the client can have his attorney's bill of costs taxed, is, that he should undertake to pay the costs taxed to him; and if he did not enter into such an agreement, he was not on an equal footing with the attorney. The case cited was different from the present, as in that the party could not be liable to an attachment unless he had entered into an undertaking, while in the present case no such undertaking was given.

With regard to the argument used, that the attorney had admitted the jurisdiction of the Court by attending the taxation, and that he could not therefore now dispute its authority to tax the costs of the taxation of the bill, the Court did not think that such was the case, but was of opinion that he was not now too late to insist that the defendant could not have the costs of taxation referred to the master for taxation, as he had not complied with the condition pointed out by the act. With respect to the repayment of the 1*l.* 10*s.* 2*d.*, the proceeding as to that before the master was perfectly correct, and the attorney must therefore refund that sum. The defendant did not appear to have satisfactorily shewn himself entitled to the mortgage deed, but the other papers, &c. should be delivered up to him. The rule would therefore be discharged, as to referring it to the master to tax the costs of taxation, and to deliver up the mortgage deed, but would be absolute as to the remainder, but without costs on either side.

Rule accordingly.—*Heward v. Groom*, T. T. 1835. K. B. P. C.

#### NON-PAYMENT OF COSTS.—PERSONAL SERVICE OF ALLOCATUR.—ATTACHMENT.—AFFIDAVIT.—DESCRIPTION OF ATTORNEY'S CLERK.

*The Court held, that it was a sufficient description of an attorney's clerk, in a joint affidavit with his master, to state, that he was in the employ of the latter, without giving his address.*

*After every attempt has been made to effect a personal service of the master's allocatur, but without success, if an attachment is applied for, the Court will grant the application, provided there is no suggestion on the part of the person sought to be served, that he has received no notice of the contents of the allocatur, or of the attempt made to serve it.*

A rule having been obtained for an attachment, for non-payment of money, and costs pursuant to the master's *allocatur*.

Cause was now shewn. An objection was first taken to the affidavit on which the rule had been granted, which was jointly made by the defendant's attorney, and his clerk; but which did not set forth the place of abode of the latter, merely describing him as clerk, in the employ of the said attorney. This, it was contended, was not a sufficient description.

The Court, however, was of opinion, that the residence of the attorney being given, the description of the deponent was quite sufficient.

The affidavits on which the rule was obtained shewed, that repeated attempts had been made to effect a personal service of a copy of the *allocatur* upon the plaintiff's attorney, and to demand the costs therein mentioned of him, but without effect. That on one occasion the defendant's attorney's clerk had met him in the street, and had pursued him for a like purpose, but that he had effected his escape, by

running into a shop, and making his way through a back door. That after this the clerk went to his (plaintiff's attorney's) chambers, which he had hitherto found invariably closed, where he saw his agent, to whom he gave a copy of the *allocatur*, as well as a notice directed to the attorney; stating, that he intended to attend on the following day, at a certain hour, to demand payment of the costs, &c.; and that in the event of his not then obtaining what he sought, to apply to the Court in the subsequent week, for an attachment, without a personal service. The clerk was accordingly in attendance at the appointed time and place, but the attorney did not make his appearance; diligent search had also been made after the plaintiff, Bottomley; but his place of abode could not be discovered, and it was believed to be impossible to effect a personal service on him.

On these affidavits it was contended, that as no personal service had been effected, the Court could not grant an attachment.

The Court, however, thought, that as there was no suggestion, in the affidavit in answer to the rule, that the plaintiff's attorney had not received any of the notices left at his chambers, the attachment might issue.

Rule absolute.—*Bottomley v. Belchamber*, T. T. 1835. K. B. P. C.

#### PROMISSORY NOTE.—LIABILITY OF PAYEE TO MAKER.—NOTICE TO INDORSEE.—CONSIDERATION.

*The indorsee of a promissory note, not overdue, cannot recover its amount against the maker, having had notice of the payee's liability to the maker, in a sum exceeding the amount of the note, before the note was indorsed to him.*

A rule nisi had been obtained, for referring back the cause to the arbitrator, with directions to enter a verdict for the defendant, or to reduce the amount of damages to 22*l.* 10*s.*, against which—

Cause was now shewn. It appeared, that the cause had been referred, with directions to the arbitrator to decide for whom, and to what amount, a verdict should be finally entered, and to state any special matters in his award.

The verdict on this reference was finally given for the plaintiff, with damages 171*l.* 10*s.*, independent of the 270*l.* paid into Court, each party to bear his own costs. From the special matters shewn on the award, it appeared that the action was brought by the plaintiff as indorsee of a promissory note, drawn by the defendant, who promised to pay to one B. B., or his order, the sum of 352*l.* on demand, together with lawful interest for the same. The defendant had pleaded that the plaintiff sustained damages only to the amount of 270*l.*, which he paid into Court, and gave notice to him to prove consideration for the indorsement. The plaintiff, it was shewn, advanced at two different periods to B. B. the respective sums of 150*l.* and 100*l.* on the deposit

of the note, and afterwards, before the note was indorsed to him, had notice that the latter was indebted to the defendant in a sum exceeding the amount of the note with interest. B. B. was also indebted to the plaintiff in a sum exceeding the amount of the note. The defendant did not dispute the plaintiff's lien on the note to the amount of 250*l.*, which he had advanced, and 22*l.* 10*s.* interest; nor did the plaintiff shew it to any greater extent. The note was a transaction of itself, and had no reference to any collateral matter.

Upon this award, it was submitted that the plaintiff, notwithstanding the note was not indorsed to him until after he had had notice that the payee was indebted to the maker in a sum exceeding its amount, could recover upon it. The present was not like a case of endorsement after the note became due, because no demand was shewn to have been made in the award, and the note was not therefore due. A case was cited where it had been held that the indorsee of an overdue promissory note was liable to all equities arising out of the note itself in an action brought against the maker, but not in a case of a set-off, in a debt due from the indorser of the note to the maker, arising out of collateral matters. It had been found by the arbitrator in this case, that the transaction of the note was entirely independent of all other matters between the payee and the maker, and the only difference between this case and that cited was, that in the latter it was not shewn that the plaintiff had any notice of the claims existing between the parties, not referring to the note. That, however, it was contended, was a matter of no importance. Another case had also been decided, the principle of which appeared to be, that a party taking an overdue promissory note, ought first to inquire into all equities upon the note. That, however, could not render it necessary to inquire into any other matters. Other cases were also cited, where it was contended the doctrine supported by the Court was to limit the equities on the note itself as much as possible, and that a promissory note payable on demand could not be due until actually presented for payment; and it was contended, that upon these authorities the rule ought to be discharged.

In support of the rule, however, several cases were cited, the principle laid down in which, it was submitted, was that the indorsee of a promissory note could not recover against the maker, when no consideration was given for it, provided the indorsee was acquainted with that circumstance; and it was contended, that the plaintiff had had the note indorsed to him, although he knew the payee had given no consideration, and he therefore came within the principle. The question was whether, according to the circumstances shewn in the award, the plaintiff was entitled to recover. If the action had been brought by B. B. the defendant would have put in the plea of set-off, which would have cleared him from the consequences of the action; could the plaintiff therefore recover on the note, having a perfect knowledge

of the payer's liability to the defendant. *Cur. adv. vult.*

The Court subsequently gave judgment, and after going at length into the circumstances of the case, said that the fact of the note not being overdue at the time of the indorsement, might be taken for the plaintiff; but the circumstance of his having had notice of the payee's liabilities to the defendant, would operate unfavourably towards him. The effect of that notice was meant to be, that as between the payee and the maker, the note was unavailable, that which was tantamount to a payment having taken place. Any further advance on the note, therefore, should be on the credit of the payee. The notice, in the opinion of the Court, ought to operate in that case. The note might be considered to be a new note, and that for a valuable consideration, so far as regarded all beyond the 250*l.* advanced on the deposit, and to be satisfied before the second holder had given any consideration for its indorsement. Upon the grounds, therefore, that the notice was properly given by the maker, and in due time, and that the plaintiff must be considered to have made every subsequent advance on the credit of the payee only, the award ought to be altered for reducing the amount of damages to the sum originally advanced. As the plaintiff's claim to the interest was not disputed, the verdict, with regard to that, must remain, and should only therefore be reduced, and not set aside. — Rule absolute. — *Goodall v. Roy*, T. T. 1835. K. B. P. C.

### Common Pleas.

**EJECTMENT. — JUDGMENT AND POSSESSION OBTAINED. — DEFENCE OF LANDLORD. — COLLUSION.**

*The Court will not allow a person claiming to be landlord to appear to defend an ejectment after judgment and possession obtained by the lessor of the plaintiff, unless collusion between the latter and the tenant shall appear.*

In this case, after judgment obtained and execution issued for the lessor of the plaintiff, a rule had been obtained calling upon the latter to shew cause why a person claiming to be landlord of the premises for which this ejectment was brought, should not be admitted to defend.

Cause was now shewn, when affidavits were put in denying any collusion between the lessor of the plaintiff and the tenant, and cases were cited to shew that after judgment and execution in an undefended ejectment, when no collusion existed, the Court would not suffer another person to be let in to defend. In one of the cases pointed out the Court had said that if collusion was proved between the lessor of the plaintiff and the tenant they could interfere; but without such proof, the only course would be for the landlord to bring an action of ejectment to recover possession.

In support of the rule another case was

cited, where the Court had set aside an interlocutory judgment signed for want of an appearance, upon an affidavit made by the attorney that he had received instructions to enter an appearance, but had neglected to do so.

The Court thought that collusion being denied, they possessed no power to interfere. It was the duty of the tenant to send the declaration and notice served upon him to the landlord. The case alluded to in support of the rule was a mere slip of the attorney, and could not be considered to govern the present case.

Rule discharged. — *Doe d. Thompson v. Roe*, T. T. 1835. C. P.

### Exchequer of Pleas.

**UNIFORMITY OF PROCESS ACT. — CAPIAS. — DESCRIPTION OF DEFENDANT. — DEFENDANT'S RESIDENCE.**

*It is not necessary to describe a defendant in a capias as of his precise residence, if it is unknown, but he may be described of his late place of residence.*

This was an application to set aside a bail-bond given by the defendant on his arrest, on the ground that the provisions of the Uniformity of Process Act had not been complied with in the description of the defendant's residence introduced into the writ of *capias* on which the arrest had been effected.

The affidavits to which the copy *capias* left with the defendant was attached, stated that the defendant did not reside at the place mentioned in the writ. That, indeed, described him as "late of Devonshire Terrace, New Road." This, it was contended in support of the rule, was an insufficient description, as it must be presumed, from the forms of the writ given in the schedule of the act, and the provisions of the fourth section, that the present place of residence of the defendant must be given. A mere description of him as "late" of a particular place, was not a sufficient description of him, according to what was required by the act. It had been held, in several cases, that the provisions of the Uniformity of Process Act must be strictly pursued; and in none was it more important that such provisions should be held strict, than in a case where the defendant's liberty was affected.

Against the rule, it was contended that there was a difference between the language of the form of *capias* given in the schedule, and that of the writ of summons. In the former, the residence of the defendant was not required to be stated, although it was required in the latter. All that could be required by the statement was, that such a description should be given of his residence, as could be reasonably expected to be in the plaintiff's power. But, as the defendant's residence would, in many cases, be unknown, where the plaintiff intended to proceed by bailable process, all that would be in his power was, that he should give the best description of where he was to be found, which was in his power. If he was not acquainted

with his actual residence, he must either state his late residence, or no residence at all. But, as it did not appear from the schedule that it was necessary to give the residence at all, it would be sufficient to give some description of the defendant, as a *descriptio personæ*. Here, these words of the writ might, at any rate, be taken as such a description, and therefore the statement was sufficiently complied with.

The Court was of opinion that the rule must be discharged. The language of the forms of summons, and *capias* introduced in the schedule, was essentially different. The former was directed to the defendant himself, and the latter to the sheriff. In the one, it might be *essential* that an exact description of the place of residence should be introduced, and it was required by the form of the summons given in the schedule. In the other, it did by no means follow that such a description was *essential*; and the form only used the word "of" after the defendant's name. The meaning of that word might be, either that a description of the defendant's residence should be introduced, or a description of his person only. Authorities had been cited, and from them it appeared, that these words of the *capias* might be taken in the latter sense. The writ of *capias*, therefore, here, on which the arrest had taken place, was sufficient, and the present rule must therefore be discharged.

Rule discharged.—*Hill v. Harvey*, T. T., 1835. Exch.

### SITTINGS IN CHANCERY,

*Michaelmas Term, 1835.*

#### BEFORE THE LORDS COMMISSIONERS.

At Westminster.

Saturday November 7	}	Appeal Motions by
Monday - - 9		Date, and Appeals.
Saturday - - 14	}	Appeal Motions by
Monday - - 16		Date, and Appeals.
Saturday - - 21	}	Appeal Motions by
Monday - - 23		Date, and Appeals.

*Previous to Michaelmas Term, 1835.*

#### BEFORE THE VICE CHANCELLOR.

At Lincoln's Inn.

Wednesday Oct. 21	}	Motions and Petitions.
Thursday - - 22		
Friday - - 23		
Saturday - - 24		
Monday - - 26		
Tuesday - - 27		
Wednesday - - 28		
Thursday - - 29		
Friday - - 30	}	
Saturday - - 31		

### Michaelmas Term.—At Westminster.

Monday - Nov. 2	}	Motions.
Tuesday - - 3		Petition-day.
Wednesday - - 4	}	Pleas, Demurrers, Exceptions, Causes, and Further Directions.
Thursday - - 5		
Friday - - 6		
Saturday - - 7		
Monday - - 9		
Tuesday - - 10	}	Motions.
Wednesday - - 11		
Thursday - - 12	}	Pleas, Demurrers, Exceptions, Causes, and Further Directions.
Friday - - 13		
Saturday - - 14		
Monday - - 16		
Tuesday - - 17		
Wednesday - - 18	}	Motions.
Thursday - - 19		
Friday - - 20	}	Pleas, Demurrers, Exceptions, Causes, and Further Directions.
Saturday - - 21		
Monday - - 23		
Tuesday - - 24	}	Short Causes and ditto.
Wednesday - - 25		

Such days as his Honour is engaged as Lord Commissioner, are excepted.

#### ROLLS COURT.

*At Westminster at 10 o'clock.*

Monday	-	Nov. 2	Motions.
Tuesday	-	3	Petitions.
Wednesday	-	4	{ Pleas, Demurrers, Causes, further Di- rections, and Ex- ceptions.
Thursday	-	5	
Friday	-	6	
Saturday	-	7	
Monday	-	9	
Tuesday	-	10	{ Motions.
Wednesday	-	11	
Thursday	-	12	
Friday	-	13	
Saturday	-	14	
Monday	-	16	{ Pleas, Demurrers, Causes, further Di- rections, and Ex- ceptions.
Tuesday	-	17	
Wednesday	-	18	
Thursday	-	19	
Friday	-	20	
Saturday	-	21	{ Pleas, Demurrers, Causes, further Di- rections, and Ex- ceptions.
Monday	-	23	
Tuesday	-	24	
Wednesday	-	25	
After Term, at the Rolls Court, Chancery-lane.			
Thursday	-	26	{ Petitions after swear- ing in the Solicitors.
Friday	-	27	
{ Short Causes.			

Causes, further Directions, and Petitions by consent, every Friday, at the sitting of the Court.

## ANSWERS TO QUERIES.

## Common Law.

## EXECUTION, P. 464.

Since the 3 & 4 W. 4, c. 42, s. 11, it seems that no material advantage can be taken of the *misnomer*. If the defendant appear by his wrong name, or if he appear by his right name, the plaintiff may declare against him thereby, stating in his declaration that he was sued by his wrong name. See *Doe v. Butcher*, T. R. 611. *Hole v. Finch*, 2 Wils. 393.

If there be any irregularity in the process, the application must be to set aside the service of the writ, and the subsequent proceedings; but you cannot apply to quash or set aside the writ itself. M. S. Mich. 1814.

The above-mentioned statute states, that "no plea in abatement for a misnomer shall be allowed in any personal action, but that in all cases in which a misnomer would, but for this act, have been by law pleadable in abatement in such actions, the defendant shall be at liberty to cause the declaration to be amended, at the costs of the plaintiff, by inserting the right name upon a judge's summons, founded on an affidavit of the right name," made by defendant; consequently, it is quite clear, that if a defendant is sued in a wrong christian name, and receives a declaration without taking any steps to cause it to be amended, the plaintiff is at liberty to sign his judgment (in default of a plea), and take the defendant in execution.

W. S.

## PEW RENTS.—CHURCHWARDENS. P. 432.

The distribution of seats in churches belongs to the churchwardens, as the officers of the church, subject nevertheless to the direction of the ordinary. In *Walter v. Gunner and Drury*, 1 Hagg. Cons. 317, it is laid down, by Sir William Scott, that "it is clearly the law on this subject, that a parishioner has a right to a seat in the church without paying for it." It was stated, in the pleadings in the same cause, that there was a custom to pay a rent for seats, which rent was applied in easement of the parish rate,—“a practice,” Sir William observed, “which had been constantly reprehended by the Ecclesiastical Courts, and discouraged as often as it had been set up.—There can be no property in pews: they are erected for the use of the parishioners. The ordinary may grant a pew to a particular person while he resides within the parish; or there may be a prescription by which a faculty is presumed; but as to personal property in a pew, the law knows of no such thing.”—By Sir John Nicholl, in *Hawkins & Coleman v. Compeigne*, 3 Phill. R. 16.

Pews in a church belong to the parish, for the use of the inhabitants, and can neither be sold nor let without a special act of parliament. See *Wyllie v. Mott and French*, 1 Hagg. Rep.

29; and also Maddy's Ecclesiastical Digest, 185. It would appear, that to maintain an exclusive right to a pew, the person claiming it must shew either a faculty, or a prescription, which will suppose a faculty.—See the above case of *Walter v. Gunner & Drury*: a mere possessory right is not good against the churchwardens and the ordinary. The churchwardens are bound to seat the parishioners, according to their station in society, taking care not to accommodate the higher classes beyond their real wants, and thereby exclude their poorer neighbours. *Fuller v. Lane*, 2 Add. Rep. 426.—I think, therefore, upon reference to the above cases, it will be found that all seats, except those held by faculty or prescription, are at the disposal of the churchwardens, subject to the control of the ordinary; that all the parishioners have a right to be seated according to their rank; and that they are entitled to this right without making any special payment for it.

T. H.

## REQUEST.—“PROPERTY.” P. 416.

The words “all my property” will pass every species of property belonging to the testator, in England, at the time of his decease; but not property elsewhere.—*Arnold v. Arnold*, Rolls, Nov. 15, 1834: and see *Ca. Col. Watkins*, Prin. of Convey. by Merrifield. 8th edit. 591.

SCRUTON.

## Laws of Landlord and Tenant.

## LAW OF LANDLORD AND TENANT.—UNDER-TENANT.—DISTRESS. P. 432.

The 11 Geo. 2, c. 19, s. 1, extending s. 2 of 8 Anne, c. 14, does not empower a landlord to follow and seize the goods of his tenant, unless they shall have been “*fraudulently or clandestinely carried away*.” There is no authority to shew that *A.* can follow and distrain the goods of *C.* “The Books of a Scholar,” and “Articles of an Attorney's Office,” it should seem, by *Gorton v. Falkner*, 4 Term Rep. 565; *S. P. Roberts v. Jackson*, Peake Add. Cas. 36, may be distrained, if there be no other sufficient distress on the premises.

N. G.

## QUERIES.

## Laws of Property and Conveyancing.

## DOWER.

By indenture of feoffment, dated the 24th of June 1826, *A.* conveyed to *B.* a plot of land, to hold the same unto the said *B.* his heirs and assigns, to the only proper use and behalf of the said *B.* and *C.* (*B.*'s trustees), and the heirs and assigns of the said *B.* for ever, nevertheless as to the said *C.* and the estate so thereby limited to him, in trust for

and for the only use and benefit of the said *B.*, his heirs and assigns, and for no other use, intent, or purpose whatsoever. *C.*, *B.*'s trustee, is dead, and *B.* has lately sold the land to *D.*; is *B.*'s wife entitled to dower?

Y. Z.

#### DEVISE.—TENANTS IN COMMON.

Under a devise "to two persons, or to the survivor of them, and the estate to be disposed of by the survivor by will, as he should think fit," would a will made by one of the tenants in common (assuming that the devisees took as tenants in common for life, with a contingent remainder in fee to the survivor) in the lifetime of both, be considered valid? If not, as I am disposed to think, how can the negative be reconciled with Blackstone's definition of an executory devise, vol. 2, page 172, "whereby," he says, "no estate vests at the death of the devisor, but only on some future contingency?"

VERAS.

#### LEASE.—BANKRUPTCY.

*A.* demises certain premises to *B.* for a term of years. *B.* deposits the lease with *C.* without executing any assignment, and shortly afterwards becomes a bankrupt. No surrender of the lease or notice of any kind has been effected by *B.* or his assignees. *C.* has given notice to *A.* of his intention to quit at the expiration of the first seven years of the term. What remedy, and against whom, has *A.*? Is *B.* discharged from his liability as lessee in consequence of his bankruptcy, or is his liability still continued from omitting to make the usual surrender; or has *A.* any, and what remedy, against the assignees?

AMICUS.

#### BANKRUPTCY.—INSOLVENCY.

Can the official assignee under a bankruptcy, call upon the official assignee under an insolvency, to pay over certain sums of money that he has received under such insolvency?

JUS.

#### Law of Attorneys.

#### ARTICLES OF CLERKSHIP.—ASSIGNMENT.—STAMP.

*A.* was articulated to *B.* for five years; *A.* served four years, then came to London to *C.*, (who is not *B.*'s agent,) but two months elapsed before *A.* was assigned. *A.*, therefore, in order to comply with the statute requiring five years service under contract, entered into a contract in the assignment to serve *C.* for twelve months, being the residue of the original term, and two months over. The stamp on the assignment was only 1*l.* 15*s.*: should it have been 12*l.* on account of the new contract? if so, will the as-

signment for the residue of the original term be good, provided a fresh contract on a proper stamp is entered into at the end of that time, to serve the two months?

G. H. K.

#### Common Law.

##### HUSBAND'S LIABILITY.

In 1823, *A.*'s husband left her; and in 1828, *A.*'s rent being in arrear, *C.* lent *A.* 20*l.* Since that time, differences arose between *A.* and *C.*, and *A.* now refuses to repay the sum to *C.* Would it be advisable to proceed against the wife, or against the husband, the latter having left her for twelve years, and being an entire stranger to *C.*?

A CONSTANT READER.

#### THE EDITOR'S LETTER BOX.

The *Legal Almanac, Remembrancer, and Diary*, for 1836, is now published, price 3*s.* 6*d.* We refer to a notice of its contents in another part of this number.

It will be observed by our numerous Correspondents relating to the *Legal Almanac*, that we have adopted several of their suggestions; and other additions which have been recommended, will, probably, be added another year. We invite the favour of further suggested improvements and corrections.

The *English Bar and Law Student's Guide: A Supplement to the Lists of Counsel, and Regulations of the Inns of Court*, will be published immediately after Michaelmas Term, comprising a Table of the Precedence of the Bar according to the latest decisions; King's Counsel and Serjeants according to their present rank; Barristers called in 1836, with the exact dates of their Call, and a corrected list of Special Pleaders and Certificated Conveyancers.

The First Part of the *Commentaries on the New Statutes*, contains a full Digest of the Law and Practice of Corporations, with the New Act and Order in Council *verbatim*, price 3*s.* 6*d.*

The Appendix to the present volume contains the Commissioners' Report on the Statute Law, price 2*s.*

The Queries and Answers of T. S.; B. M.; "Reader"; N. G.; "Ero"; E. B.; A. B.; N. G.; N. O.; and C. G., have been received.

We recommend "Spes" to apply at the Incorporated Law Society for the information he requires.

We shall, as suggested, publish as early as possible, a General Table of Contents of the first Ten Volumes of the *Legal Observer*, and of the Two Volumes of the *Monthly Record*.

We thank a Correspondent for pointing out the information inserted in another part of this Number, and which was omitted last week.

The suggestion as to the Circuits of the Insolvent Debtors' Court shall be considered.

# The Legal Observer.

Vol. X. SATURDAY, OCTOBER 31, 1835. No. CCXCVIII.

— "Quod magis ad nos  
Pertinet, et nescire malum est, agitamus.

HORAT.

## THE LAW REFORMS OF THE LAST SESSION OF PARLIAMENT.

WE last week took occasion to notice the opinions of a contemporary with respect to law reform, and to give, we think, pretty satisfactory evidence of his ignorance on the subject. We now wish to direct the attention of our readers to an article of a very different nature, which is contained in the last (October) number of the *Edinburgh Review*. Rumours ascribe it to Lord Brougham, and we should say from internal evidence, that it comes from his pen; but at any rate it proceeds from one well acquainted with the matters on which he writes, and displays not only a knowledge of the principles, but also of the secret history of the chief bills of the last session of Parliament relating to law reform. The general subjects of the article are the whole proceedings of the session, and the conduct of the House of Lords. The various important matters relating to general politics are debated, and the most liberal opinions espoused; the plans for the reform and remodelling of this house, are discussed in a manner the most free. The opinions relating to the legal measures cannot therefore be suspected of proceeding from a prejudiced or narrow-minded view; for while they approve of the conduct of the House with respect to law reform, they are accompanied by reproofs and censure of its proceedings in almost all other matters. They are thus, we consider, of considerable value, as proving that the course which we have always advocated with respect to law reform, is approved of by all its real and reflecting friends. And first, with respect to the Imprisonment for Debt Bill, alluding to the House of Lords, the Reviewer says:—

"The Imprisonment for Debt Bill is the most important of those measures which they are  
No. CCXCVIII.

very erroneously, and therefore unjustly, accused of stopping. It is a measure of immense extent—of extreme importance—of great difficulty in principle—of vast and complicated details. Few of those who speak of it have perhaps considered its nature. It establishes local judicatures all over England; subjects every man, whether in trade or not, to a system resembling, in its operations, the bankrupt law; prescribes the mode in which all the debtor's property shall be wrung from him and distributed among his creditors; and in short, introduces a new code of the law of debtor and creditor, with a new judicial system for carrying the provisions of that code into effect. *There is hardly a principle of the English law which this code does not materially affect, and not a person in the community whose position it does not in some measure change.* We are acquainted with its details; we approve of them, generally speaking, as we wholly approve of the fundamental principles. There is, however, the greatest diversity of opinion respecting them among the trading part of the community; to say nothing of the legal profession. But be that as it may, is it not a little too much to say that the Lords ought to have passed a bill of this sort in a week or ten days—and yet it was only brought before them at the end of August? Can any man who soberly reflects on the matter deny, that unless the Lords are to be regarded as merely ministerial in legislation, it was absolutely impossible for them to enter upon this important subject at that time. We assume for the present that there is some use in two chambers of Parliament, and that those measures which pass the one are the better for undergoing examination in the other. We assume this because, probably, even those who hold the *reto* of the Lords should be taken away, are not prepared to assert the entire efficacy of the discussions of any one chamber of Parliament, this being in fact an assertion of the infallibility in that chamber." p. 196.

Now, if our readers will refer to our opinions as to this bill, they will find that we have always insisted that its provisions and effect are not generally known; that in fact it passed the House of Commons not without considerable difficulty, and by the



means of much parliamentary tact and manœuvre, and without any general discussion on the *merits*. We shall be quite satisfied if, when its principles and details are fully made known to the country, it pass into law; but we have always protested against its being pressed through without proper consideration, and we are happy to have our opinions so powerfully supported by the Reviewer.

Then again, as to the Prisoners' Counsel Bill, the writer says:—

"Mr. Buller's bill<sup>a</sup> for allowing prisoners counsel to make defence in cases of felony, by addressing the jury, is the next. It was proceeded with, and referred to a select committee, which examined much evidence; and then it was found that a very great difference of opinion prevailed among the most practically experienced men upon the question. Nothing is more common than to represent this measure as quite a thing of course, and on which all men are agreed—at least all men of liberal opinions;—but nothing is less true. There are many grand difficulties in the question. We think the preponderance of the argument is in favour of the bill; but we cannot speak with so much confidence now, as we could before the labours of the committee disclosed such diversity of sentiment among the most experienced persons. One thing is clear, that men of liberal opinions are as much divided on this bill as the anti-reformers; for, while the Lord Chief Justice Denman, Lord Chief Baron Abinger, Sir F. Pollock, and Mr. Hill, are found on one side, and favourable to the measure, Lord Lyndhurst and the Recorder are supported in their opposition to it by Mr. C. Phillips, one of the most distinguished friends of liberal principles, and the person in the profession most practised in criminal jurisprudence at the present day; and Lord Radnor himself, a most experienced magistrate, as well as a recorder, and a most eminent reformer, has given decisive testimony also against the measure. It is surely not to be wondered at, that in this discrepancy of sentiments the Lords declined proceeding with the bill while the Law Lords were absent upon their circuits, from which the Chief Justice and Chief Baron did not return till the very close of the session. If the Lords did wrong then, in postponing this bill, they must share the blame with Lord Brougham who moved it, and Lord

Denman who supported it, both of whom agreed in the opinion, that it must, for the reason we have assigned, stand over." pp. 195, 196.

Here also, we agree with the writer, although we are, with him, in favour of this bill. But what follows is even more to our taste:—

"The bills for altering the law on the execution of wills, and on other matters connected with testamentary and intestate succession, were likewise referred to a select committee. A difference of opinion arose among the law lords who attended it; and the eminent conveyancer who had chiefly prepared the report of the real property commissioners, out of which the bill grew, was directed to attend for the purpose of being examined on the disputed points. A family affliction prevented him from appearing for some days, during which the chief justices were obliged to go to their respective circuits. One of them had proposed some very important alterations in the powers of the principal bill. These could not be discussed before his return. *Perhaps nothing more needs be said to convince all whose opinions upon the fit and safe mode of reforming our jurisprudence are worthy of notice, or at least entitled to much respect.* We have no hesitation in saying that the lords would have been greatly to blame had they hurried through these bills in the absence of the judges.

"The Tithe Suits Bill, and the Turnip-tithe Bill (the latter of which, by the way, is as direct an interference with the rights of churchmen and their private property, as any clause in the Irish Act [Bill<sup>a</sup>] are accounted in all the lists we have seen among the bills thrown out by the lords. There is not a word of truth in this; both of them passed. Each greatly improved by the alterations it received, and made to effect its purpose much more surely. They are now laws." p. 19.

We willingly record this approval of the principles of legal legislation, which we have always advocated. With the other matters contained in this article we have nothing to do; but we cannot but contrast the rash and blundering ignorance of the last reviewer who came under our notice, with the temperate and judicious views of the present writer. There are two ways of endeavouring to accomplish a complete reform of the defects which exist in our judicial institutions: the one is, without any reference to the past or the present, to lay the axe at their root; the other is, by degrees to improve their structure, removing so much as is necessary, and embellishing what remains. We prefer the latter way, and so, we are happy to see, does the Edinburgh Reviewer.

<sup>a</sup> The bill was brought in by Mr. Ewart.—Ed. L. O.

<sup>a</sup> Our list was correct in these particulars. See *ante*, p. 399.—Ed. L. O.

# NOTICES OF NEW BOOKS.

*The Merchant Seamen's Act, with Forms, copious Notes, and a full Index. Also, the Act for encouraging the Enlistment of Seamen into the Navy.* By Charles F. F. Wordsworth, Esq., of the Inner Temple, Barrister at Law. London: Henry Butterworth, 1835.

We cannot better explain the scope of this little work, than by the following extract from the author's Preface.

"The consolidation of various statutes, and the enactment of several new provisions relating to merchant seamen, render the act, which is here illustrated with notes, another of the numerous improvements in modern legislation. There are two principal features, however, in the present act which at once command attention: the first is the establishment of a register of all the British merchant seamen of the United Kingdom,—a provision calculated to add to the unity and strength of that branch of national power, at the same time that it affords the means of readily ascertaining its condition, and the amount of contribution which might be required from it in any national emergency. Subordinate to this important feature, is the provision under which there must be an *agreement in writing of a certain form*, between the masters of ships and their crews. Hitherto, many irregularities and frauds have been practised against seamen—a class of persons in a great degree indifferent about their rights—from the want of proper enactments on this subject.

"The other great improvement is the empowering of justices of the peace to adjudge summarily upon claims for wages not exceeding *twenty pounds*,—whereas seamen were formerly but too often driven to the Court of Admiralty for a remedy. This provision may be said to be analogous to one contained in the recent "*Law Amendment Act*," enabling plaintiffs to try certain causes under 20*l.* before the sheriff, at an inconsiderable expense. Again: when a voyage was terminated, a certain time must have elapsed before a seaman could claim his wages,—but now, when he shall have an opportunity of at once shipping himself in another vessel, he may proceed before a justice and obtain immediate payment.

"It will be seen, also, that under the 38th section, where assaults and batteries shall have been committed on board ships, a summary remedy before two justices of the peace is now created. That section extends the provisions of the 9 Geo. 4, c. 31, 'for consolidating and amending the statutes in England relative to offences against the person,' to merchant seamen whilst on board ship.

"Humanity pervades several of the clauses of this act. By the 40th and four following sections, the forcing on shore, or leaving behind any person belonging to the crew, is made a misdemeanour, and such offence may be tried in any part of his Majesty's dominions,

instead of the United Kingdom only, as hitherto; nor can a seaman be discharged abroad without the sanction of consuls or other functionaries; nor left abroad upon plea of his not being in a condition to proceed, &c., without a similar authority, and without the master paying such seaman his wages. The mere enumeration of these provisions will manifest the anxiety of the legislature to provide in behalf of seamen against every contingency. In furtherance of this humane object, accumulated duties are thrown upon consuls, resident British merchants, and other persons.

"Every ship-owner and ship-master must furnish himself with the act of parliament;—it has therefore been my object to append copious notes, in order that an epitome of all the laws relating to merchant seamen might be comprised in one publication. There are two or three of the notes relating to those benevolent establishments, the "*Corporation for the Relief of Merchant Seamen*," and the "*Seaman's Hospital Society*," which I have had much pleasure in subscribing, because, although not strictly within the present legal object of this publication, they cannot be too extensively known to merchants and merchant seamen.

"Some forms are added,—most of them fit for practical purposes: those which are not so in precise terms, will be found useful as guides in the framing of others. These, with the notes, and a tolerably full index, constitute the claims which this little book may be considered to have upon public attention."

The subject of the work is not one in which a very large part of the profession is engaged; but it is satisfactory to know where all the necessary information can readily be found, whenever the practitioner may require it. We have looked through the notes to the act, and think that Mr. Wordsworth has diligently performed the promise contained in his preface. The former statutes, and the decisions bearing on the subject, are comprised in the notes. The Common Law practitioner will observe, that a justice of the peace is now authorized to determine all questions relating to seamen's wages, when the amount does not exceed 20*l.* (s. 15); and if an action or suit be brought, the Judge may deprive the plaintiff of his costs (s. 16).

## PRACTICAL POINTS OF GENERAL INTEREST.

No. LXXXIV.

### CHANGING A NAME.

In our first volume, p. 214, the law relating to the legal mode of changing a name was stated; and the view there taken is fully supported by a case just reported, chiefly relating to another

point. In the elaborate judgment of Chief Justice *Tindal*, he thus adverted to the necessary formalities required to change a name. An estate was devised to a person of the name of *Lowndes*, "on condition he changes his name to *Selby*."

"It has been more than once asked by a learned gentleman of the grand assize, whether the name has been changed in the way which the law prescribes. In this will the condition is, that Mr. *Lowndes* changes his name to *Selby*. It appears that at first he retained the name of *Lowndes*, while the receivership was going on; and that afterwards he took the name of *Selby* in addition to the other; and I am not prepared to say that that was not changing his name; but at all events he afterwards changed it entirely, and left out the name of *Lowndes*. There is nothing in the will that purports that the condition is to be executed in a very limited or precise time; therefore, though he took it a little later, and though in some particular acts he might use the other name, it would not at all interfere with the general act of changing his name. And there is no necessity for any application for a royal sign manual to change the name. It is a mode which persons often have recourse to, because it gives a greater sanction to it, and makes it more notorious; but a man may, if he pleases, and it is not for any fraudulent purpose, take a name and work his way in the world with his name as well as he can. Therefore it does not appear to me that that is an objection which can, upon the present occasion, succeed. It is an objection which is quite out of Court, if the fine has been levied, or if the demandant has failed in her pedigree; or, in my judgment, and that of my learned brothers, it is equally out of Court, if this will is one, as we think it is, which intended only to benefit, first, the heir of the blood of the *Selby's*, and, failing in that, the testator constituted an adopted heir. *Davies*, dem. *Lowndes*, ten. 1 Bing. 618, New Cases.

If the testator expressly directs that the devisee shall apply for the King's licence, and leaves the lands over on non-compliance, then the devisee must obtain such license.

## LEGAL BIOGRAPHY. No. X.

LORD BACON.

[Concluded from p. 437.]

We proceed to conclude our outline of the leading circumstances and professional particulars of the Life of Lord Bacon. In the last paper we brought the narrative down to his elevation to the office of Lord Chancellor, the publication of his celebrated work the *Novum Organum*, and the attainment of his sixtieth year. "If at this period,"

(says Mr. Martin, his recent biographer,) Bacon had quitted all civil employment, and retired into the seclusion of Gorbamby, there to pursue his beloved philosophy,

'Exhausting thought

And living wisdom with each studious year,'

he would have appeared to posterity not only as the great ornament of his age and nation, but of human nature itself."

Amongst the grievances which became the subjects of complaint in the time of Lord Bacon, the judgment-seat did not escape inquiry. In 1620-1, the Commons appointed a committee to investigate the abuses alleged to prevail in the Courts of Justice. The Judge of the Prerogative Court and one of the Bishops were impeached for bribery; and on the 15th of March the committee reported that a charge of corruption had been made against the Lord Chancellor. The information was laid before the Lords, and that House resolved immediately to examine the complaint. The matter being communicated by a message to Lord Bacon, who still held the Great Seal, he addressed a letter to the House, in which he said,

"Because, whether I live or die, I would be glad to preserve my honor and fame, so far as I am worthy; hearing that some complaints of base bribery are coming before your lordships, my requests unto your lordships are:

"First, that you will maintain me in your good opinion, without prejudice, until my cause be heard.

"Secondly, that in regard I have sequestered my mind at this time in great part from worldly matters, thinking of my account and answers in a higher court, your lordships will give me convenient time, according to the course of other courts, to advise with my counsel, and to make my answer; wherein, nevertheless, my counsel's part will be the least; for I shall not, by the grace of God, trick up an innocency with cavillations, but plainly and ingenuously (as your lordships know my manner is) declare what I know or remember.

"Thirdly, that according to the course of justice, I may be allowed to except to the witness brought against me; and to move questions to your lordships for their cross-examinations; and likewise to produce my own witnesses for the discovery of the truth.

"And lastly, that if there be any more petitions of like nature, that your lordships would be pleased not to take any prejudice or apprehension of any number or muster of them, especially against a Judge, that makes two thousand orders and decrees in a year, (not to speak of the courses that have been taken for hunting out complaints against me,) but that I may answer them according to the rules of justice, severally and respectively.

"These requests, I hope, appear to your lordships no other than just. And so thinking

myself happy to have so noble peers and reverend prelates to discern of my cause, and desiring no privilege of greatness for subterfuge of guiltiness; but meaning, as I said, to deal fairly and plainly with your lordships, and to put myself upon your honors and favours, I pray God to bless your counsels and persons."

It appears that the informers against the Chancellor were not free from suspicion: one of them was a Registrar of the Court, who, on his own confession, was undoubtedly guilty of corruption in his office. A Member of the House observed he had been a witness of the Chancellor's proceedings: "he knew he had sown the good seed of justice, and he hoped it would be proved that the envious man had sown the tares."

Lord Bacon added in another letter:

"When I enter into myself, I find not the materials of such a tempest as is come upon me. I have been (as your Majesty knoweth best,) never author of any immoderate counsel, but always desired to have things carried "*suavibus modis*." I have been no avaricious oppressor of the people. I have been no haughty, or intolerable, or hateful man, in my conversation or carriage. I have inherited no hatred from my father, but am a good patriot born. Whence should this be; for these are the things that used to raise dislikes abroad.

"For the House of Commons, I began my credit there, and now it must be the place of the sepulture thereof. And yet this parliament, upon the message touching religion, the old love revived, and they said, I was the same man still, only honesty was turned into honour.

"For the Upper House, even within these days, before these troubles, they seemed as to take me into their arms, finding in me ingenuity, which they took to be the true straight line of nobleness, without crooks or angles.

"And for the briberies and gifts wherewith I am charged when the books of hearts shall be opened, I hope I shall not be found to have the troubled fountain of a corrupt heart, in a depraved habit of taking rewards to pervert justice; *howsoever I may be frail, and partake of the abuses of the times*.

"And therefore I am resolved, when I come to my answer, not to trick my innocency (as I writ to the Lords,) by cavillations or voliances; but to speak to them the language that my heart speaketh to me, in excusing, extenuating, or ingenuous confessing; praying God to give me the grace to see to the bottom of my faults, and that no hardness of heart do steal upon me, under show of more neatness of conscience, than is cause."

It is manifest, from the letters of Lord Bacon, that he had fully intended to defend himself from the charge; but after an interview with the King, he signified his willing-

ness to leave the question to the judgment of his Peers, without hearing the evidence against him, or adducing any in his favor. Now considering Bacon's repeatedly expressed determination to enter upon his defence, as appears by the preceding letters, and the strong reasons which he might have adduced to extenuate and explain, if not altogether to justify, his conduct;—considering also the exceptionable character of some of the witnesses, and the well-known practice of his predecessor in office,—it is extraordinary that he should have relinquished his defence. It seems highly probable that his conduct in this respect was induced by a threat or promise of the government, that if he persisted in entering upon a legal investigation in open Court, which might lead to the disclosure of some particulars unfavourable to the King and Buckingham, he would be abandoned by them, and left to the persecution of his enemies; whilst, if he submitted to the judgment of the Peers, the King would protect him from the consequence of their sentence, and ultimately restore him to his office and dignity.

The presumption of this being the true state of the case, is much confirmed by a letter to Buckingham from Lord Bacon, in which the latter says, "I hear yesterday was a day of very great honor to his Majesty, which I do congratulate. I hope also his Majesty may reap honor out of my adversity, as he hath done out of my prosperity. His Majesty knows best his own ways; and for me to despair of him were a sin not to be forgiven. I thank God, I have overcome the bitterness of this cup of Christian resolution, so that worldly matters are but mint and cummin."

The positive testimony of Lord Bacon's secretary confirms beyond question this view of the subject:

"There arose," says Bushell, "such complaints against his lordship, and the then favorite of Court, that for some days put the King to this quere, whether he should permit the favorite of his affections, or the oracle of his council to sink in his service? Wherefore his lordship was sent for by the King, who, after some discourse, gave him this positive advice, to submit himself to the House of Peers, and that, (upon his princely word,) he would then restore him again, if they (in their honors) should not be sensible of his merits. Now, though my lord foresaw his approaching ruin, and told his Majesty there was little hopes of mercy in a multitude, when his enemies were to give the fire, if he did not plead for himself;

yet such was his obedience to him from whom he had his being, that he resolved his Majesty's will should be his only law; and so took leave of him with these words:— 'Those that will strike at your Chancellor, (it is much to be feared,) will strike at your crown;' and wished, that as he was then the first, so he might be the last of sacrifices."

It was soon after this interview with the King, that Lord Bacon wrote his celebrated letter to the House of Lords, which was read on the 24th of April. We cannot refrain from introducing the whole of this interesting document:

"— It may please your lordships, I shall humbly crave at your lordships' hands a benign interpretation of that which I shall now write; for words that come from wasted spirits, and an oppressed mind, are more safe in being deposited in a noble construction, than in being circled with any reserved caution.

"This being moved, and, as I hope, obtained, in the nature of a protection to all that I shall say, I shall now make into the rest of that wherewith I shall at this time trouble your lordships a very strange entrance. For, in the midst of a state of as great affliction as I think a mortal man can endure (honor being above life,) I shall begin with the professing of gladness in some things.

"The first is, that hereafter the greatness of a judge or magistrate shall be no sanctuary or protection of guiltiness, which (in few words) is the beginning of a golden world. The next, that, after this example, it is like that judges will fly from any thing that is in the likeness of corruption (though it were at a great distance) as from a serpent; which tendeth to the purging of the courts of justice, and the reducing them to their true honor and splendor. And in these two points, God is my witness, that, though it be my fortune to be the anvil upon which these good effects are beaten and wrought, I take no small comfort.

"But, to pass from the motions of my heart whereof God is only judge, to the merits of my cause whereof your lordships are judges, under God and his lieutenant, I do understand there hath been heretofore expected from me some justification; and therefore I have chosen one only justification instead of all other, out of the justifications of Job. For, after the clear submission and confession which I shall now make unto your lordships, I hope I may say and justify with Job, in these words: I have not hid my sin as did Adam, nor concealed my faults in my bosom. This is the only justification which I will use.

"It resteth therefore, that without fig-leaves, I do ingenuously confess and acknowledge that, having understood the particulars of the charge, not formally from the House, but enough to inform my conscience and memory, I find matter sufficient and full, both to move me to desert the defence, and to move

your lordships to condemn and censure me. Neither will I trouble your lordships by singling those particulars, which I think may fall off,

*' Quid te exempta juvat spinis de pluribus una ?'*

Neither will I prompt your lordships to observe upon the proofs, where they come not home, or the scruples touching the credits of the witnesses; neither will I represent unto your lordships how far a defence might, in divers things, extenuate the offence in respect of the time or manner of the gift, or the like circumstances; but only leave these things to spring out of your own noble thoughts and observations of the evidence and examinations themselves, and charitably to wind about the particulars of the charge here and there, as God shall put into your minds, and so submit myself wholly to your piety and grace.

"And now that I have spoken to your lordships as judges, I shall say a few words unto you as peers and prelates, humbly commending my cause to your noble minds and magnanimous affections.

"Your lordships are not simple judges, but parliamentary judges; you have a further extent of your arbitrary power than other courts; and, if your lordships be not tied by the ordinary course of courts or precedents, in points of strictness and severity, much more in points of mercy and mitigation.

"And yet, if any thing which I shall move might be contrary to your honourable and worthy ends to introduce a reformation, I should not seek it. But herein I beseech your lordships to give me leave to tell you a story. Titus Manlius took his son's life for giving battle against the prohibition of his general; not many years after, the like severity was pursued by L'apirius Cursor, the dictator, against Quintus Maximus, who being upon the point to be sentenced, by the intercession of some principal persons of the senate, was spared; whereupon Livy maketh this grave and gracious observation: 'Neque minus firmata est disciplina militaris periculo Quinti Maximi, quam miserabili supplicio Titi Manlii.' The discipline of war was no less established by the questioning of Quintus Maximus, than by the punishment of Titus Manlius: and the same reason is of the reformation of justice; for the questioning of men of eminent place hath the same terror, though not the same rigor, with the punishment.

"But my case standeth not there; for my humble desire is, that his Majesty would take the Seal into his hands, which is a great downfall; and may serve, I hope, in itself for an expiation of my faults. Therefore, if mercy and mitigation be in your power, and do no ways cross your ends, why should I not hope of your lordships' favor and commiseration?

"Your lordships will be pleased to behold your chief pattern, the King our sovereign,— a king of incomparable clemency, and whose heart is inscrutable for wisdom and goodness. Your lordships will remember that there sat not these hundred years before a Prince in your House (and never such a prince)

whose presence deserveth to be made memorable by records and acts mixed of mercy and justice: yourselves are either nobles (and compassion ever beateth in the veins of noble blood,) or reverend prelates, who are the servants of Him that would not break the bruised reed, nor quench the smoking flax. You all sit upon one high stage; and therefore cannot but be more sensible of the changes of the world, and the fall of any of high place. Neither will your lordships forget that there are *vitia temporis* as well as *vitia hominis*, and that the beginning of reformations hath the contrary power of the pool of Bethesda; for that had strength to cure only him that was first cast in, and this hath commonly strength to hurt him only that is first cast in; and for my part, I wish it may stay there, and go no further.

"Lastly, I assure myself, your lordships have a noble feeling of me, as a member of your own body, and one that, in this very session, had some taste of your loving affections, which, I hope, was not a lightning before the death of them, but rather a spark of that grace, which now in the conclusion will more appear.

"And therefore my humble suit to your lordships is, that my penitent submission may be my sentence, and the loss of the Seal my punishment; and that your lordships will spare any further sentence, but recommend me to his Majesty's grace and pardon for all that is past. God's holy spirit be amongst you."

The House, not satisfied with this appeal, sent Lord Bacon a copy of the charges, with a message that his confession did not fully set down his submission—that no particular bribe or corruption was acknowledged—and the confession, such as it was, afterwards extenuated the charge in the same submission. Bacon, in answer to the charges, explained that the alleged gifts were either received *unknown to him by his servants*, or were of less value than stated, or that they were *delivered whilst no cause was pending*, or advanced only in loans. Although this document is of considerable length, we must insert it on account of its importance to the fame and character of Lord Bacon, as well as for its curious details in relation to the administration of justice.

"1. To the first article of the charge, viz. in the cause between Sir Rowland Egerton and Edward Egerton, the Lord Chancellor received five hundred pounds on the part of Sir Rowland Egerton, before he decreed the cause:—I do confess and declare, that upon a reference from his Majesty, of all suits and controversies between Sir Rowland Egerton and Mr. Edward Egerton, *both parties submitted themselves to my award*, by recognizance reciprocal in ten thousand marks a-piece. Thereupon, after divers hearings, I made my award, with advice and consent of my Lord Hobart. The award was perfected and published to the parties, which

was in February; then, some days after, the five hundred pounds mentioned in the charge was delivered unto me. Afterwards Mr. Edward Egerton fled off from the award; then, in Midsummer term following, a suit was begun in Chancery by Sir Rowland, to have the award confirmed; and upon that suit was the decree made, which is mentioned in the article.

"2. To the second article of the charge, viz. in the same cause, he received from Edward Egerton four hundred pounds:—I confess and declare, that, soon after my first coming to the Seal, (being a time when I was presented by many,) the four hundred pounds mentioned in the charge was delivered unto me in a purse, and I now call to mind, from Mr. Edward Egerton; but, as far as I can remember, it was expressed by them that brought it, to be for *favours past*, and not in respect to favours to come.

"3. To the third article of the charge, viz. in the cause between Hodie and Hodye, he received a dozen of buttons, of the value of fifty pounds, about a fortnight *after the cause was ended*:—I confess and declare, that, as it is laid in the charge, about a fortnight after the cause was ended (it being a suit of a great inheritance,) there were gold buttons about the value of fifty pounds, as is mentioned in the charge, presented unto me, as I remember, by Sir Thomas Perient and the party himself.

"4. To the fourth article of the charge, viz. in the cause between the Lady Wharton and the co-heirs of Sir Francis Willoughby, he received of the Lady Wharton three hundred and ten pounds:—I confess and declare, that I received of the Lady Wharton, at two several times, (as I remember) in gold, two hundred pounds and an hundred pieces, and this was certainly *pendente lite*; but yet I have a vehement suspicion that there was some *shuffling between Mr. Shute and the Register*, in entering some orders, which afterwards I did distaste.

"5. To the fifth article of the charge, viz. in Sir Thomas Moncke's cause, he received from Sir Thomas Monk, by the hands of Sir Henry Helmes, an hundred and ten pounds; but this was three quarters of a year after the suit was ended:—I confess it to be true, that I received an hundred pieces; but it was *long after the suit ended*, as is contained in the charge.

"6. To the sixth article of the charge, viz. in the cause between Sir John Treavor and Ascue, he received, on the part of Sir John Treavor, an hundred pounds:—I confess and declare, that I received at New Year's-tide an hundred pounds from Sir John Treavor; and because it came as a New-Year's gift, I neglected to inquire whether the cause was ended or depending; but since I find, that though the *cause was then dismissed to a trial at law*, yet the equity is reserved, so as it was in that kind, *pendente lite*.

"7. To the seventh article of the charge, viz. in the cause between Holman and Yonge, he received of Yonge an hundred pounds, after the decree made for him:—I confess and declare, that, as I remember, *a good while after the cause ended*, I received an hundred pounds,

either by Mr. Tobye Mathew, or from Yonge himself; but whereas I understood that there was some money given by Holman to my *servant* Hatcher, with that certainly *I was never made privy*.

"8. To the eighth article of the charge, viz. in the cause between Fisher and Wrenham, the Lord Chancellor, after the decree passed, received from Fisher a suit of hangings, worth an hundred and sixty pounds and better, which Fisher gave by advice of Mr. Shute:—I confess and declare, that some time *after the decree passed*, I being at that time upon remove to Yorke-House, I did receive a suit of hangings, of the value (I think) mentioned in the charge, by Mr. Shute, as from Sir Edward Fisher, towards the furnishing of my house; as some others that were no way suitors did present me the like about that time.

"9. To the ninth article of the charge, viz. in the cause between Kenneday and Vanlore, he received a rich cabinet from Kenneday, prized at eight hundred pounds:—I confess and declare, that such a cabinet was brought to my house, though nothing near half the value; and that I said to him that brought it, that I came to view it, and not to receive it; and *gave commandment that it should be carried back*, and was offended when I heard it was not; and some year and an half after, as I remember, Sir John Kenneday having all that time refused to take it away, as I am told by my servants, I was petitioned by one Pinckney, that it might be delivered to him, for that he stood engaged for the money that Sir John Kenneday paid for it. And thereupon Sir John Kenneday wrote a letter to my servant Sherborne with his own hand, desiring that I would not do him that disgrace as to return that gift back, much less to put it into a wrong hand; and so it remains yet ready to be returned to whom your lordships shall appoint.

"10. To the tenth article of the charge, viz. he borrowed of Vanlore a thousand pounds, upon his own bond, at one time, and the like sum at another time, upon his lordship's own bill, subscribed by Mr. Hunt, his man:—I confess and declare that I borrowed the money in the article set down; and that this is a true debt. And I remember well that I wrote a letter from Kewe, above a twelvemonth since, to a friend about the King; wherein I desired that, whereas I owed Peter Vanlore two thousand pounds, his majesty would be pleased to grant me so much, out of his fine set upon him in the Star Chamber.

"11. To the eleventh article of the charge, viz. he received of Richard Scott two hundred pounds, after his cause was decreed (but upon a precedent promise), all which was transacted by Mr. Shute:—I confess and declare, that some *fortnight after*, as I remember, that *the decree passed*, I received two hundred pounds, as from Mr. Scott, by Mr. Shute; but for any precedent promise or transaction, by Mr. Shute, certain I am, I knew of none.

"12. To the twelfth article of the charge viz., he received in the same cause, of the part

of sir John Lentall, an hundred pounds:—I confess and declare, that *some months after*, as I remember, that the decree passed, I received an hundred pounds by my servant Sherburne, as from sir John Lentall, who was not the adverse party to Scott, but *a third person*, relieved by the same decree, in the suit of one Powre.

"13. To the thirteenth article of the charge, viz. he received of Mr. Wroth an hundred pounds, in respect of the cause between him and sir Arthur Maynewaringe:—I confess and declare, that this cause, being a cause for inheritance of good value, was ended by my *arbitrament*, and consent of parties; and so a decree passed of course. And some month *after the cause* thus ended, the hundred pounds mentioned in the article was delivered to me by my servant Hunt.

"14. To the fourteenth article of the charge, viz. he received of Sir Raphe Hansby, having a cause depending before him, five hundred pounds:—I confess and declare, that there were two decrees, one, as I remember, for the inheritance, and the other for goods and chattels, but all upon one bill; and some good time after the first decree, and before the second, the said five hundred pounds were delivered me by Mr. Tobye Mathew, so as I cannot deny but it was upon the matter, *prædente lite*.

"15. To the fifteenth article of the charge, viz. William Compton being to have an extent for a debt of one thousand and two hundred pounds, the lord Chancellor stayed it, and wrote his letter, upon which part of the debt was paid presently, and part at a future day. The lord Chancellor hereupon sends to borrow five hundred pounds; and because Compton was to pay four hundred pounds to one Huxley, his lordship requires Huxley to forbear it six months, and thereupon obtains the money from Compton. The money being unpaid, suit grows between Huxley and Compton in Chancery, where his lordship decrees Compton to pay Huxley the debt, with damages and costs, when it was in his own hands:—I declare, that in my conscience, *the stay of the extent was just*, being an extremity against a nobleman, by whom Compton could be no loser. The money was plainly borrowed of Compton upon bond with interest; and the message to Huxley was only to intreat him to give Compton a longer day, and in no sort to make me debtor or responsible to Huxley; and, therefore, though I were not ready to pay Compton his money, as I would have been glad to have done, save only one hundred pounds, which is paid; I could not deny justice to Huxley, in as ample manner as if nothing had been between Compton and me. But, if Compton hath been damned in my respect, I am to consider it to Compton.

"16. To the sixteenth article of the charge, viz. in the cause between Sir William Brunecker and Awbrey, the lord Chancellor received from Awbrey an hundred pounds:—I do confess and declare, that the money was given and received; but the manner of it I leave to the witnesses.

"17. To the seventeenth article of the charge, viz. in the Lord Montague's cause; he received

from the Lord Montague six or seven hundred pounds; and more was to be paid at the ending of the cause:—I confess and declare, there was money given, and (as I remember) by Mr. Bevis Thelwall, to the sum mentioned in the article after the cause was decreed; but I cannot say it was ended, for there have been many orders since, caused by Sir Frauncis Englefield's contempts; and I do remember that, when Thelwall brought the money, he said, that my lord would be further thankful if he could once get his quiet; to which speech I gave little regard.

"18. To the eighteenth article of the charge, viz. in the cause of Mr. Dunch, he received of Mr. Dunch two hundred pounds:—I confess and declare, that it was delivered by Mr. Thelwall to Hatcher my servant, for me, as I think, some time *after the decree*; but I cannot precisely inform myself of the time.

"19. To the nineteenth article of the charge, viz. in the cause between Reynell and Peacock, he received from Reynell two hundred pounds, and a diamond ring worth five or six hundred pounds:—I confess and declare, that, at my first coming to the seal, when I was at Whitehall, my servant Hunt delivered me two hundred pounds, from Sir George Reynell, my near ally, to be bestowed upon furniture of my house; adding further, that he received divers *former favours* from me; and this was, as I verily think, *before any suit begun*. The ring was received certainly *pendente lite*; and, though it were at new year's tide, yet it was too great a value for a new year's gift, though, as I take it, nothing near the value mentioned in the article.

"20. To the twentieth article of the charge, viz. he took of Peacock an hundred pounds, and borrowed a thousand pounds, without interest, security, or time of payment:—I confess and declare that I received of Mr. Peacock an hundred pounds at Dorsett-House, at my first coming to the seal, as a present; at which time *no suit was begun*; and that, the summer after, I sent my then servant Lister to Mr. Rolf, my good friend and neighbour, at St. Albans, to use his means with Mr. Peacock, (who was accounted a monied man,) for the borrowing of five hundred pounds; and after, by my servant Hatcher, for borrowing of five hundred pounds more, which Mr. Rolf procured, and told me, at both times, that it should be without interest, script, or note; and that I should take my own time for payment of it.

"21. To the one and twentieth article of the charge, viz. in the cause between Smithwick and Wyche, he received from Smithwick two hundred pounds, which was repaid:—I confess and declare, that my servant Hunt did, upon his acco<sup>mt</sup>, being my receiver of the fines of original writs, charge himself with two hundred pounds, formerly received of Smithwick; which, *after that I had understood the nature of it, I ordered him to repay it*, and to default it of his acco<sup>mt</sup>.

"22. To the two and twentieth article of the charge, viz. in the cause of Sir Henry Ruswell, he received money from Ruswell; but it is not

certain how much:—I confess and declare, that I received money from my servant Hunt, as from Mr. Ruswell, in a purse; and whereas the sum in the article is indefinite, I confess it to be three or four hundred pounds; and it was about some *months after the cause was decreed*; in which decree I was assisted by two of the judges.

"23. To the three and twentieth article of the charge, viz. in the cause of Mr. Barker, the Lord Chancellor received from Barker seven hundred pounds:—I confess and declare, that the money mentioned in the article was received from Mr. Barker, some time *after the decree* passed.

"24, 25, 26. To the four and twentieth article, five and twentieth, and six and twentieth articles of the charge, viz. the four and twentieth, there being a reference from his majesty to his lordship of a business between the grocers and the apothecaries, the Lord Chancellor received of the grocers two hundred pounds. The five and twentieth article: in the same cause he received of the apothecaries that stood with the grocers a taster of gold, worth between forty and fifty pounds, and a present of ambergrease. And the six and twentieth article: he received of the new company of the apothecaries that stood against the grocers, an hundred pounds:—To these I confess and declare, that the several sums from the three parties were received; and for that it was *no judicial business*, but a concord, or composition between the parties, and that as I thought all had received good, and they were all three common purses, I thought it the less matter to receive that which they voluntarily presented: for, if I had taken it in the nature of a corrupt bribe, I knew it could not be concealed, because it must needs be put to acco<sup>mt</sup> to the three several companies.

"27. To the seven and twentieth article of the charge, viz. he took of the French merchants a thousand pounds, to constrain the vintners of London to take from them fifteen hundred tons of wine; to accomplish which he used very indirect means, by colour of his office and authority, without bill or suit depending; terrifying the vintners, by threats and imprisonments of their persons, to buy wines, whereof they had no need or use, at higher rates than they were vendible:—I do confess and declare, that Sir Thomas Smith did deal with me in the behalf of the French company; informing me, that the vintners, by combination, would not take off their wines at any reasonable prices. That it would destroy their trade, and stay their voyage for that year; and that it was a fair business, and concerned the state; and he doubted not but I should receive thanks from the King, and honour by it; and that they would gratify me with a thousand pounds for *my travel* in it; whereupon I treated between them, by way of persuasion, and (to prevent any compulsory suit) propounding such a price as the vintners might be gainers six pounds a ton, as it was then maintained to me; and after, the merchants petitioning to the King, and his majesty



recommending the business unto me, as a business that concerned his customs and the navy, I dealt more earnestly and peremptorily in it; and, as I think, restrained in the messengers' hands for a day or two some that were more stiff; and afterwards the merchants presented me with a thousand pounds out of their common purse; acknowledging themselves that I had kept them from a kind of ruin, and still maintaining to me that the vintners, if they were not insatiably minded, had a very competent gain. This is the merits of the cause, as it then appeared unto me.

"28. To the eight and twentieth article of the charge, viz. the Lord Chancellor hath given way to great exactions by his servants, both in respect to private seals, and otherwise for sealing of injunctions:—I confess, it was a great fault of neglect in me, that I looked no better to my servants.

"This declaration I have made to your lordships with a sincere mind: humbly craving, that if there should be any mistaking, your lordships would impute it to want of memory, and not to any desire of mine to obscure truth, or palliate any thing: for I do again confess, that in the points charged upon me, although they should be taken as myself have declared them, there is a great deal of corruption and neglect, for which I am heartily and penitently sorry, and submit myself to the judgment, grace, and mercy of the court.

"For extenuation, I will use none concerning the matters themselves; only it may please your lordships, out of your nobleness, to cast your eyes of compassion upon my person and estate. I was never noted for an avaricious man. And the Apostle saith, that covetousness is the root of all evil. I hope also, that your lordships do the rather find me in the state of grace; for that in all these particulars, there are few or none that are not almost two years old, whereas those that have an habit of corruption do commonly wax worse and worse; so that it hath pleased God to prepare me by precedent degrees of amendment, to my present penitency. And for my estate, it is so mean and poor, as my care is now chiefly to satisfy my debts."

The result of their lordships' deliberations was, that Lord Viscount St. Alban should be fined 4,000*l.*; that he should be imprisoned in the Tower during the King's pleasure; that he should be incapable of holding any office, place, or employment; and that he should not sit in Parliament, nor come within the verge of the court.

The reader will form his own conclusion on Bacon's acknowledgment of the facts,—the frankness of which cannot be too much commended. There appears no reason to doubt the truth of his confession, or the circumstances of extenuation with which it is accompanied; and it seems probable that, but for the difficulties by which he was surrounded in relation to the government, he

might have answered the charges more satisfactorily, or compelled his accusers to appear, and, by sifting, overthrown their testimony. It is also but common justice to recollect the difference between the practice of the present age and that in which Bacon lived. On this point Mr. Martin ably states the following particulars:—

"It had been a practice," says Carte, "perhaps from the times that our Kings had ceased to take money for the purchase of writs to sue in their courts, for suitors to make presents to the judges, who sat in them, either at new year's tide, or when their causes were on the point of coming to an hearing: it was a thing of course, not considered in the nature of a bribe, being universally known, and deemed an usual or honorary perquisite." In the course of Bacon's trial, Mr. Alford, an eminent member of the House of Commons, observed, that in the legyer-book of his family, there were entries of thirty shillings, paid to a secretary, and ten pounds to a Lord Chancellor for his pains in hearing a cause, and that, in his opinion, such gratuities were customary. The extent of this practice of receiving presents may be partly estimated by the following extract from Miss Aikin's Account of the Reign of Elizabeth—"an authority," says the writer from whom we borrow the quotation, "the less suspicious, as that lady has exercised her gifts with great diligence against Lord Bacon:—'The ministers of a sovereign, who scrupled not to accept of bribes from parties engaged in law suits, for the exertion of her own interest with the judges, could scarcely be expected to exhibit much delicacy on this head. In fact, the venality of the court of Elizabeth was so great, that no public character appears even to have professed a disdain of the influence of gifts and bribes; and we find Lord Burleigh inserting the following among rules moral and prudential, drawn up for the use of his son Robert, when young:—"Be sure to keep some great man thy friend, but trouble him not for trifles. Compliment him often. Present him with many, yet small gifts, and of little charge. And if thou have cause to bestow any great gratuity, let it be some such thing as may be daily in his sight.'" Miss Aikin then quotes the following letter of Hutton, Archbishop of York, to the Lord Treasurer, Burleigh: "I am bold at this time to inform your lordship, what ill success I had in a suit for a pardon for Miles Dawson, seminary priest, whom I converted wholly the last summer from popery. Upon his coming to church, receiving the holy communion, and taking the oath of supremacy, I and the council here, about Michaelmas last, joined in petition to her majesty, for her gracious pardon, and commended the matter to one of the masters of requests, and writ also to Mr. Secretary to further it, if need were, which he willingly promised to do. In Michaelmas term nothing was done; and therefore in Hilary Term, I being put in mind, that all was not done in that court for God's sake only, sent up twenty French crowns of mine own purse, as a

remembrance of the poor man's pardon, which was thankfully accepted of.

"It was usual," says Barrington, in his Observations on Magna Charta, p. 22, "to pay fines anciently for delaying law proceedings even to the extent of the defendant's life; sometimes they were paid to expedite process and to obtain right; and in some cases, the parties litigant offered part of what they were to recover to the crown. Madox, in his History of the Exchequer, collects, likewise, many instances of fines for the King's favour; and particularly of the dean of London's paying twenty marks to the King, that he might assist him against the bishop, in a law suit. William Stutevill presented to King John three thousand marks, for giving judgment with relation to the barony of Mowbray, which Stutevill claimed against William de Mowbray." And from Burnet we learn, that Charles the Second, whilst appeals were hearing in the House of Lords, used to go about and solicit particular lords, for appellant or respondent."

It should further be especially remembered, that *no corrupt motive* was ever proved against Bacon; that although the gifts which he had received excited suspicion of injustice, *no decree ever made by him was reversed as unjust*; and indeed his successor, who was any thing but friendly, was appointed by Parliament to review Lord Bacon's decisions, and was unable, after a severe scrutiny, to detect any ground of impeachment. If we analyze the several charges, and exclude those to which Bacon was not privy, and those which he altogether denied, (and his statement was never controverted,) the weight of the remaining charge, which he partially admits, is greatly diminished. In substance it amounts to this: that according to the general custom of the time, he received gifts *after* the termination of the suits, in many of which he acted as a private arbitrator; and in other instances, the sums were received as loans of persons who afterwards were suitors in his court, but were not favoured on account of his obligations to them. The objectionable and suspicious practice by which the services of the Judges were thus allowed to be remunerated, cannot be too strongly reprobated; and undoubtedly if the public paid thrice the amount of the salaries now settled upon the Judges, the advantage of their perfect independence and unimpeachable integrity would not be too dearly purchased.

The sentence of the Lords, although severe in its terms, it appears, was not expected to be carried into effect, and in fact was almost nominal. The fine was altogether remitted; he was imprisoned only

two days, and then allowed to reside at Fulham and other places, where he proceeded in his scientific researches, and the composition of his immortal writings. In March, 1622-3, he returned to his chambers in Gray's Inn, and at length obtained a full pardon of the whole sentence. He again received his writ as a peer of Parliament; but his declining health did not permit him to resume his seat in the House.

In the early part of 1626, whilst pursuing an experiment in the snow, he became chilled, and was taken suddenly ill, which it is said was increased by a damp bed; an inflammation of the lungs ensued, and on the 9th April he died, then in the 66th year of his age. He was of middling stature, had a spacious forehead, a piercing eye; his presence was grave and comely, and his countenance marked as with age before he was old. He was noted for his lively wit, and strong and active memory. His powers of conversation were infinitely various. Of the estimation in which he was held, we may judge from the saying of one of his contemporaries:—"All that were great or good loved and honoured him."

A clear and interesting account of Lord Bacon's illustrious writings is given by Mr. Martin, in "The Character of Lord Bacon, his Life and Works," a book written in excellent spirit, with much eloquence, and in a method sufficiently full—yet not redundant—that we hope will be followed in other biographies of our eminent lawyers.

## NOTES OF THE WEEK.

### UNQUALIFIED PRACTITIONERS AT THE SESSIONS.

By the report of a case at the Middlesex Quarter Sessions on the 24th instant, it appears that an evil of great magnitude, both to the public and the profession, has for a long time prevailed, and is now in extensive operation. Persons, either *expressly pretending* to be attorneys, or *acting* in that capacity, are in the habit of receiving money from the unfortunate suitors, grossly perverting the ends of justice, and misconducting the proceedings of the Court. This is no new complaint: it evidently is of very old standing, and we observe that the act 22 G. 2, c. 46, s. 12, expressly provided for the correction of the evil by inflicting a penalty of 50*l.* for each offence. The unqualified persons who, as vestry clerks of

parishes, are accustomed to conduct appeals at the sessions, would do well to consider the consequences of their illegal practice. But the case we now refer to is of a most flagrant nature, and evidently subjects the party to the punishment of transportation, for obtaining money under the false pretence of being an attorney.

It is clear, as stated by the learned Chairman of the Quarter Sessions, that it is not essential to the completion of the offence, that the party should actually state himself to be an attorney; it is sufficient to support the indictment if he act in that capacity. The words of the statute are, "that no person whatsoever shall act as a solicitor, attorney, or agent, or sue out any process at any general or quarter sessions," &c., "unless admitted an attorney of one of his Majesty's Courts of Record at Westminster." The preamble shews that the object of the enactment was to secure the due administration of justice, by competent and responsible persons,—just as in certain cases the Court of King's Bench will not grant an application on the motion of the party, but requires it to be made by counsel.

We shall probably return to this subject in our next number.

## SUPERIOR COURTS.

### Lords Commissioners' Court.

#### BANKRUPTCY.—REPUTED OWNERSHIP.

*Certain shares in a joint stock company stood in the name of A., who gave to B. a written declaration that he held them in trust for him, but acted in all respects as the real owner. It was known to one of the directors, and to the actuary, that A. was only trustee, but no formal notice was given: held, that the shares were in the order and disposition of A. within the operation of the bankrupt laws; and a contrary order of the Court of Review was reversed.*

This was an appeal from an order of the Court of Review in Bankruptcy. George Price Watkins being the holder of two shares in the Economic Life Assurance Company, purchased in the year 1827 six other shares for 250l. each share. A regulation of the company prohibited any person, not being a director, from holding in his own name more than two shares, unless by marriage or will; and Mr. Watkins, therefore, caused two of the newly-purchased shares to be transferred to a Mr. John Kidder, who was regularly entered as the owner in the books of the company, held the certificates of the shares, received the dividends noted at the meetings in respect of

them, and in all other respects acted as the real owner. Watkins alone paid the whole price for the shares, and took from Kidder a written declaration that he held them in trust for him, and the fact of his having been trustee was known to Mr. Allen, then one of the directors of the company, and to the actuary. Kidder always paid the dividends received on these shares to Watkins, and acted according to his direction as nominal proprietor of them. In the year 1834, Kidder was declared bankrupt, and his assignees holding that the two shares were within the order and disposition of the bankrupt, treated them as his estate. Watkins petitioned the Court of Review for an order on the assignees to transfer those shares to him. It was stated in evidence before that Court, and was now part of the case sent here, that the resident director of the company informed the solicitor to the commission, on application by him, that no other person than Kidder was known to the society to have any control over these shares, and that he exercised all acts of ownership in respect of them. The Court of Review decided that Kidder was trustee for Watkins, and ordered the shares to be transferred to him.

Mr. Montagu and Mr. Bethell for the assignees. The shares were in the reputed ownership of the bankrupt; there had not been sufficient notice that he was only trustee, and the policy of the laws rendered it necessary for the Court to set its face against such appearances of ownership as would lead the world to give credit to persons who seemed to be in possession of property, of which they were not the actual owners. In the present instance Kidder might have obtained considerable credit on the strength of the possession of those shares, and there could have been no notice to any one that he was not the actual owner, for all enquiries at the Assurance Office, and inspection of the books, must have satisfied the enquirer that Kidder was the actual owner. It was the case of a man appearing to the world as the owner of valuable property, because there might be some understanding between him and the owner that he was to appear so. This state of things, which was a fraud on the public and on the company, could not be one of those cases of trusteeship contemplated by the 79th section of the Bankrupt Act, under which the respondent claimed to be relieved. They cited *Ex parte Monro*,<sup>a</sup> *Dearle v. Hall*, and *Loveridge v. Cooper*,<sup>b</sup> and *Nelson v. The London Assurance Company*.<sup>c</sup>

Mr. Swanton and Mr. Romilly for the respondent. The notice to the director and actuary was sufficient notice to the company; but with or without notice, the declaration of trust ought to be deemed decisive for Mr. Watkins. The cases cited related to property which had been at one time in the true and beneficial ownership of the bankrupt. In the present case, there had never been any beneficial into-

<sup>a</sup> Buck. 300.

<sup>b</sup> 3 Russ. 1.

<sup>c</sup> 2 Sim. and Sta. 293.

rest in the bankrupt, and it was not necessary that the trust should be incorporated with the title to the property. In a case of *Ex parte Martin*, (19 Ves.) Lord Eldon decided that a person who carried on a trade in a house left to her on trust, had not thereby brought that house within her order and disposition so as to bring it under the operation of the bankrupt laws; and it had been held by Lord Eldon that very slight notice was sufficient to take such trust property out of the bankrupt laws.

Sir Launcelot Shadwell, in giving the judgment of the Court, some days after the argument, said it was the opinion of the Court that the decision of the Court of Review was wrong, and that it must be reversed. The shares in question were in the nominal possession of the bankrupt for all ordinary purposes, such as voting at the meetings of the company, and the receipt of dividends; but he moreover held the certificates from the year 1829, when they were purchased, up to the hour of his bankruptcy. In addition to the common *indicia* of ownership, the bankrupt had a power, through the certificates, of imposing himself on the world as the real owner of the shares, and obtaining credit accordingly. The Court did not think that the knowledge said to be possessed by Mr. L. B. Allen, one of the directors of the company, and Mr. Naylor, the actuary, that these shares were held by Kidder for the benefit of Watkins, made any difference with respect to this point, as the bankrupt, from the possession of the certificates, had it in his power at any time to produce them in the market and raise money on them, or obtain money as the real owner. It must be apparent that much mischief might be produced in commercial transactions by the facilities which an ostensible ownership of property presented for obtaining improper credits. There being therefore no means through which the trust or the real nature of the transaction could be ascertained, the Court was of opinion that the property must be held to be in the order and disposition of the bankrupt, and therefore included in his assets.—*Ex parte Watkins in re Kidder*. Before the Lords Commissioners at Lincoln's Inn Hall, July 29, 30, and August 13, 1835.

### King's Bench Practice Court.

#### EJECTMENT.—COSTS OF A FORMER ACTION.—CONSENT RULE.

*In ejectment, a tenant who has been served with a copy of the declaration, cannot compel the lessor of the plaintiff to pay the costs of a previous action brought to recover possession of the same premises without first entering into the consent rule.*

Cause was shewn against a rule which had been obtained for staying the proceedings in this action, until the costs of a former ejectment should have been paid.

The objection taken was that the party applying had not entered into the consent rule, and could not, therefore, support the present rule.

In support of the rule, it was stated, that the application was made at the instance of the parties who had been served, and who were the defendants in the former action.

The Court thought the rule must be discharged. Until the complaining party appeared to defend the action, he could not complain that he was aggrieved. He must make himself a party, by entering into the consent rule. Rule discharged, with costs. *Doe dem. Plunkett v. Roe*. T. T. 1835. K. B. P. C.

#### WARRANT OF ATTORNEY.—SIGNING JUDGMENT.—DEFENDANT'S DEATH.

*The Court will order judgment to be signed on an old warrant of attorney, although the defendant has not been seen alive for three weeks before the application is made for the rule.*

A rule was moved for, that leave might be granted to sign judgment on an old warrant of attorney. It appeared from the affidavits on which the motion was made, that the defendant had been seen last alive about three weeks before, which was prior to the commencement of the term; but it was submitted that that circumstance could not act as a bar to the granting of the rule. The new Pleading Rules of Court required that all judgments interlocutory or final should be entered of record on the day of the month when judgment should be signed, and should have no relation to any other day. It was therefore immaterial at what time, so far as regarded the term, that the defendant had been seen alive. A case was also referred to, where the Court had permitted judgment to be signed on the first day of term, the defendant having been seen on the previous day; and it was contended that if that principle had been once acted upon it might continue to be so, for it was difficult to set a precise period at which the person must be proved to have been alive. Any inconvenience that might arise would only affect the plaintiffs, who, in the event of the defendant being found to be dead, would alone suffer any disadvantage.

The Court granted the rule. Rule granted. —*Watts v. Bury*, T. T. 1835. K. B. P. C.

#### REFERENCE OF CAUSE AT NISI PRIUS.—TIME FOR QUESTIONING AWARD.—PARTICULARIZATION OF OBJECTIONS IN RULE.

*An award made upon a reference at Nisi Prius, including all matters in difference, may be questioned before the last day of the following term.*

*It is necessary to state particularly any objection on which the award is sought to be set aside, in the rule.*

Cause was in this case shewn against a rule nisi obtained for setting aside an award on various grounds; and arguments having been heard on both sides.

*Cur. adv. vult.*

The Court subsequently, in giving judgment, stated the facts of the case. The preliminary objection taken to the rule, on shewing cause, was, that the notice came too late, being after the first four days of the term succeeding that in which the award was published. The reference, it appeared, was made under an order of *Nisi Prius*, and a verdict having been taken for the plaintiff, the reference was directed to be for all matters in dispute in the cause between the parties, and a verdict for the plaintiff, or nonsuit, or verdict for the defendant to be entered, as the arbitrator should direct. The defendant's fourth plea was to be withdrawn, and power was also given to declare what should be done by either party, and what road the defendant should have.

The general principle that a limited time was allowed for setting aside the award, was quite clear; and the act, 9 & 10 W. 3, c. 15, gave the rule that any motion, made for that purpose under that statute, must be made before the last day of the term next after the publication of the award. The Court, in all other cases, will be called upon to exercise their own discretion, which, however, was governed by certain rules laid down. By the latter the arbitrator is looked upon merely as a substitution for the jury, and a motion, therefore, to impeach his award, was treated as a motion for a new trial, and as such was required to be made within four days after the commencement of the term next following the publication. Both these regulations however were adopted, at the discretion of the Court, who could relax them if sufficient grounds were shewn. It should seem, that this latter rule could only be applied in cases where the reference was at *nisi prius*, a verdict taken *pro forma*, and the cause only referred. If the cause were referred at an earlier stage of its proceedings than those described, the rule would be found difficult of application as to time in many cases; but if more than the matter in the cause were referred the principle of the rule failed, for upon such a case the reference would appear rather to be founded on the statute than the authority of the Court. The rule might easily be traced to its origin by a reference to the earlier cases, upon the decision of which it appeared to be founded. Here other matters had been referred, and from the decision upon them the reference must be considered to have been made under the statute; and in such case the Court had no power to abridge the time allowed to question the award. Even if the circumstance of the reference to this extent being so considered, could be doubtful, yet it would be better to depart from a limit only adopted in the discretion of the Court, than to contravene the statute. Upon these grounds the preliminary objection must fail.

Other objections had been taken with regard to the validity of the award. The first, that the arbitrator had decided under a "misapprehension of the terms of the reference," could not be enquired into, not being sufficiently described in the rule. A direct authority to this point had been cited in opposition to the

objection. All the other objections taken must fail, they being rather to the merits, of which the arbitrator was the sole judge. Rule discharged.—*Allenby v. Proudlock and Stokes*, T. T. 1835. K. B. P. C.

PROPER DESCRIPTION OF AN ATTORNEY PLAINTIFF.—INDORSEMENT ON A WRIT OF SUMMONS.—DEPARTURE FROM PRESCRIBED FORM.

*In the description of an attorney plaintiff, in an indorsement on a writ of summons, the substitution of the word "of" for "who resides at," as required by the Act, is not a material difference, in the opinion of the Court.*

*The proper description of an attorney plaintiff, is at his place of business; but he may also be described of his private residence.*

*Any alteration in the words of an indorsement, or addition to the same, provided the sense be not altered, is immaterial.*

Cause was shewn against a rule which had been obtained for setting aside a writ of summons, on the ground of irregularity. The summons, it appeared, had been indorsed by the plaintiff, who was his own attorney, as having been issued by "William Yardley, of Nelson Terrace, Stoke Newington, attorney, in person." This, it had been contended, was not a sufficient description according to the terms of the act. The schedule to the act prescribed a proper form of indorsement, which was, "This writ was issued in person by A. B., who resides at—"

The substitution of the word "of," for "resides at," it was now submitted, was of no importance, and could not be held to constitute an irregularity. Another objection which had been taken must also fall. It was, that "Nelson Terrace" was not his place of residence, but that he lived at West Hackney. It was true that the plaintiff had a private residence at Hackney, but his business being carried on in Nelson Terrace, that was the fit place from which to date his summons. It was sworn that there was no number to his house, and he could not, therefore, more particularly describe himself.

In support of the rule, it was urged that a form having been given by the statute, that should have been strictly adhered to. A case was cited where the Court had observed that the form of summons which should be issued was given in the act, and must be followed; and if the parties did not choose to trouble themselves to look at the act before they commenced proceedings, they must take the consequences. It was impossible that the Court could be continually inquiring into questions of what was material, and what immaterial; but if the parties would not take the regular course, their proceedings must be set aside. So in the present case it was contended, that the form having been departed from, the Court ought to make the rule absolute. By the act, it was required that every writ sued out by authority of the act should be indorsed with the

name and place of abode of the attorney actually suing out the same; but when no attorney should be employed, the name of the street and number of the house of the plaintiff's residence should be given, together with a memorandum that he sued in person. On this, therefore, it was evident that when the attorney merely acted for another, if the description of his office was given, that was sufficient; but if, on the contrary, the proceedings were in his own name, his place of residence where he slept should be given. The act drew a distinction between his abode and his residence.

The Court admitted that it was important to adhere to the fixed rules laid down, and it would be dangerous to suffer their materiality to be discussed. The grounds of objection, however, were of such a nature, as to be quite untenable. There could not be any real variance suggested between the words used and those laid down in the act. It had been said that the act drew a distinction between the attorney's place of "abode" and "residence," and that the former meant his place of business, while the latter alluded to his house, where his family lived. Such a distinction could never have been intended by the legislature. The objection taken, as to the number of the house, must also fall, as it was sworn that there was no number. The alteration in the order of the words, and the introduction of the word "attorney," were also immaterial. The rule must be discharged with costs.

Rule discharged with costs.—*Yardley v. Jones*, T. T. 1835. K. B. P. C.

### COMMON LAW SITTINGS.

*In and after Michaelmas Term, 1835.*

#### KING'S BENCH.

##### IN TERM.

*Middlesex.*

*London.*

Tuesday	-	Nov. 3		
Friday	-	-	6	
Monday	-	-	23	Tuesday - Nov. 24

##### AFTER TERM.

Thursday - 26 | Friday - - 27

The Court will sit at Eleven o'clock in Term, in *Middlesex*; at Twelve, in *London*; and in both, at Half-past Nine after Term.

Causes untried on the Lists for the 3d and 6th of November, will be taken on the 4th, 6th, 7th, and 9th.

None but undefended Causes will be tried on the 23d and 24th of November.

#### COMMON PLEAS.

##### IN TERM.

*Middlesex.*

*London.*

Tuesday	-	Nov. 10		Friday	-	-	13
Wednesday	-	-	18		Friday	-	20

##### AFTER TERM.

Thursday - - 26 | Friday - - 27

The Court will sit at Ten o'clock in the Forenoon on each of the days in Term, and at

Half-past Nine precisely on each of the day after Term.

The Causes in the List for each of the above Sitting Days in Term, if not disposed of on those Days, will be tried by Adjournment on the Days following each of such Sitting Days.

### EXCHEQUER.

##### IN TERM.

*Middlesex.*

1st Sittings, Tuesday, Nov. 3.

2d Sittings, Monday, Nov. 16.

The Court will sit in *Middlesex*, by Adjournment, on

Wednesday, November 11th.

Wednesday, November 18th.

*London.*

1st Sittings, Saturday, Nov. 7th.

2d Sittings, Friday, Nov. 20th.

The Court will sit in *London*, by Adjournment, on

Saturday, Nov. 21.

##### AFTER TERM.

*Middlesex.*

*London.*

Thursday, Novem. 26 | Friday, Novem. 27

New Causes entered for the Sittings in Michaelmas Term will be tried in Term.

Remanets may be taken at the Sittings in Term by consent.—No Special Juries will be taken in Term.

Sit at half-past Nine o'clock.

### EXCHEQUER SITTINGS IN BANC.

*Michaelmas Term, 1835.*

Mon. Nov. 2 Term begins.

*Middlesex N. P.* Tuesday - 3

Wednesday 4

Thursday 5

Friday - 6

*London N. P.* Saturday - 7

Monday - 9

Error (Lord Mayor's day) & Special Paper.

Tuesday 10

*Middlesex N. P.* Wednesday 11

Thursday 12

Friday - 13

Saturday 14

*Middlesex N. P.* Monday 16

Tuesday 17

*Middlesex N. P.* Wednesday 18

Thursday 19

*London N. P.* Friday 20

Saturday 21

*London N. P.* Monday 23

Tuesday 24

Wednesday 25

Term ends.

## ANSWERS TO QUERIES.

**Law of Property and Contemplation of Death.**

LEGACY.—PERPETUITY. P. 336 &amp; 431.

C. has clearly mistaken the point for consideration. He sets out by a long established position, that executory devises may be made *for a life or lives in being, and twenty-one years after*; including a sufficient number of months for the birth of a child *en ventre sa mere*.

But there can be no doubt that he has failed properly to apply this doctrine to the bequest in dispute, which is as follows: *A. directs his executors to invest sufficient money in the funds, as will realize the annual sum of 500*l.*, and "to permit his wife B. to receive the same during her life, and immediately after her decease, to pay certain legacies, and subject thereto for C. D., for life, and immediately after her decease, subject to his issue absolutely upon his or their attaining the age of twenty-four years, &c."* The answer given to this query by "T. L. J." (p. 431,) seems perfectly correct; and as to C. D. taking absolutely, see *Ware v. Polhill*, 11 Ves. 257. N. G.

**Law of Landlord and Tenant.**

UNDERTENANT.—DISTRESS. P. 432.

It is laid down in *Ferneaux v. Fotherby*, 4 Campb. 136, that goods can only be followed where the removal took place after the rent became due. The case of *Thornton v. Adams*, 5 Maule & Selw. shews, that the statute applies only to the tenant's goods, and not to those of a stranger; and I therefore think, that *A.* cannot follow and distrain the goods of *C.* For an answer to the remaining questions, I beg to refer to Gilbert on Distresses, p. 31. &c. C. H. J.

**Common Law.**

WIFE'S DEBT.—ARREST. P. 304, 432.

Such an affidavit as *C.* suggests would be clearly bad; and the defendant could not properly be held to bail, for two reasons; first, that the causes of action could not be joined; and second, that the wife should be a party defendant, in order to recover the debt contracted by her while sole. J. N.

**Practice.**

PLEADING.—UNIFORMITY OF PROCESS ACT. P. 345, 431.

1. J. S. H. is, I submit, in error, as to the time for appearance expiring after the 10th of August, in which case he says defendant would have until after the 24th of October to appear. The 11th sect. of the act only restrains the

plaintiff from *declaring*, or taking other subsequent proceedings, until after the latter period, but does not prevent him from entering an appearance *sec. stat.* The statute expressly authorizes him to do this, where the writ is served *between* the 10th of August and 24th of October. J. N.

2. J. S. H. says (p. 431) in answer to the query of C. (p. 345) "that it is *always* considered, that a defendant has the same number of days to deliver any pleading after the 24th of October, as he had left to plead on the 10th of August." This seems erroneous, and I submit, that the terms of Rule 12, Michaelmas Term, 3 & 4 W. 4, are perfectly clear and intelligible upon the point, that the party adverted to by C. is entitled to the same number of days to plead, after the 24th of October, as if the declaration were delivered on that day.—See *Wilson v. Bradlocke*, 2 Dowl. P. C. 416, where the marginal note is as follows: "If the time for pleading does not expire until after the 10th of August, although it may be enlarged time, the defendant has still the same time for pleading as if the declaration had been filed or delivered on the 24th of Oct." See also *Trinder v. Smedley*, 3 Dowl. 89. I must also take leave to differ entirely in opinion with J. S. H. as to the construction he puts upon the words "preceding pleading." I do not see the slightest shade of reason for his argument, as it is well understood, that if a defendant be arrested on the 8th of August, he must put in and perfect special bail, as if the legal interregnum had not had existence. I conceive, that by the words "declaration or preceding pleading" is meant the *last pleading* whatever it may be, prior to the 10th of Aug., which a party is called upon to answer, as if it had been said "whether it be declaration or any other pleading." N. G.

3. It is *not* in practice *always* considered, that a defendant has the same number of days to deliver any pleading after the 24th of October, as he had left to plead on the 10th of August, but the very contrary. The practice is in conformity with the Uniformity of Process Act, Sec. 11, & the 12th Reg. Gen. Michaelmas Term, 3 W. 4; by which in every case, where the time for pleading, or for answering any pleading has not expired before the 10th of Aug. the defendant has the same number of days after the 24th of October, as if the declaration or "preceding pleading" (e.g. a replication which is a "preceding pleading" to a rejoinder,) had been delivered on the 24th of October. In the case put by C., therefore, this defendant will have four days to plead, after the 24th of October. The opinion expressed by J. S. H. (p. 431,) that by "preceding pleading" is meant the service of the writ, is surely absurd. The same sec. of the Uniformity of Process Act declares, that an appearance may be entered at the expiration of eight days from the service of the writ, whether in term or vacation, or between the 10th of August, and the 24th of October, except where the last day is Sunday &c. S.

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No. CCXCIX.

—“ Quod magis ad nos  
Pertinet, et nescire malum est, agitamus.”

HORAT.

## CHANGES MADE IN THE LAW DURING THE LAST SESSION OF PARLIAMENT.

### No. VI.

#### ATTORNEYS AND SOLICITORS.

5 & 6 W. 4, c. 11.

AN important alteration in the law of attorneys, has been made by the 7th and 8th sections of this act, which were introduced by Mr. Tooke, the member for Truro, on the suggestion of the Incorporated Law Society. It was a great hardship on those who, having served their articles of clerkship *bond fide*, were rendered incapable of practising in consequence of the attorneys to whom they were articulated, being subsequently struck off the roll, for defective service of such attorneys' articles, or their admission or inrollment. The law now is, that the articulated clerk shall not be prejudiced by the attorney's defective qualification, provided the clerk be otherwise entitled to admission. It was also a grievance to those who, after having been long admitted on the roll, and in actual practice, had an application made for striking them off the roll, on the ground of some technical defect in the articles of clerkship or registry, or their service or admission. The law now is, that these defects, *except in cases of fraud*, cannot be taken advantage of after the expiration of twelve months from the admission.

The Act is intituled, “ An Act to indemnify such Persons in the United Kingdom as have omitted to qualify themselves for Offices and Employments, and for extending the Time limited for those purposes respectively until the 25th day of March, 1836; to permit such Persons in Great Britain as have omitted to make and file

Affidavits of the Execution of Indentures of Clerks to Attorneys and Solicitors to make and file the same on or before the first day of Hilary Term, 1836: and to allow Persons to make and file such Affidavits, although the Persons whom they served shall have neglected to take out their Annual Certificates.” Passed 3rd July, 1835.

The enactments are as follow:—

1. Persons who have omitted to qualify themselves for offices and employments, as required by the recited acts, indemnified and allowed further time.

2. Indemnity to those who have omitted to make and subscribe the oaths, &c. required by the Irish Act of 2 Anne.

3. Not to indemnify persons against whom final judgment is given.

4. Not to exempt justices acting without legal qualification.

5. Admissions to corporations may be stamped after time allowed by law.

Then follows the usual indemnity clause, as to inrolling articles, &c.

6. Reciting that many persons who may have paid the proper stamp duties, either before or within six months after the execution of the contracts in writing entered into by them to serve as clerks to attorneys or solicitors, scriveners, or notaries public in Great Britain, have omitted to cause affidavits to be made, and afterward to be filed in the proper office, of the actual execution of such contracts, and have also omitted to cause such contracts and the indentures thereof to be enrolled within the time in which the same ought to have been done; and many solicitors, attorneys, notaries public, and others have omitted to take out annual certificates, or to enter the same in the proper office; and many infants and others may thereby incur certain disabilities: for preventing thereof, and relieving such persons, it is enacted, That every person who shall, either before or within six months after the execution of such contract or indenture, have paid the



proper stamp-duty in that behalf, and who, at the passing of this act shall have neglected or omitted to cause any such affidavit or affidavits as aforesaid to be made and filed, or such contract or indenture to be enrolled, and who, on or before the first day of Hilary term, 1836, shall cause such contract or indenture to be enrolled with the proper officer in that behalf, and one or more affidavit or affidavits to be made, and afterwards to be filed, in such manner as the same ought to have been made and filed in due time, shall be and is hereby indemnified, freed, and discharged from and against all penalties, forfeitures, incapacities, and disabilities in or by any act or acts of parliament mentioned, and incurred or to be incurred for or by reason of such neglect or omission; and every such affidavit and affidavits so to be made, and which shall be duly filed on or before the first day of Hilary term, 1836, shall be as effectual to all intents and purposes as if the same had been made and filed within the respective times the same ought, by the laws now in being for that purpose, to have been made and filed; and that the respective officer or officers who ought to receive, file, enter, or register such contract or indenture, or affidavit or affidavits, shall not refuse to receive, file, enter, or register the same by reason that the attorney, solicitor, or notary public to whom such infant or other person shall have been articulated or have contracted to serve, shall have neglected to take out his annual certificate, or to register the same, but such officer or officers are hereby directed and empowered to receive, file, enter, or register the same, notwithstanding such omission; and that every person who shall have regularly served any attorney or attorneys, solicitor or solicitors, notary public or notaries public, for the term of years required by law, shall not be prevented or disqualified from being admitted an attorney, solicitor, or notary public, by reason of any omission of the person or persons to whom he served for the same term, or for any part thereof, having so neglected to take out his annual certificate, or to register the same, provided that such person is otherwise entitled to be created and admitted to such office by the laws now in force relating thereto.

The new sections above referred to are as follow:

7. That in case the attorney, solicitor, proctor, or notary to whom any person shall have duly served his clerkship under articles in writing for that purpose shall after such service of the clerk be struck off the roll in consequence of some defect in the service under the articles of clerkship or of the admission and enrolment of such attorney, solicitor, proctor, or notary, the person who has so duly served his clerkship shall not be prevented or disqualified from being admitted and enrolled as an attorney, solicitor, proctor, or notary, nor liable to be struck off the roll, if admitted, by reason of any such defect as aforesaid, provided that such clerk or person be otherwise entitled to be admitted and enrolled according to the laws now in force relating thereto.

8. That no person who has been admitted and enrolled and in actual practice as an attorney, solicitor, proctor, or notary, shall be liable to be struck off the roll for or on account of any defect in the articles of clerkship, or the registry thereof, or the service under such articles, or of his admission and enrolment, unless the application for striking him off the roll be made within twelve months from the time of his admission and enrolment, provided that such articles, registration, service, admission, or enrolment be without fraud.

9. Not to restore persons to any office avoided by judgment.

10. General issue may be pleaded.

### ORDERS IN COUNCIL UNDER THE ABOLITION OF SLAVERY ACT.

ANTIGUA—BERMUDA—BAHAMAS—ST. CHRISTOPHER—DOMINICA—GRENADA—ST. LUCIA—TRINIDAD—MAURITIUS—CAPE OF GOOD HOPE.

At the Court of St. James's, the 31st day of July, 1835.

Present—The King's Most Excellent Majesty in Council.

WHEREAS, by an act of parliament made and passed in the third and fourth years of the reign of his present Majesty, intitled "An Act for the Abolition of Slavery throughout the British Colonies; and for promoting the Industry of the Manumitted Slaves; and for compensating the Persons hitherto entitled to the Services of such Slaves;" it was enacted, that from and after the first day of August, 1834, all persons who, in conformity with the laws now in force in the said colonies respectively, shall, on or before the 1st day of August, 1834, have been duly registered as slaves in any such colony, and who on the said 1st day of August, 1834, shall be actually within any such colony, and who shall by such registers appear to be, on the said 1st day of August, 1834, of the full age of six years or upwards, shall, by force and virtue of the said act, and without the previous execution of any indenture of apprenticeship, or any other deed or instrument for that purpose, become and be an apprenticed labourer; and whereas, by the said act it is further enacted, that, subject to the obligations imposed by the said act, or to be imposed as therein mentioned upon such apprenticed labourers as aforesaid, and every the persons who on the said 1st day of August, 1834, shall be holden in slavery within any such British colony as aforesaid, shall, upon and from and after the said 1st day of August, 1834, become and be to all intents and purposes, freed and discharged of and from all manner of slavery, and shall be absolutely and for ever manumitted; and that the children thereafter to be born to any such person, and the offspring of such children, shall in like manner be free from their birth; and that from and after the said 1st day of August, 1834, slavery shall be and is thereby utterly and for ever abolished,

and declared unlawful throughout the British colonies, plantations, and possessions abroad:

And whereas by the said act it is provided that the Lords Commissioners of his Majesty's Treasury may raise the sum of twenty millions of pounds sterling, towards compensating the persons entitled to the services of the slaves to be manumitted and set free by virtue of the said act, for the loss of such services:

And whereas by the said act it is recited, that various rules and regulations are or may be necessary for the purposes therein specified, and that such regulations could not without great inconvenience be made, except by the respective governors, councils, and assemblies, or other local legislatures of the said respective colonies, or by his Majesty, with the advice of his Privy Council, in reference to those colonies, to which the legislative authority of his Majesty in Council extends; and it is therefore by the said act enacted and declared, that nothing in the said act shall extend, or be construed to extend to prevent the enactment, by the respective governors, councils, and assemblies, or by such other local legislature as aforesaid, or by his Majesty with the advice of his Privy Council, of any such acts of General Assembly, or Ordinances or Orders in Council, as might be requisite for making and establishing such several rules and regulations as aforesaid, or any of them, or for carrying the same or any of them into full and complete effect.

And whereas it is by the said act further enacted, that no part of the said sum of twenty millions of pounds sterling shall be applied or shall be applicable to the purposes therein aforesaid, for the benefit of any person entitled to the services of any slave in any of the colonies therein aforesaid, unless an order shall have been first made by his Majesty, with the advice of his Privy Council, declaring that adequate and satisfactory provision hath been made by law in such colony, for giving effect to the said act, by any further and supplementary enactments as therein mentioned; nor unless a copy of such Order in Council, duly certified by one of the clerks in ordinary of his Majesty's Privy Council, shall, by the Lord President of the Council, have been transmitted to the Lords Commissioners of his Majesty's Treasury, or to the Lord High Treasurer for the time being, for their or his guidance or information; and every such order shall be published three several times in the London Gazette, and shall be laid before both Houses of Parliament within six weeks after the date thereof, if Parliament shall be then in session, and if not, within six weeks from the then next ensuing session of Parliament:

And whereas, in order to carry into effect the objects of the said recited act, an act hath been passed by the Governor, Council, and Assembly of the island of *Antigua*, intituled "An Act for relieving the Slave Population from the obligations imposed upon them by the recent Act of the Parliament of the United Kingdom of Great Britain and Ireland, intituled 'An Act for the Abolition of Slavery

throughout the British Colonies; for promoting the Industry of the manumitted Slaves; and for compensating the Persons hitherto entitled to the Services of such Slaves;" and an act hath been passed by the Governor, Council, and Assembly of the island of *Bermuda*, intituled "An Act for the Abolition of Slavery in these Islands, in consideration of Compensation;" and an act hath also been passed by the Lieutenant-Governor, Council, and Assembly of the *Bahama* Islands, intituled "An Act auxiliary to an Act of the Imperial Parliament, intituled 'An Act for the Abolition of Slavery throughout the British Colonies; for promoting the Industry of the manumitted Slaves, and for compensating the Persons hitherto entitled to the Services of such Slaves;' and also an act, intituled "An Act to provide for the Payment of Salaries to certain Magistrates therein designated, and to repeal certain clauses or sections of an act of the General Assembly, made and passed in the fourth year of his Majesty's reign, intituled 'An Act auxiliary to an Act of the Imperial Parliament, intituled, 'An Act for the Abolition of Slavery throughout the British Colonies; for promoting the Industry of the manumitted Slaves; and for compensating the persons hitherto entitled to the services of such Slaves;' and also an act, intituled "An Act to amend an Act of the General Assembly of these islands, intituled 'An Act auxiliary to an Act of the Imperial Parliament, intituled 'An Act for the Abolition of Slavery throughout the British Colonies; for promoting the Industry of the manumitted Slaves; and for compensating the Persons hitherto entitled to the services of such Slaves;' and certain acts have also been passed by the Lieutenant-Governor, Council, and Assembly of the Island of *St. Christopher*, respectively, intituled, "An Act for the Abolition of Slavery in this island, and for the establishment of a system of apprenticeship for a limited time in lieu thereof;" "An Act for prescribing the powers and duties of Special Magistrates;" "An Act to divide apprenticed Labourers into several Classes;" "An Act to provide for apprenticed Labourers during the term of their Apprenticeship;" "An Act for prescribing the Duties, and regulating the Conduct of apprenticed Labourers within this Island;" "An Act for prescribing the Duties to be performed by Employers towards their apprenticed Labourers, and to enforce the Performance of the same;" "An Act to regulate the Removal of predial apprenticed Labourers from one Plantation to another; to establish certain Rules to govern the Sale of the Services of all Classes of apprenticed Labourers, and the Disposition thereof by Will, as well as to regulate the Descent of the same in cases of Intestacy;" "An Act for dividing this Island into two Districts, and for establishing a sufficient Police within the same;" "An Act to punish apprenticed Labourers for Offences against the public Welfare;" and "An Act to regulate the Dissolution of Apprenticeship by the voluntary Act of the Employer, and to compel such Dissolution in

cases where the Labourer is able and willing to purchase his or her Discharge from Apprenticeship;" and also an act, intituled "An Act to extend to the Island of Anguilla the several Acts passed by the Island of St. Christopher, pursuant to an Act of Parliament made in the third and fourth years of William the Fourth, intituled 'An Act for the Abolition of Slavery throughout the British Colonies; for promoting the Industry of the manumitted Slaves; and for compensating the Persons hitherto entitled to the Services of such Slaves;' except as hereinafter provided; and an act hath also been passed by the Lieutenant-Governor, Council, and Assembly of the Island of *Dominica*, intituled "An Act for the Abolition of Slavery in this Island in consideration of Compensation, and for promoting the Industry of the manumitted Slaves;" and an act hath also been passed by the Lieutenant-Governor, Council, and Assembly of the Island of *Grenada*, intituled, "An Act for carrying into effect Provisions of an Act of the Imperial Parliament of Great Britain and Ireland, passed in the third and fourth years of his Majesty King William the Fourth, for the Abolition of Slavery throughout the British Colonies;" and also an act, intituled, "An Act to amend an Act, intituled, 'An Act for carrying into effect the Provisions of an Act of the Imperial Parliament of Great Britain and Ireland, passed in the third and fourth years of his present Majesty King William the Fourth, for the Abolition of Slavery throughout the British Colonies, and to make further provisions for the Purposes in the said act mentioned;' and three several Orders have also been made by his Majesty in Council, for carrying into effect in the respective colonies of *Saint Lucia*, *Trinidad*, and *Mauritius*, the provisions of the said recited act of parliament; and an Ordinance hath also been made and passed by the Governor and Legislative Council of the *Cape of Good Hope*, intituled "An Ordinance for giving due Effect to the Provisions of an Act of Parliament, passed in the third and fourth years of the Reign of his Majesty King William the Fourth, intituled 'An Act for the Abolition of Slavery throughout the British Colonies; for promoting the Industry of the manumitted Slaves; and for compensating the Persons hitherto entitled to the Services of such Slaves:'

And whereas it is considered by his Majesty in Council, that adequate and satisfactory provision hath been made by law in the respective islands and colonies of Antigua, Bermuda, Bahamas, Saint Christopher, Dominica, Grenada, Saint Lucia, Trinidad, Mauritius, and the Cape of Good Hope, for giving effect to the said recited act of parliament, by such further and supplementary enactments as therein mentioned, according to the intent and meaning of the said act:

His Majesty is therefore pleased, by and with the advice of his Privy Council, to declare, and it is hereby declared, that adequate and satisfactory provision hath been made by law in the several and respective islands of Anti-

gua, Bermuda, Bahamas, Saint Christopher, Dominica, Grenada, Saint Lucia, Trinidad, Mauritius, and the Cape of Good Hope, for giving effect to the said recited act of parliament, by such further and supplementary enactments as therein are mentioned.

And the Right Honourable the Marquis of Lansdowne, the President of his Majesty's Privy Council, and the Right Honourable Lord Glenelg, one of his Majesty's principal Secretaries of State, are to give the necessary directions herein, as to them may respectively appertain.

W. L. BATHURST.

#### HONDURAS.—SUSPENSION OF ORDER IN COUNCIL.

At the Court of St. James's, the 12th day of August, 1835;

Present,—the King's Most Excellent Majesty in Council.

WHEREAS by a certain act of Parliament, passed in the third and fourth years of his Majesty's reign, intituled, "An Act for the Abolition of Slavery throughout the British Colonies; for Promoting the Industry of the Manumitted Slaves; and for Compensating the Persons hitherto entitled to the Services of such Slaves," it is amongst other things recited, that it is necessary that various rules and regulations should be framed and established for ascertaining, with reference to each apprenticed labourer within the said colonies respectively, whether he or she belongs to the class of attached prædial apprenticed labourers, or to the class of unattached apprenticed labourers, or to the class of non-prædial apprenticed labourers, and for determining the manner and form in which, and the solemnities with which, the voluntary discharge of any apprenticed labourer from such his or her apprenticeship may be effected, and for prescribing the form and manner in which, and the solemnities with which, the purchase of any such apprenticed labourer of his or her discharge from such apprenticeship, without, or in opposition, if necessary, to the consent of the person or persons entitled to his or her services shall be effected; and how the necessary appraisement of the future value of such services shall be made; and how, and to whom the amount of such appraisement shall in each case be paid and applied; and in what manner and form, and by whom, the discharge from any such apprenticeship shall thereupon be given, executed, and recorded: and it is also necessary for the preservation of peace throughout the said colonies, that proper regulations should be framed and established for the maintenance of good order and discipline amongst the said apprenticed labourers; and for ensuring the punctual discharge of the services due by them to their respective employers; and for the prevention and punishment of idleness, or the neglect or improper performance of work by any such apprenticed labourer; and for enforcing the due performance by any such

apprenticed labourer of any contract into which he or she may voluntarily enter, for any hired service during the time in which he or she may not be bound to labour for his or her employer; and for the prevention and punishment of insolence and insubordination, on the part of any such apprenticed labourer, towards their employers; and for the prevention or punishment of vagrancy, or of any conduct on the part of such apprenticed labourers injuring, or tending to the injury, of the property of any such employer; and for the suppression and punishment of any riot or combined resistance of the laws on the part of any such apprenticed labourers; and for preventing the escape of any such apprenticed labourers, during their term of apprenticeship from the colonies to which they may respectively belong: and that it will also be necessary, for the protection of such apprenticed labourers as aforesaid, that various regulations should be framed and established in the respective colonies, for securing punctuality and method in the supply to them of such food, clothing, lodging, medicines, medical attendance, and other maintenance and allowances, as they are by the said act declared entitled to receive; and for regulating the amount and quality of all such articles in cases where the laws at present existing in any such colony may not, in the case of slaves, have made any regulation, or any adequate regulation, for that purpose; and that it is also necessary that proper rules should be established for the prevention and punishment of any frauds which might be practised, or of any omissions or neglects which might occur, respecting the quantity or the quality of the supplies so to be furnished, or respecting the periods for the delivery of the same; and that it is necessary in those cases in which the food of any such prædial apprenticed labourers as aforesaid may, either wholly or in part, be raised by themselves, by the cultivation of ground to be set apart and allotted for that purpose, that proper regulations should be made and established as to the extent of such grounds, and as to the distance at which such grounds may be so allotted from the ordinary place of abode of such prædial apprenticed labourers, and respecting the deductions to be made for the cultivation of such grounds from the annual time during which such prædial apprenticed labourers are hereinbefore declared liable to labour; and that it may also be necessary, by such regulations as aforesaid, to secure to the said prædial apprenticed labourers the enjoyment, for their own benefit, of that portion of their time during which they are not hereby required to labour in the service of their respective employers, and for securing exactness in the computation of the time, during which such prædial apprenticed labourers are hereby required to labour in the service of such their respective employers; and that it is also necessary that provision should be made for preventing the imposition of such work on any such apprenticed labourer, without his or her free consent to undertake the same; but that it may be necessary, by

such regulations in certain cases, to require and provide for the acquiescence of the minority of the prædial apprenticed labourers attached to any plantation or estate, in the distribution and apportionment amongst the whole body of such labourers of any task work, which the majority of such body shall be willing and desirous collectively to undertake; and that it is also necessary that regulations should be made respecting any voluntary contracts, into which any apprenticed labourers may enter with their respective employers, or with any other person, for hired service for any future period, and for limiting the greatest period of time to which such voluntary contract may extend, and for enforcing the punctual and effectual performance of such voluntary contracts on the part both of such apprenticed labourers, and of the person or persons engaging for their employment and hire; and that it is also necessary that regulations should be made for the prevention or punishment of any cruelty, injustice, or other wrong or injury which may be done to, or inflicted upon, any such apprenticed labourers by the persons entitled to their services; and it is also necessary that proper regulations should be made respecting the manner and form in which such indentures of apprenticeship as aforesaid, shall be made on behalf of such children as aforesaid, and respecting the registering and preservation of all such indentures; and that it is also necessary that provision should be made for ensuring promptitude and dispatch, and for preventing all unnecessary expense in the discharge by the justices of the peace, holding such special commissions as in the said act mentioned for the jurisdiction and authorities thereby committed to them, and for enabling such justices to decide in a summary way, such questions as may be brought before them in that capacity, and for the division of the said respective colonies in districts, for the purposes of such jurisdiction, and for the frequent and punctual visitation by such justices of the peace of the apprenticed labourers within such their respective districts; and that it is also necessary that regulations should be made for indemnifying and protecting such justices of the peace in the upright execution and discharge of their duties; and that such regulations as aforesaid could not, without great inconvenience, be made except by the respective governors, councils, and assemblies, or other local legislatures of the said respective colonies, or by his Majesty, with the advice of his privy council, in reference to those colonies to which the legislative authority of his Majesty in council extends:

It is therefore enacted and declared in and by the said Act, that nothing therein contained extends, or shall be construed to extend, to prevent the enactments by the respective governors, councils, and assemblies, or by such other local legislatures as aforesaid, or by his Majesty in Council, of any such acts of general assembly or ordinances, or orders in council, as may be requisite for making and establishing such several rules and regulations as

aforesaid, or any of them, or for carrying the same or any of them into full and complete effect: provided, nevertheless, and it is thereby enacted, that it shall not be lawful for any such governor, council, and assembly, or for any such local legislature, or for his Majesty in Council, by any such acts of assembly, ordinance or orders in council as aforesaid, to make or establish any enactment, regulation, provision, rule, or order which shall be in any wise repugnant or contradictory to the said recited act, or any part thereof, but that every such enactment, regulation, provision, rule, or order shall be, and is thereby declared to be absolutely null and void and of no effect:

And whereas, it is by the said act further enacted, that all laws made by his Majesty for the government of his Majesty's subjects at Honduras shall for the purposes of the said act, be as valid and effectual, as any laws made by his Majesty in Council for the government of any colonies, subject to the legislative authority of his Majesty in Council are or can be:

And whereas, in pursuance of the said act, his Majesty did, on the 5th day of June 1834, by the advice of his Privy Council, make a certain order in council, for carrying the said act into effect, within the Island of Trinidad: and whereas, by a certain other order of his Majesty in Council, also dated on the 5th day of June 1834, after reciting that it was expedient that the regulations for the government of apprenticed labourers should, throughout his Majesty's possessions to which the said act applies, as nearly as might be, and having regard to the variety of local circumstances in such several possessions, be of one uniform tenor; and that the state and circumstances of society in the said settlement of Honduras were in many respects peculiar, and differed essentially from the state and circumstances of society as existing in the said Island of Trinidad, and other of his Majesty's colonies in the West Indies; and that by reason of the variety and minuteness of such distinctions it was necessary, that provision should be made for the adaptation of the said Order in Council to the case of Honduras by some local authority, it was, in pursuance of the said recited act of parliament, and for carrying the same into effect within the said settlements of Honduras, ordered by his Majesty, by and with the advice of his Privy Council, that the said Order in Council for the said Island of Trinidad should, save as hereinafter mentioned, extend to, and be in force within his Majesty's said settlement, at Honduras upon, from, and after the first day of August 1834; provided, nevertheless, and it was further ordered, that it should be lawful for the superintendent for the time being of the said settlements, by any proclamation or proclamations to be by him from time to time for that purpose issued, to suspend any part or parts of the said order which he should consider inapplicable to the state and circumstances of society in the said settlements, and by any such proclamation or proclamations, to adopt the said order in council or any part or parts thereof, to the state and

circumstances of society in the said settlements; and it was thereby provided, that no such proclamation should in any respect be repugnant to, or inconsistent with, any thing in the said act of parliament contained: and it was further ordered, that the said superintendent should transmit to his Majesty, or to one of his principal secretaries of state, copies of any such proclamations, for his Majesty's approbation or disallowance; and it was thereby also provided, that no such proclamation should, by the terms thereof, be made to operate and take effect, or to be binding upon his Majesty's subjects, within the said settlements, until the same should first have been approved by his Majesty, save only in cases in which it should appear to the said superintendent for the time being, that the delay incident to obtaining his Majesty's approbation of any such proclamation would subject his Majesty's subjects in the said settlements, to serious inconvenience, in which cases any such proclamation might, by the terms thereof, be made to operate, and take effect, and to be binding upon his Majesty's subjects aforesaid, either from the day of the date thereof, or from any such other time as should be therein for the purpose appointed, until his Majesty's pleasure should be known:

And whereas, the said superintendent of the British settlements at Honduras, in pursuance of the powers in him in that behalf vested by the last recited Order in Council, hath made and established certain regulations for adapting to the state and circumstances of those settlements the provisions of the order made by his Majesty in Council, for giving effect to the said act for the abolition of slavery within the Island of Trinidad:

And whereas his Majesty, having this day taken into consideration the regulations so made as aforesaid, by the said superintendent, hath been pleased to approve thereof: now it is hereby ordered by his Majesty, that the said regulations shall be, and the same are hereby confirmed and allowed:

And whereas it is by the said act of parliament amongst other things, enacted that no part of the said sum of twenty millions sterling shall be applied, or be applicable to the purposes in the said act mentioned, for the benefit of any person, then entitled to the services of any slave, in any of the colonies in the said act mentioned, unless an order shall have been first made by his Majesty, with the advice of his Privy Council, declaring, that adequate and satisfactory provision hath been made by law in such colony, for giving effect to the said act, by such further and supplementary enactments as aforesaid, nor unless a copy of such Order in Council, duly certified by one of the clerks in ordinary of his Majesty's Privy Council, shall by the Lord President of the Council, have been transmitted to the lords commissioners of his Majesty's treasury, or to the Lord High Treasurer for the time being, now, therefore, in further pursuance and exercise of the powers in his Majesty in Council by the said recited act in that behalf vested, his Majesty with the

advice of his Privy Council, doth declare, and it is hereby declared; that adequate and satisfactory provision hath been made by law in the said settlements at Honduras, for giving effect to the said recited act of parliament, by such further and supplementary enactments as therein are mentioned:

And the Lord President of the Council, and the right honourable the Lord Glenelg, one of his Majesty's principal secretaries of state, are to give the necessary directions herein, as to them may respectively appertain.

C. C. GREVILLE.

## LIST OF NEW PUBLICATIONS.

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The Highway Act, with Notes by J. Bateman, Esq. Price 5s. boards.

The Highway Act, with Notes by H. W. Woolrych, Esq. Price 5s. boards.

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Reports of Cases in the King's Bench Practice Court, &c. By A. S. Dowling, Esq. Trinity Term, 5 W. 4. Vol. 4, Part 1. 8s.

## MASTERS EXTRAORDINARY IN CHANCERY.

*From September 22 to October 20, 1835, both inclusive, with Dates when gazetted.*

Trenchard, John, Exmouth, Devon. Sept. 29.

## DISSOLUTIONS OF PROFESSIONAL PARTNERSHIPS.

*From September 22 to October 20, 1835, both inclusive, with Dates when gazetted.*

Gregory, George Phillips Foster, and George Price, 28, Poultry, Attorneys and Solicitors. Oct. 16.

Lofly, Matthew, Samuel Potter, and William Crowe, King-Street, Cheapside, Attorneys and Solicitors.

Marsden, John, and George Hammond Whalley, Wakefield, York, Solicitors. Oct. 6.

Stevens, Samuel, and George Sperling, Clare, Suffolk, Attorneys and Solicitors. Sept. 29.

Wilkinson, Benjamin Gay, and Richard Reeves Wilkinson, Gosport, Hants, Attorneys. Sept. 25.

Willis, Richard, Joseph Heapy Watson, Geo. Bower, and Christopher Willis, Tokenhouse Yard, Attorneys at Law; so far as regards Joseph Heapy Watson. Sept. 29.

Williams, Thos., and Orlando Hyde, Cheltenham, Gloucester, Attorneys and Solicitors. Oct. 6.

## BANKRUPTCIES SUPERSEDED.

*From Sept. 22, to Oct. 20, 1835, both inclusive, with Dates when gazetted.*

Bates, Wm., Lower Shaw Hill, Skircoat, Halifax, York, Merchant. Sept. 22.

Davis, Thomas, jun., Little Baddow, Essex, Cattle Dealer. Oct. 20.

## BANKRUPTS.

*From Sept. 22, to Oct. 20, 1835, both inclusive, with Dates when gazetted.*

Allport, Henry Curzon, Lansdowne Place, Middlessex, and Bread Street Hill, London, Commission Agent. *Holme & Co., New Inn: Bartlett, Birmingham.* Oct. 2.

Brown, John, Lower Place, Middlessex, Chandler. *Gibson, Off. Ass.: Stephen, King's Arms Yard.* Oct. 9.

Bishton, Wm., Parkfield, Sedgley, Stafford, Ironmaster. *Messrs. Eber, Newport, Salop: Alban & Co., Lincoln's Inn.* Oct. 9.

Behr, Charles Lewis, Liverpool, Ship-broker. *Chatter, Staple Inn: Dunsen, Liverpool.* Oct. 13.

Boutland, Wm., Bill Quay, Durham, Ship Builder. *Hoyle, Newcastle-upon-Tyne: Meggison & Co., King's Road, Bedford Row.* Oct. 13.

Buckland, James Warwick, Union Road, Albany Road, Old Kent Road, Surrey, British Plate Manufacturer. *Belcher, Off. Ass.: Reeves, Funnal's Inn.* Sept. 22.

Balley, Joel, Southampton, Hatter. *Abbott, Off. Ass.: Walker, Southampton Street, Bloomsbury.* Sept. 22.

Bevan, Caleb, and Thomas Geo. Bayntun, Strand, Victualers and Wine and Spirit Merchants. *Pennell, Off. Ass.: Pascoe, Jewin Street, and South Sea Chambers, Threadneedle Street.* Sept. 25.

Bulgin, Henry, Bristol, Bookseller. *Hare & Co., Bristol: Bridges & Co., Red Lion Square.* Oct. 13.

Bender, Riches Benjamin, South Street, Grosvenor Square, Wine Merchant and Tailor. *Dale, Barnard's Inn; Whitmore, Off. Ass.* Oct. 20.

Campbell, Peter, Jerusalem Coffee House, London, Master Mariner, Ship Owner and Merchant. *Spencer & Co., Aldermanbury: Lockington, Off. Ass.* Sept. 25.

Cawley, Edward, Bridport, Dorset, Upholder. *Brown & Co., Commercial Sale Rooms, Mincing Lane. Clerk, Off. Ass.* Oct. 9.

Carter, Alfred, Wenlock Basin, City Road, Iron Merchant. *Devey, Dorset Street, Fleet Street: Whitmore, Off. Ass.* Oct. 9.

Cooke, Thomas, Liverpool, Chemist and Druggist. *Dow, Palgrave Place: Parkinson & Co., Liverpool: Roberts, Oswestry.* Oct. 13.

Davis, John, Goswell Street, Victualler. *Green, Off. Ass.: Thomas, Lothbury.* Oct. 9.

Dobree, William Pickstone, New City Chambers, Bishopsgate Street, Merchant. *Gibson, Off. Ass.: Otterson & Co., Frederick's Place, Old Jewry.* Oct. 9.

Davis, Henry Hart, Soho Square, Auctioneer. *Gibson, Off. Ass.: Hodgson & Co., Salisbury Street, Strand.* Oct. 16.

Edwards, Esaias, Kingston-upon-Hull, Brewer, and Dealer in London Porter. *Willis & Co., Tokenhouse Yard, Lothbury: Woolley, Hull.* Sept. 25.

Finney, Wm., jun., Hanley, Stoke-upon-Trent, Stafford, Grocer and Tea Dealer. *Dutton, Hanley: King, Wilmington Square.* Oct. 2.

Fenner, Rest, and Stephen Hobson, London Street, Fenchurch Street, Corn Factors. *Stevens & Co.*, Little St. Thomas Apostle. *Tarquand, Off. Ass.* Oct. 6.  
 Grey, Wm., Liverpool, Commission Agent & Ship Broker. *Bristow & Co.*, Liverpool: *Swaen & Co.*, Frederick's Place, Old Jewry. Oct. 20.  
 Gartley, Samuel, Golden Lane, Saint Luke's, Middlesex, Victualler. *Abbott, Off. Ass.*: *Keane, Gray's Inn Square.* Oct. 2.  
 Glenister, John Rolfe, Tring, Hertford, Auctioneer and Commission Agent. *Fairfall, King's Road, Bedford Row*: *Tarquand, Off. Ass.* Oct. 9.  
 Greaves, John, Liverpool, Merchant. *Adlington & Co.*, Bedford Row: *Radcliffe & Co.*, Liverpool. Oct. 9.  
 Howe, Francis, Margate, Kent, Hotel Keeper and Wine Merchant. *Dering & Co.*, Margate: *Willett, Essex Street.* Sept. 29.  
 Hanesworth, Thomas, Sheffield, Hatter. *Miles & Co.*, Temple: *Whithead & Co.*, Oldham. Oct. 6.  
 Jones, Robert, Carnarvon, Draper. *Weekes & Co.*, Cook's Court, Lincoln's Inn Fields; *Williams, Penrhos, near Carnarvon.*  
 Key, Wm., Isleworth, Middlesex, Linen Draper. *Belcher, Off. Ass.*: *Jones, Size Lane.* Sept. 29.  
 Keyse, John, Youl's Place, Old Kent Road, Surrey, Plumber, Painter and Glazier. *Edwards, Off. Ass.*: *Thomas, Bridge-house Place, Southwark.* Oct. 16.  
 Lorymer, Samuel, Bristol, Brewer and Starch Maker. *White & Co.*, Bedford Row: *Bevan & Co.*, Bristol. Sept. 29.  
 Lorymer, James, Bristol, Corn Factor. *White & Co.*, Bedford Row: *Bevan & Co.*, Bristol. Sept. 29.  
 Langman, George, Bride Lane, London, Victualler. *Green, Off. Ass.*: *Lloyd, Crown Court, Chapside.* Oct. 13.  
 Lewis, Samuel, Cheltenham, Gloucester, Builder, Plumber, Glazier, and Painter. *Bousfield, Chatham Place; Messrs. Winterbothams, Cheltenham.* Oct. 16.  
 McEntire, Robert James, Belfast, Antrim, Ireland, Merchant. *Taylor & Co.*, Bedford Row; *Louwdes & Co.*, Liverpool.  
 Mason, Charlotte, and Charles Mason, Piccadilly, Livery Stable Keepers. *Robinson, Half Moon Street, Piccadilly: Canaan, Off. Ass.* Oct. 16.  
 Maggs, George, Bristol, Linen Draper. *Jenkins & Abbott, New Inn: Clarke & Co.*, Bristol. Sept. 29.  
 Nabb, Thomas, Manchester, Auctioneer. *Bower, Chancery Lane; Owen & Co.*, Manchester. Sept. 29.

Nicholson, Geo., Rotherham, York, Grocer. *Taylor & Co.*, John Street, Bedford Row: *Badger, Rotherham.* Sept. 29.  
 Nightingale, Joseph, Oxford Street, Victualler. *Martineau & Co.*, Carey Street, Lincoln's Inn; *Lackington, Off. Ass.* Oct. 2.  
 Pearson, George, and Thomas Pearson, Newcastle-upon-Tyne; Lintzford, Durham; and Houghton, Northumberland, Paper Merchants and Manufacturers. *Swain & Co.*, Frederick's Place, Old Jewry; *Gibson, Newcastle-upon-Tyne.* Sept. 22.  
 Partridge, Wm., Birmingham, Haberdasher. *Amory & Co.*, Thurgomorton Street: *Parkes & Co.*, or, *Leferre, Birmingham.* Oct. 9.  
 Perowne, John, Dickelburgh, Norfolk, Grocer and Draper. *Colman & Co.*, Norwich. Oct. 9.  
 Robinson, Henry, Nutford Place, Bryanstone Square, Coal Merchant. *Lane, Argyll Street, Regent Street; Whitmore, Off. Ass.* Oct. 9.  
 Rowe, Joseph Hyde, Goswell Street, Builder. *Gibson, Off. Ass.*: *Klodes & Co.*, Chancery Lane. Oct. 13.  
 Scamell, Wm., Tottenham Court Road, Leather Seller. *Ellis, Corbet Court, Gracechurch Street: Clark, Off. Ass.* Sept. 29.  
 Shayler, John, Blackman Street, Southwark, Draper. *Green, Off. Ass.*: *Turner & Co.*, Basing Lane. Oct. 6.  
 Splatt, Wm., Stoke-upon-Trent, Stafford, Flint Grinder. *Ward, Burnley: Wolston, Furnival's Inn.* Oct. 12.  
 Storey, James Arnet, Derby, Tea Dealer & Grocer. *Birch & Son, Cloak Lane: Smith & Co.*, Derby: *Canaan, Off. Ass.* Oct. 20.  
 Taylerson, Robert, South Shields, Durham, Ship Owner. *Messrs. Tyas, Beaufort Buildings, Strand: Penson & Co., Whitby: Wright, Sunderland.* Oct. 2.  
 Tempest, Tho., Leeds, York, Grocer. *Dingwall, New Bank Building.* Oct. 2.  
 Taylor, Tho., Steeple Ashton, Wilts. Dealer. *Joyce, Chancery Lane: Bayly & Co.*, Devizes. Oct. 6.  
 Whiston, Wm., Birmingham, Smelter & Refiner. *Duncan, Symond's Inn: P. Smith, Birmingham.* Oct. 6.  
 Wagstaff, Tho., Little Exeter Street, Chelsea, (no trade stated). *Green, Off. Ass.*: *Reeves, Furnival's Inn.*  
 Weber, Geo. Charles, Eaton Row, Eaton Square, Dealer in Homes. *Green, Off. Ass.*: *Sanford, John Street, Adelphi.* Oct. 16.  
 Woods, Richard, Cambridge, Builder. *Foster, jun. Cambridge: Hall, Queen Square.* Oct. 6.

### THE EDITOR'S LETTER BOX.

The Title-page, Contents, and Index, to the Tenth Volume, will be published, gratis, with the next Number, and a General Index to the first Ten Volumes of the Legal Observer, and the two Volumes of the Monthly Record, will be included in the Supplement for November.

We are glad to receive the communication of "An Old Lawyer."

A letter from J. W., dated 17th July last, has only just been received. The Bill to which our correspondent refers having passed, it is of course useless to agitate the question.

The Queries and Answers of A. E.; J. H.; F. B.; J. F.; and N. G., have been received.

We cannot take upon us to answer the letter of "Spes," and have already referred him to the only quarter where he can obtain information: if it should be refused, we will then consider of inserting his letter, though we do not

see what right we have to interfere in the pecuniary arrangements of the society in question.

The Legal Almanac, Remembrancer, and Diary for 1836 is just published, containing a Law Calendar adapted peculiarly for the use of the Profession; including the Times of Legal Proceedings, Terms, Returns, Sittings, and Sessions; Elections and Proceedings under the Reform, Jury, Corporation, Vestry and Highway Acts, &c.; Lists of the Judges and Officers of all the Courts; Holidays at the Law Offices, and Times of Attendance; Magistrates and Commissioners; Courts of Request; Precedence of the Bar, and Barristers called in 1835, with Dates of Call; Plan and List of Members of the Incorporated Law Society; Records, Town Clerks, Clerks of the Peace, Clerks of Magistrates, and Perpetual Commissioners; Insurance Tables, ad Valorem Stamps, &c.: with a Diary for 1836, containing all Useful Intelligence for each Day throughout the Year.

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